



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8028 OF 2014

Shree Krishna Education Society, Through  
Chairman/Secretary ...Petitioner  
V/s.

The State of Maharashtra, Through Secretary,  
School Education Department & anr. ...Respondent

WITH  
WRIT PETITION NO. 8143 OF 2014

Tuljamata Shikshan Sanstha, Nakshi, Through  
Chairman/Secretary ...Petitioner  
V/s.

The State of Maharashtra, Through Secretary,  
School Education Department & anr. ...Respondent

WITH  
WRIT PETITION NO. 5951 OF 2015

Ekatmata High School & anr. ...Petitioner  
V/s.

The State of Maharashtra, Through Secretary,  
School Education Department & anr. ...Respondent

WITH  
WRIT PETITION NO. 8030 OF 2014

Kai Thagubai Shankar Deore Seva Bhavi  
Sanstha, Saundane, Through Chairman/Secretary  
& ors. ...Petitioners  
V/s.

The State of Maharashtra, Through Secretary,  
School Education Department & anr.

...Respondent

**WITH**

**WRIT PETITION NO. 8029 OF 2014**

Jijamata Education Society, Kakandi,  
Through Chairman/Secretary  
V/s.

...Petitioner

The State of Maharashtra, Through Secretary,  
School Education Department & anr.

...Respondents

**WITH**

**WRIT PETITION NO. 8026 OF 2014**

Indian Education Society;s Jawaharlal Nehru  
Vidyalay, Sheva, Through Head Master  
V/s.

...Petitioner

The State of Maharashtra, Through Secretary,  
School Education Department & anr.

...Respondent

**WITH**

**WRIT PETITION NO. 8027 OF 2014**

Satyamev Jayate Shikshan Prasarak Mandal,  
Nagpur, Through Chairman/Secretary  
V/s.

...Petitioner

The State of Maharashtra, Through Secretary,  
School Education Department & anr.

...Respondent

**WITH**

**WRIT PETITION NO. 3226 OF 2013**

Shree Krishna Education Society & anr.  
V/s.

...Petitioners

The State of Maharashtra & ors.

...Respondents

WITH  
WRIT PETITION NO. 3227 OF 2013

Kai Thagubai Shankar Deore Sevabhavi  
Sanstha, Soundane & anr.

...Petitioners

V/s.

The State of Maharashtra & ors.

...Respondents

WITH  
WRIT PETITION NO. 3228 OF 2013

Siddharth Shikshan Prasarak Mandal & anr.

...Petitioners

V/s.

The State of Maharashtra & ors.

...Respondents

WITH  
WRIT PETITION NO. 3229 OF 2013

Shivaji Shikshan Prasarak Mandal & anr.

...Petitioners

V/s.

The State of Maharashtra & ors.

...Respondents

WITH  
WRIT PETITION NO. 3231 OF 2013

Jijamata Education Society & anr.

...Petitioners

V/s.

The State of Maharashtra & ors.

...Respondents

WITH  
WRIT PETITION NO. 3232 OF 2013

Satyamev Jayate Shikshan Prasarak Mandal  
& anr.

...Petitioners

V/s.

The State of Maharashtra & ors.

...Respondents

WITH  
WRIT PETITION NO. 3233 OF 2013

Tuljamata Shikshan Sanstha & anr.

...Petitioners

V/s.

The State of Maharashtra & ors.

...Respondents

WITH  
WRIT PETITION NO. 3234 OF 2013

Jawaharlal Nehru Port Vidyalaya

Sheva & anr.

...Petitioners

V/s.

The State of Maharashtra & ors.

...Respondents

Shri Narendra V. Bandiwadekar and Vinayak Kumbhar i/b.Sagar Mane for the petitioners in WP Nos. 8028/14, 8026/14, 8027/14, 8029/14, 8030/14,8143/14 and wp 5951/15.

Mr. Prashant Bhavake for petitioners in wp nos.3226/2013 to 3229/2013 and wp 3231/13 to 3234/13.

Mr.A.I. Patel, Addl.GP for State in wp nos.3226/2013 to 3229/2013 and wp 3231/13 to 3234/13.

Mr.Deelip Patil-Bankar, Special Counsel for State a/w. Smt.R.M.Shinde, AGP for State in wp 8028/14, 8026/14, 8027/14, 8029/14, 8030/14, 8143/14, 5951/15.

**CORAM: B.R.GAVAI &  
DAMA SESHADRI NAIDU, JJ**

**JUDGMENT RESERVED ON: 25<sup>th</sup> MARCH 2019  
JUDGMENT PRONOUNCED ON: 03<sup>rd</sup> May 2019.**

**JUDGMENT (PER DAMA SESHADRI NAIDU, J)**

**Introduction:**

An unaided school applies for grant-in-aid. The authorities subject it to scrutiny and find it eligible. Despite the in-principle approval, the school does not get the grant immediately, for the disbursement depends on fund availability. The grant is discretionary. As the school waits, the Government changes the eligibility criteria: the school must have followed the rule of reservation. Then, it insists that the school should have implemented the reservation policy in recruiting its staff—even before it has applied for the grant-in-aid and it rejects the school's claim for the grant.

2. Aggrieved, the School—besides a few other similarly placed schools—challenges the government refusal. So the issues we should resolve are these:

(A) Does the G.R. No. ममशमअ २००९/(५९९/०९)/ममशश-१, dated 15th November 2011, apply to the petitioner schools?

(B) If it does, should it apply prospectively or retrospectively? In other words, should the schools comply with the reservation policy by the date

they have applied for the grant-in-aid or only from the date the grant is given?

**Facts:**

3. The Petitioner is a registered Educational Institution, running a Government recognized Secondary School—Vidyaniketan Vidyalaya. The first respondent is the Secretary, School Education Department, and the 2<sup>nd</sup> respondent the Director of Education. With validly secured permissions, the petitioner started an “unaided” Secondary School, from the Academic Year (AY) 2000-2001. Over time, the petitioner school has established up to Std. X. Of the unaided private schools, some are ‘plainly’ unaided and some ‘permanently’ unaided. The petitioner’s school belongs to the former category.

4. Through Government Resolution (“GR”), 11<sup>th</sup> October 2000, the first respondent prescribed the norms to sanction grant-in-aid to the Secondary Schools in the State of Maharashtra. As per those norms, an unaided school will have no grant for the first four years; later it gets grant-in-aid in stages: starting from the fifth year, annually it will have 20%, 40%, 60%, 80%, and in the 9th year 100%. The Government, however, revised the norms through another GR, 17<sup>th</sup> February 2004.

5. The norms mandate that if an unaided school applies for the grant-in-aid, first the District Level Committee will examine the request and submit its report to the State Level Committee. Then, the State Level Committee examines and recommends to the first respondent, which will notify the names of the schools eligible for the grant-in-aid, acting on that recommendation.

6. So, on the petitioner's application for grant-in-aid, the District Level Committee assessed the school for the AY 2009-10. The school secured about 95 marks. The report forwarded to it, the State Level Committee has also independently considered the petitioner's request along with others and concluded that the school is eligible. Thus, the State Level Committee, through its report, dated 11<sup>th</sup> January 2012, submitted to the Respondent No.1 that 11 schools should be declared eligible for the grant-in-aid. The petitioners, in this context, assert that their assessment was completed save the formal grant of the aid.

7. About the same time, the permanently unaided schools wanted the Government to delete the tag "permanent" from their categorization, so they too can claim aid. The Government, then, through a GR, dated 20th July 2009, deleted the word "permanent" from the permission it had granted to those "permanent-unaided schools." This deletion did not cover English

Medium Schools, though. Three more years later, those schools, too, would be eligible for grant-in-aid—that is, from A.Y. 2012-13.

8. As the record reveals, in November 2011, the first respondent issued a GR, laying down the norms for assessing the erstwhile permanently unaided schools.

9. In the wake of 2011 GR, the 2nd respondent issued a Circular, dated 22nd March 2013, directing the Regional Directors and Education Officers (Secondary) of the Zilla Parishads concerned to reassess the unaided schools, including the petitioners'. Aggrieved, the Petitioner filed WP No. 3233 of 2013. It challenged, among other things, “the legality and validity” of clause [d] of para 2 of 2011 GR, besides challenging the 2<sup>nd</sup> respondent’s Circular issued in March 2013. Eight others, too, filed similar writ petitions. This Court, through an ad-interim order, dated 1st April 2013, “restrained the respondents from reassessing the school.” The order still subsists.

10. Then, a Division Bench of this Court, pending the writ petition, in October 2013, also directed the State Government to consider the petitioner’s claim for the grant-in-aid “without applying norms” fixed by the November 2011 GR. So the first respondent considered the cases of the 11 schools and, through the GR, dated 7th February 2014, declared them eligible subject to

the conditions mentioned in that GR. But the petitioner was “partly aggrieved”; it has filed this writ petition.

### **The Other Writ Petitions:**

11. As the record reveals, in all other writ petitions, too, the pleas are identical, barring minor variations. So we need not labour setting out those facts.

### **Petitioners’:**

12. Shri Narendra Bandiwadekar and Shri Vinayak Kumbhar, the learned Counsel for the petitioners, have contended that the impugned GR in a broad sweep classifies all schools under "Urban Area", but they are in "Rural Area". Both the learned counsel frontally attack the second condition in the impugned GR: the schools must have filled up the posts reserved for backward classes in the prescribed manner. If a school has not filled up the posts as mandated, that school will not be eligible for the grant-in-aid. They even attack the first condition, which declares that the schools ought to have complied with all “the norms and conditions” mentioned in that GR.

13. Assailing these two conditions, the learned counsel contend that the evaluation was under the 2004 GR and 2005 Circular, as was made clear in

the second respondent's report, dated 11th January 2012. So neither condition, according to them, sustains the legal scrutiny. In other words, they assail these two conditions as opposed to, or at least beyond, what has been mandated under 2004 GR and 2005 Circular.

14. The learned counsel's challenge to the third condition in the impugned GR further projects the petitioners' objections over the other two conditions. According to them, the third condition requires these schools to comply with the statutory mandate under the Right of Children to Free and Compulsory Education Act, 2009 ("RTE Act"). They maintain that as that Act came into force in August 2009, it could not be retrospectively applied to the petitioners' schools. For they stand governed by the 2004 GR and 2005 Circular. Besides that, they also contend, in the alternative, that the RTE Act applies to schools imparting elementary education as defined under Section 2 [f] of that Act. But the petitioners' schools do run classes only from Std. VIII to X.

15. The petitioners' counsel also attack the fifth condition, which, it seems, disentitles the schools to the arrears "till the funds become available." In that context, they argue that the delay in the petitioners' getting the grant-in-

aid cannot be attributed to them. It was, they assert, because of the departmental delay. Even this Court, according to them, passed the order on 11<sup>th</sup> October 2013, directing the first respondent to take immediate decision on the petitioners' proposal.

### **Respondents':**

16. Shri Deelip Patil Bankar, the learned Special Counsel for the State, has taken us through the Private Schools (Condition of Service) Regulation Act, 1977, the eponymous Rules 1982, and the Maharashtra Act No. VIII of 2003. In the backdrop of those legislations, he contends that the petitioner schools have a statutory mandate to fulfil: to reserve 52% of the total posts of teaching and non-teaching staff for the persons belonging to the Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category, and Other Backward Classes. And it is a constitutional mandate to be fulfilled at that, under "Articles 14, 15 (4) and 16 (4) of the Constitution of India.

17. Then, in tune with the Government's counter affidavit, the learned Special Counsel has elaborated on the Government Policy—as spelt out through its numerous Resolutions—on the pattern of reservations and the

governmental discretion in granting the aid to the private schools following the reservation. But he underlines that even if a school fulfils the statutory mandate, still the Government's granting the aid is "subject to availability of funds". And no school, he asserts, can claim the grant with retrospective effect.

18. The learned Special Counsel frontally attacks, what he calls, the petitioners' unfounded claim, first, for the grant-in-aid without their adhering to the reservation policy and, second, their claim for the grant retroactively. He has also contested the petitioners' claim that the Grs, the Government has brought about after the petitioners' applying for the grant-in-aid would not apply to them. He has denied that those GRs exclusively apply to the "permanent unaided" institutions. In the end, he urges us to dismiss the writ petitions for the petitioners have failed, among other things, to implement the Government's reservation policy.

19. Heard Shri Narendra Bandiwadekar and Shri Vinayak Kumbhar, the learned counsel for the petitioners; Shri Deelip Patil-Bankar, the learned Special Counsel for the State, along with Mrs. R. M. Shinde, the learned AGP for the State.

### **The Dispute in Perspective:**

20. The petitioners are private unaided schools. In 2009 or thereabout, these schools applied for grant-in-aid. Initially, the District Level Committee, and later the State Level Committee have recommended their applications. But before the Government could sanction the grant, it had a policy change. Under that changed policy, these institutions must have fulfilled the reservation policy before they applied for the grant-in-aid.

21. But the petitioners maintain that the changed policy applies prospectively. In the alternative, they also contend that by the time the Government introduced the new policy, the authorities concerned approved the petitioners' applications. So the ministerial delay in providing the grant could not defeat their rights. They also contend that the changed policy was meant to be applied exclusively to the permanently unaided schools, which had, in the course of time, the prefix "permanently" removed—at their request.

### **The Questions:**

22. So we need to examine these issues: (1) does the new policy of reservation apply inclusively to both the unaided and permanently unaided

schools or exclusively to the permanently unaided schools alone? (2) Is the new policy of reservation prospective or retrospective? (3) Does the Government have the discretion to deny aid even to the schools that complied with the statutory mandate? (4) Can a school claim the grant-in-aid retrospectively, that is, from the date of its application?

## **The Constitutional & Statutory Scheme:**

### **I. Constitutional Concession:**

23. The Constitution provides for reservation both in appointments and in promotions in the “government service”. To be explicit, Article 16 (4) empowers the State to provide for the reservation “of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.” Article 16 (4A) enables the State to provide reservation in matters of promotion to any group or groups of posts in the services under the state in favour of the Scheduled Caste and Scheduled Tribes. Article 335 emphasises that the claims of the members of the Scheduled Caste and Scheduled Tribes shall be considered consistent with the maintenance of efficiency of administration in the making of appointment of service and posts in connection with “the affairs of the

union or of a state.”

24. And yet the reservations under Article 16(4) of the Constitution are no exception to the fundamental right of equal opportunity in government employment. Reservation in employment is in itself an equality measure implicit in Article 16(1)—made explicit through Article 16(4) of the Constitution. Its efficacy undisputed and judicially upheld, for example, in *State of Kerala v. N. M. Thomas*<sup>1</sup>, *ABSK Sangh v. Union of India*<sup>2</sup>, *Indra Sawhney v. Union of India*<sup>3</sup>, we must examine who should discharge this positive State obligation.

## II. Statutory Scheme:

### (i) Primary Legislation:

#### (a) Reservation Act 2001:

25. This State has enacted “The Maharashtra State Public Services Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and other Backward Classes Act, 2001” (“the Reservation Act”). Maharashtra is the first state to have enacted such a law. It provides for the reservation of vacancies in

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<sup>1</sup> AIR 1976 SC 490

<sup>2</sup> AIR 1981 SC 298

<sup>3</sup> AIR 1993 SC 477

“public services and posts” in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes, and so on. Section 2 (c) of this Act defines “establishment” to mean any office of the Government, of local authority, or of a statutory authority constituted under any Act of the State Legislature for the time being in force, or a University or a Company, a Corporation, or a Co-operative Society in which share capital is held by the Government or “any Government aided Institutions.” Section 4 of the Act determines the percentage of reservations.

**(b) MEPS Act, 1977:**

26. The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (“MPES Act”) regulates the recruitment and conditions of service of employees in “certain private schools in the State”. It aims at providing the employees of these schools “security and stability of service to enable them to discharge their duties towards the pupils and their guardians in particular, and the institution and the society in general, effectively and efficiently.” Laudable is the objective. Indeed, “regulate” is a capacious expression, having a malleable meaning. As held in *Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board*<sup>4</sup>, it has different shades of meaning

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<sup>4</sup> 1989 Supp. (2) SCC 52

and “must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions.” *Jiyajeerao Cotton Mills* also asserts that while interpreting the expression, the Court must necessarily keep in view “the object to be achieved and the mischief sought to be remedied.”

27. The Act, indisputably, applies to all private schools which are recognised: aided or unaided. The recognition refers to that accorded by the Director of Education, the Divisional Board, or the State Board. In other words, a private school, as defined under Section 2 (20), is a recognized school established or administered by a Management, other than the Government or local authority. An employee under the Act, as defined under Section 2(7), is any member of the teaching and non-teaching staff of a recognized school and includes shikshan sevak, too. Section 3 of the Act emphatically declares that the Act applies to all private schools in the State of Maharashtra, whether receiving any grant-in-aid from the State Government or not.

28. Section 16 of the Act deals with delegated legislation; rather, through this provision, the Legislature delegates its legislative power in defined spheres to the Executive. The State Government may make rules “for carrying out the purposes of this Act.” And the purpose of this Act is, as we have already noted,

“security and stability of service to enable [the employees] to discharge their duties towards the pupils and their guardians in particular, and the institution and the society in general, effectively and efficiently.” In Subsection (2) of Section 16 these general powers have been illustratively enumerated: (a) qualifications for recruitment of employees; (b) scales of pay and allowances; (c) post-retirement and other benefits; (d) the other conditions of service of such employees including leave, superannuation, reemployment, and promotion; (e) the duties and Code of Conduct; (f) enquiry procedure; and (g) any other matter which is required to be or may be prescribed. The delegate has the power to legislate retrospectively, too. But that retrospectivity cannot prejudicially “affect the interests of any person to whom such rule may be applicable.”

**(ii) Secondary or Subordinate Legislation:**

**MEPS Rules, 1978:**

29. So came the MEPS Rules. Rule 9 is material for our purpose. Subrule (7) has, through a recent amendment, mandated that the school management shall reserve 52% of the total teaching and non-teaching posts for the persons belonging to the Scheduled Castes, Scheduled Tribes, and so on.

Rules 8, 9, and 10 lay down the procedure for filling up the reserved vacancies. In fact, Subrule (7) was modified on 8th July 2008; earlier it was 34%, which now stands increased to 52%. Thus the authorities maintain that unless the petitioners comply with Rule 9(7), their entitlement to grant-in-aid does not arise. It is, according to them, not only the statutory mandate but also constitutional obligation.

30. Through Rule 9 of the MEPS Rules, the Government applied reservations to the private educational institutions, as contained in the Reservation Act, 2001. In fact, this Act applies, among other things, to Government aided institutions, as evident from Section 2 (c) of that Act. Yet, through a subordinate piece of legislation, the State has brought the unaided private institutions, too, under the Reservation Act. It has, in other words, applied a constitutional mandate horizontally, through its delegated legislative power.

31. But we hasten to add that the *vires* of the MEPS Rules have not been questioned here. So we will steer clear of any constitutional controversy and examine only Rule 9 (7), which reads:

The Management shall reserve 52 per cent. of the total number of posts of the teaching and non-teaching staff for the persons

belonging to the Schedule Castes, Schedule Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes as follows, namely:

...

**(iii) Administrative Instructions or Government Resolutions:**

**(a) Government Resolution (GR), dated 25th October 1990:**

32. In terms of government letter, dated 4<sup>th</sup> September 1990, the Deputy Director of Education, Nagpur Region, permitted the petitioner institution to start a secondary school in Marathi medium, from the academic year 1990-91. It was unaided.

**(b) GR, dated 11th October 2000:**

33. Until this Government Resolution was issued, the sanction of grant-in-aid to recognised unaided secondary schools was governed by GR, dated 10<sup>th</sup> February 1989. Through the GR of 2000, the Government revised the norms for sanctioning the grant-in-aid. Under these revised norms, a recognised unaided Marathi medium school gets no grant in the first four years; in the fifth year it gets 20% of salary and non-salary expenditure; in the next four years the grant annually increases by 20%. Thus, in the ninth year, the school receives 100% grant-in-aid. The assessment for grant-in-aid takes

place under 10 heads, each head carrying specified marks and the total coming to 100. To be eligible to get the grant-in-aid, a school must secure 90 marks out of 100, with certain exceptions to the schools in tribal areas.

34. Of course, the GR has a couple of disclaimers: the actual payment of grant-in-aid to the schools will depend on the availability of funds; no school can claim the grant as of right. And the higher secondary schools have slightly modified norms.

**(c) GR, dated 17th February 2004:**

35. This GR reveals that under the norms fixed in the GR, dated 11.10.2000, about 588 schools were granted permission. They were all established before 1997-1998. This evaluation or assessment took place in 2001-2002. Including one in the Tribal Area, 49 schools became eligible.

36. In September 2003, the Government decided to change the norms fixed earlier in October 2000. But the Government, first, declared 180 schools eligible to receive the grant-in-aid. This was under the norms fixed in 2000. These schools will, as the Government declares, receive the grant as per the fund availability. Indeed, the selected schools are required to “comply with the norms regarding S.S.C. Examination result.”

37. The 2004 GR, we must note, wanted the new norms applied prospectively for the evaluations from 2003-04. It fixed a two-tier evaluation: first by the District Committee and, later, by the State Committee. These Committees seem to have been constituted under this Court's directions in Writ Petition No. 1773 of 2000.

38. Thus, under the revised norms, the State Committee will scrutinize the District Committee's report. Thereafter, the Director, Secondary and Higher Secondary Education, (M.S.), as the Chairman of the Committee, would submit a list of the eligible schools to the State Government.

39. The State shall declare the list of the Schools that have become eligible for a grant-in-aid; after that declaration, the ineligible Schools will be intimated in one month, through the Education Officer [Secondary], about the marks they secured.

40. The GR also clarifies that the recognized unaided secondary schools established before 1997-1998 declared ineligible for the grant-in-aid and "the secondary schools which were granted permission on unaided basis till 1999-2000 should be evaluated/ assessed by these Committees as per the prescribed norms till May 2004."

41. Granted, here too, the GR clarifies that the eligible schools cannot claim grant as of right; it lies, on the contrary, within the Government's discretion. Similarly, notwithstanding the approval in a particular Academic Year, the Government can change "the formula for grant-in-aid taking into consideration the availability of the financial resources and the needs of the State and their priority."

**(d) GR, dated 3rd January 2005:**

42. In May 2004, the authorities evaluated a few schools under the 2004 revised norms. Then, the Government received many complaints. So it tweaked those norms. Then, it directed the authorities to reevaluate the schools declared ineligible in May 2004 evaluation. The Government further wanted the authorities to evaluate the unaided schools established in 2000-01. The District Committee must complete the evaluation by January 2005, and the State Committee by February 2005.

**(e) GR, dated 15th November 2011:**

43. In this GR, the Government, first, acknowledges that the "formula for grant-in-aid to Primary and Secondary Schools in the State is being changed from time to time." Second, it takes note of the representations from

the institutions running private schools on a “permanent unaided” basis. Then, it considers many representations from these institutions to remove the word “permanent” from the orders of permission granted to those schools. Finally, the GR refers to an earlier GR, dated 20th July 2009, that decided to delete that word from the permissions granted to the Primary and Secondary Schools, excluding English Medium Schools, however.

44. Under the 2009 GR, the Government seemed to have appointed a Committee to fix revised norms for evaluating the unaided schools which have shed the “permanent” tag from their category. The Committee’s suggestions accepted, the Government has allowed the authorities to evaluate these schools for grant-in-aid under the new norms. It was from 2012-13. The schools comply with “the minimum eligible norms fixed from time to time by the Government.” Of immense importance is the condition that “while making the application for evaluation/ assessment, [the school concerned must have complied with] the reservation policy for appointment of the employees in the schools,” excluding Minority Schools, though.

**(f) GR, dated 11th December 2012:**

45. This GR considered the request of 24 secondary schools, which

had already been evaluated and approved for the grant-in-aid. But the Government, through its letter, dated 28th September 2012, as the GR notes, enquired whether the schools concerned had fulfilled the “backlog of reservations”. In that context, the GR noted that the proposals for the grant from these schools were received by December 2010. It also acknowledges that these schools were evaluated “as per the norms in the GR No. SSG/1003/[516/03]/SE1, dated 17.2.2004 and No. NGSS/1804/[656/04] SE1, dated 3.1.2005.”

46. Indeed, the GR did observe that the GR under which these 24 schools had been evaluated mentioned nothing about the backlog of reservation. So the Directorate reckoned that the reservation norm should not be applied to these schools. And the Directorate further accepted that the norms as contained in GR, dated 15th November 2011, should not be applied, specifically, to eleven schools. For these schools have met all other norms, including those fixed under the RTE Act, save the requirement of reservation, which did not apply when evaluation took place.

**(g) GR, dated 22nd March 2013:**

47. But despite the Directorate’s disinclination to apply the

reservation norm retrospectively to schools already evaluated before 2011, the Government insisted on its compliance. So in this GR, the authorities require the secondary schools in their respective regions or districts to be reassessed or evaluated as per the revised norms; that is, as per GR, dated 15th November 2011. Therefore, this GR insists on these schools' complying with the job-reservation norm—even after their earlier evaluation and in-principle approval for grant.

**(H) GR, dated 7 February 2014:**

48. This GR refers to the recommendation made by the Director of Education (Secondary and Higher Secondary) in December 2011. Of the 24 secondary schools the Director of Education recommended to be eligible for a grant, the Government declared 11 secondary schools as having complied with the norms of evaluation and emerging eligible to receive the grant-in-aid.

49. But the GR reiterates that these schools must comply with all the norms and conditions in the GR, dated 17 February 2004. To be explicit, though these 11 schools were declared eligible for evaluation, it is mandatory for the schools to fill up the reserved posts for backward classes as per the prescribed ratio. True, it also reiterates the Government's discretion in

granting the aid and the schools' disentitlement for the aid retrospectively.

**(I) GR, dated 19 May 2016:**

50. This Government Resolution concerns a few of the 11 schools. And it substantially repeats the conditions as set out in the previous GR.

**The Reliefs Sought:**

51. In W.P. No.8143 of 2014, the petitioner wants (1) the Secretary, School Education Department, to replace “Urban Area” with “Rural Area” in communication, dated 7 February 2014; (2) the same authority to declare that four posts of peon are eligible for grant-in-aid; (3) the Court to set aside condition numbers 2, 3, 4 and 5 in the impugned order, dated 7 February 2014; (4) the Secretary, School Education Department, to release the grant-in-aid for the academic year 2010-11, as per the Director of Education’s recommendations; and (5) the same authority to release the grant-in-aid, including the arrears, from the academic year 2010-11 onwards.

52. In all other Writ petitions, too, the petitioners sought identical relief.

**What are the Conditions 2, 3, 4, and 5 in GR 2011?**

Condition (2): Even though the school concerned was declared eligible in evaluation, it is mandatory for that school to have filled up the vacancies

applying the rule of reservation. If the school has not filled up the posts accordingly, it is not eligible for grant-in-aid.

Condition (3): It is mandatory for all the schools to comply with the norms under the RTE Act.

Condition (4): Even though the school is declared eligible for grant-in-aid, the actual grant lies in the State government's discretion and is subject to the availability of the funds.

Condition (5): The grant has no retrospectivity; it is given prospectively from the day the funds are available.

### **What is the Bone of Contention?**

53. Indeed, the bone of contention is the petitioner-schools' obligation to comply with the reservation norm before it could claim any grant-in-aid. The schools' claim to adhere to the reservation policy prospectively—from the date they get the grant—stands judicially rejected. Or at least, the Respondents assert thus. So we must necessarily examine the scope of the State's imposing reservations on unaided schools. We may pose unto ourselves the question whether this issue stands settled by *Pramati*.

### **Constitutional Compulsions & the Problem of Private Players:**

### **Horizontality and Verticality:**

54. For a citizen, a constitution is an empowering and liberating document; for the State it is a limiting one. True, empowerment is not tantamount to conferment. It acknowledges the citizen's inalienable rights and elaborates on them, thus to render itself a verifiable source of those powers, which otherwise may remain amorphous. Then, with the rights remaining unarticulated and unenumerated, the classical concept of State sovereignty may run riot, trampling on the very powers of the citizens.

55. On the State as a political entity, the Constitution imposes constraints. It draws the line—the Lakshman Rekha—the State cannot cross. Each organ of the State has the duties to perform, burdens to discharge, conventions to honour, and objectives to attain. That is verticality. But as the State's activities multiply, it has given room to private players to be its partners in progress. It allowed those players to discharge governmental functions —“the state action” or the public duties. Then, the constitutional compulsions affect these private players, too. That is horizontality.

56. The Constitution's protections of individual liberties and its requirement for equal protection apply, according to *Erwin Chemerinsky*<sup>5</sup>, only to the government. Private conduct generally does not have to comply  
5 Constitutional Law: Principles and Policies, Wolters Kluwer, 5<sup>th</sup> Ed., p. 507

with the Constitution. This is often referred to as the “state action” doctrine, although “state action” is something of a misnomer. The Constitution applies to government at all levels—federal, state, and local—and to the actions of government officers at all levels. It, however, generally does not, the learned author observes, apply to private entities or actors.<sup>6</sup> In their *Constitutional Law*, Geoffrey R. Stone *et al.*,<sup>7</sup> have discussed the “state-action issue” in a comparative constitutional perspective. They have observed that many of the world’s constitutional systems have confronted the state-action problem. Outside the United States, the problem is usually described as one involving the horizontal effect of constitutional norms, such as procedural fairness, free expression, and nondiscrimination. Then, the learned authors pose unto themselves a question: in the absence of applicable statutes, to what extent do such norms apply to the actions of non-governmental actors? Other constitutional systems, they note, deal with the problem in two ways: (a) direct-horizontal way and (b) indirect-horizontal way.

57. More commonly, constitutional courts give, as Geoffrey R. Stone *et al* emphasise, constitutional norms “indirect” horizontal effect. This approach

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6 Id.

7 Wolters Kluwer, 8th Ed., Pg 1556, Kindle Ed.

is said to have been enormously influenced by, if not originated from, the German Constitutional Court's decision in *Erich Lüth*<sup>8</sup>. Under this approach, constitutional norms do not apply of their own force to a nongovernmental actor's actions, but they must be considered when the courts apply non-constitutional statutory or common law rules to those actions. Constitutional norms, that is, must shape the interpretation of statutes and the common law.

58. This concept finds expanded by Mark Tushnet, in his curiously titled book: *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*.<sup>9</sup> According to him, the state action issue is merely a question—though a difficult one—of what the substantive requirements of a nation's constitutions are.<sup>10</sup> In the Chapter “Structure of Judicial Review, Horizontal Effect, and Social Welfare Rights”<sup>11</sup>, Mark Tushnet first acknowledges that the “state action” doctrine is one of the most difficult in the US constitutional law, and has been almost as difficult in other constitutional systems.

59. Constitutional systems around the world have confronted the state action problem, the terminology differing though. Under the doctrine known

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<sup>8</sup> 7 BverfGE 198 (1958)

<sup>9</sup> Princeton University Press, Princeton and Oxford, Ed.2008

<sup>10</sup> Id. 162

<sup>11</sup> Id., 196

as “indirect horizontal effect”, courts charged with construing and developing non-constitutional law must consider constitutional values, and constitutional courts will oversee them to determine whether they have been sufficiently respectful of those values.

### **The Indian Scenario:**

60. Like its counterparts in the United States, Canada, South Africa, and Germany, the Indian Supreme Court, notes the learned author and columnist Gautam Bhatia,<sup>12</sup> has had occasions to engage with horizontality, and to craft various kinds of remedies in such cases. According to him, the horizontality is achieved through different devices: (1) Functional Test: through this device, the private player is assimilated under the rubric of “other authorities”, as mentioned in Article 12 of the Constitution. (2) Positive-Rights Enforcement: the Courts have brought out the fundamental rights from the classical confines; they have transformed them from being negative restraints to being positive obligations. (3) Indirect Horizontality: In this method, as discussed earlier, the fundamental or “basic fundamental rights radiate outwards beyond the Constitution, in a manner that affects private law and private

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12 Horizontality Under the Indian Constitution: A Schema, a blog post, dt.24.05.2015,  
<https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/>

adjudication.”<sup>13</sup> Finally, the learned author mentions (4) Direct Horizontality: under this method, the Fundamental Rights are directly enforced against the non-state players. In fact, the Constitution has a couple of provisions under Chapter III that apply across the board, to all citizens: Articles 15(2), 17, and 23.

### Is There any Interplay between Articles 15 and 16?

61. Let us accept the fact that under Article 16 there is no corresponding, or even analogous, provision to Article 15 (2). Combining the ratio of *TMA Pai Foundation v State of Karnataka*<sup>14</sup> and the Constitutional Assembly debates on the expression “shop” in Article 15 (2), the Supreme Court in *Indian Medical Association v. Union of India*<sup>15</sup> has held that an educational institution is a shop, where services can be secured for a fee. Besides that, the Court has read Article 21-A expansively in *Society for Unaided Private Schools of Rajasthan v. Union of India*<sup>16</sup>. To cap it all, the Constitution made matters explicit: it has Clause (5) engrafted to Article 15.

62. So the State cannot bring in Article 15 or the decisions under that

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<sup>13</sup> Id.

<sup>14</sup> (2002) 8 SCC 481

<sup>15</sup> (2011) 7 SCC 179

<sup>16</sup> (2012) 6 SCC 102

Article to support its action under Article 16. That action must sustain itself on what has been mandated under Article 16 and, by extension, under enactments that owe their origin to that Article—for example the Reservation Act, 2001.

### **The Constitutional Mandate:**

63. Often articulated is the judicial assertion that Article 14 is the genus and Articles 15 and 16 are the species. Both these articles particularise two instances of equality embodied in Article 14. Clause (1) of Article 15 prohibits “the State” from discriminating “against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” On the other hand, Clause (2) of the same Article prohibits citizens as well as the States from practicing discrimination in providing access to shops, hotels, and all places of public entertainment, of public resort, wells, tanks, roads, and so on. Evidently, clause (1) is state-centric, whereas clause (2) is not. That is, one operates vertically and the other horizontally.

64. Clause (3) empowers the state to make special provisions for protecting women and children. Clause (4) enables the State to make special provisions for protecting the interests of the backward classes of citizens.

65. Indeed, the expression "shop" has come to be judicially interpreted

to include an education institution. And this interpretation, besides the constitutional engrafting of Articles 21-A and 15(5), has opened new vistas, enabling the State to enforce the constitutional mandate horizontally. So let us examine how the law—the constitutional law at that—has come to affect a child’s right to education.

### **The Imbroglia in Educational Establishments:**

66. What *Unni Krishnan J.P. v. State of A.P.*, has judicially asserted—a child’s right to free and compulsory primary education—has become a legislative reality through Articles 21-A and 51-A (k) of the Constitution. This has been brought about through the Constitution (86th Amendment) Act, 2002. But it was not brought into force until 1st April 2010. In the meanwhile, the Government’s efforts to throw open educational institutions—even the unaided ones—to the underprivileged and backward class children have been met with resistance. In the face of unenforced Article 21-A, the State faced constitutional constraints too; this has led to a few adverse decisions from the courts.

#### **(a) Judicial Interpretation:**

67. In *TMA Pai Foundation*, a Constitution Bench of 11-Judges of the Supreme Court initially held that reservations in private colleges were

unconstitutional. Of the eleven questions *TMA Pia Foundation* answered, one is about the rights of non-minorities to establish and administer educational institutions under Articles 19(1)(g) and 21. In answering that question in the affirmative, the Court has held that setting up an educational institution would be an “occupation” under Article 19(1)(g).

68. This decision was followed up by a five-judge Bench decision in *Islamic Academy of Education v State of Karnataka*<sup>17</sup>; it has clarified the case-holding of *TMA Pai Foundation*. Finally came *PA Inamdar v State of Maharashtra*<sup>18</sup>. In that decision, a seven-Judge Bench has held that ‘the imposition of quota seats in unaided professional institutions’ seriously encroaches on the private professional educational institutions’ right and autonomy. The Court has held that this violates the private institutions’ ‘right to occupation’ protected under Article 19(1)(g) of the Constitution. And reservations, according to the Court, were not a reasonable restriction within the meaning of Article 19(6).

### **The Legislative Response:**

#### **93rd Constitutional Amendment:**

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17 (2005) 6 SCC 537

18 (2002) 8 SCC 481

69. Parliament responded with the Ninety-third Constitutional Amendment, adding Clause (5) to Article 15. Among other things, this Clause constitutionally enables the State to mandate reservations in private educational institutions; it effectively overrides *PA Inamdar*. True, this clause does not apply to minority educational institutions. This Ninety-third Amendment has engendered the Central Educational Institutions (Reservation in Admission) Act 2006.

70. Both the Constitution (Ninety-third) Amendment Act and Central Educational Institutions (Reservation in Admission) Act 2006 were challenged in *Ashoka Kumar Thakur v. Union of India*.<sup>19</sup> But as noted by Prof. M. P. Singh,<sup>20</sup> no private aided or unaided educational institution or anyone on their behalf approached the Court questioning the Amendment. For the Act applies only to Central Government institutions, though the Amendment applies both to public and private—whether aided or unaided—educational institutions. So four Judges out of the five upheld both the Constitutional Amendment and the Act; nevertheless, they left one issue open: whether the part of clause (5) that enabled reservations in private educational institutions was

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<sup>19</sup> (2008) 6 SCC 1

<sup>20</sup> Ashoka Thar v. Union of India: A Divided Verdict on an Undivided SociaJustice Measure, I NUJS L. Rev. (2008) p.193

constitutionally valid. But one learned Judge has clearly held that such a provision violated the basic structure of the Constitution.

### **RTE Act:**

71. Soon after *Ashoka Kumar Thakur*, Article 21-A, enacted through the 86th Constitutional Amendment, was brought into effect on 1st April 2010. Under this Amendment came into existence the RTE Act. Section 12 of the RTE Act requires that all aided and unaided schools reserve 25% of their admissions for students from economically weaker and socially disadvantaged backgrounds.

### **Challenge to RTE:**

72. Unaided Private Schools challenged the RTE Act, for Article 21-A explicitly casts no positive constitutional obligation on the private players in Education. In *Society for Unaided Private Schools of Rajasthan*, the Supreme Court, per majority, has upheld the constitutionality of section 12 of the RTE Act. The Court has reasoned that the RTE Act is “child centric and not institution centric”; the provision of education to all children is a priority, even though it might burden private schools. The court reiterated the importance of Article 21-A and found that the burden on private schools to satisfy the quota was irrelevant, given the importance of the right to education.

## The Second Attempt:

73. Based on a reference by a three-Judge Bench in *Society for Unaided Private Schools of Rajasthan*, a Constitution Bench had to decide on the validity of clause (5) of Article 15 of the Constitution and of Article 21A of the Constitution. That is, both the 93rd and 86th Constitutional Amendments were tested. In *Pramati Educational & Cultural Trust v. Union of India*,<sup>21</sup> the petitioners contended that Articles 15(5) and 21A of the constitution and the RTE Act violated the basic structure of the constitution and the right to equality by distinguishing between aided and unaided minority schools. The Constitutional Bench of the Supreme Court once again has upheld the constitutionality of the RTE Act. The Court has held that as the objectives of Articles 15(5) and 21A were to provide equal opportunities for students from weaker sections of the society, they would not violate the private schools' right under Article 19(1)(g). It has, in that process, held that "none of the rights under Article 14, 19(1)(g), and 21 of the Constitution have been abrogated by Clause (5) of Article 15 of the Constitution." So it has overruled the view taken by Bhandari J in *Ashoka Kumar Thakur*.

## The Conflation & the Confusion:

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21 (2014) 8 SCC 1

## In Employment:

74. The 86th Constitutional Amendment, the 93rd Constitutional Amendment, the Central Educational Institutions (Reservation in Admission) Act 2006, and the RTE Act all concern education. And they transformed the right to education—at least up to primary level—into a fundamental right. This right, however, emanates either from Article 15 (5), or Article 21-A, or both. So do the decisions: *Ashoka Kumar Thakur, Society for Unaided Private Schools of Rajasthan*, and *Pramati Educational & Cultural Trust*. These decisions concern the right to education and, consequently, the right of a student to admission into schools. None of these—the Constitutional Amendments, the Acts, or the judicial decisions—touch upon, much less affect, another constitutional facet: the right to employment and, in its wake, the right to reservation in service.

## In Private Employment:

75. *The Oxford Handbook of Indian Constitution*, in the Chapter “Private Employment”<sup>22</sup>, notes that political parties have long advocated

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22 Pg.731, Kindle Edition

reservations in private employment. But there is currently no constitutional provision that allows for it, no Supreme Court judgment on the subject, and no government Bill pending. Proponents see this as the logical culmination of India's extensive reservation policy. They argue that, with the economic reforms of the 1990s, it is the private sector that has seen the most significant growth in jobs, while government jobs (for which there are reservations) has shrunk. They also point to studies suggesting that private sector employers discriminate based on caste while selecting employees. To preempt this move, some industry groups have accepted forms of 'voluntary affirmative action', and some companies have showcased schemes to provide special training to candidates from disadvantaged groups to help them in private employment.

76. Therefore, enforcement of Article 16 horizontally, that is in the purely private sphere, needs a constitutional device such as Article 15(5); otherwise, State action in that regard may fall foul of the constitutional mandate, as it exists now.

### **The Decisional Dilemma:**

#### ***Bormalnath Shikshan Sanstha:***

77. GR, dated 15th November 2011, allows the schools opened on a

permanent no-grant basis to get the grant-in-aid. Clause (2) of the G.R compels the schools to satisfy the policy of reservation. A few such “permanent no-grant” schools applied for the grant, met the eligibility criteria but found wanting in their implementing the reservations in employment. The grant denied, they approached this Court.

78. In *Bormalnath Shikshan Sanstha v. State of Maharashtra*, though the petitioners challenged the validity of the GR, during the arguments they gave up that challenge. Instead, they seem to have confined their relief against the official rejection, on another ground: “the backlog of reserved category.” They maintained that there was no backlog of reserved vacancies in the schools. In that context, a Division Bench of this Court in its judgment, dt.17<sup>th</sup> September 2013, has observed that the petitioners could have approached the authorities and demonstrated that they had no backlog. Instead, they rushed to the Court.

79. Indeed, the petitioners have also contended that a school cannot be held ineligible after the Committee has favourably assessed it. In other words, to get the grant-in-aid, the compliance with the policy of reservation is no criterion. To repel this contention, the Court has observed that the “second petitioner school was permitted to be opened on a permanent no-grant basis.” Yet, subject to their complying with the conditions imposed in the G.R, the

Government decided to convert those into aided schools.

80. In the end, the learned Division Bench has observed that if the second petitioner's application has not been finally rejected, it would be open for the petitioners to represent to the authorities concerned, "pointing out that the second petitioner has scrupulously followed the policy of reservation."

81. In *Bormalnath*, the school was brought out of the "permanent no-grant" category and later admitted to grant-in-aid based on the GR, dt.15<sup>th</sup> November 2011. So the Court has observed that "if the petitioners want to take benefit of the G.R, [they] will have to satisfy the eligibility criteria provided in clause (2)" of the GR.

***Radhey Shikshan Vikas Mandal:***

82. Denied the grant-in-aid under the GR, dated 15<sup>th</sup> November 2011, the petitioner schools challenged the denial. By the judgment, dated 16<sup>th</sup> July 2014, this Court set aside the impugned orders because the petitioner schools were not given any opportunity of hearing. The authorities were directed to decide the petitioners claim afresh, hearing them.

83. The State of Maharashtra moved civil applications for recalling and modifying the Court's order. The Division Bench in *State of Maharashtra v. Radhey Shikshan Vikas Mandal Kowad*, has considered this CA. The State

Government wanted the Court to review or modify only direction nos. (iii) and (v): that the authorities should release the salary grant to the writ petitioners, and that they should also release the arrears of salary grant.

84. The learned counsel for the school relied on *Ashoka Kumar Thakur* to contend that reservations in private unaided institution offend Article 19(1) (g), besides disrupting the basic structure of the Constitution.” On backlog of reserved posts, he contended that school had followed the reservation policy as was in force from time to time.

85. Dismissing the CA, a learned Division Bench has observed that the 2011 GR clearly lays down the Government policy, as well as the procedure for giving the grantinaid to “the permanently unaided primary and secondary schools (excluding English medium schools in the State of Maharashtra)”. In that context, it has examined paragraphs 2, 3, 4 and 11 of the GR. Besides that, the Court has also taken the aid of *Ashok Kumar Thakur* to decide the controversy.

86. Eventually, *Radhey* has held that “when the Government is not going to grant aid with retrospective effect, the Government cannot apply its reservation policy with retrospective effect. According to it, the Government “cannot insist that the reservation policy should have been followed with

retrospective effect prior to the date of application of the school management under the [2011 GR]” *Radhey* has also accepted the petitioners’ contention that the GR does “not provide for any marks for reservation policy in respect of the past period.”

87. Of course, having held as above, *Radhey* entertained the CA on a technical plea and partially modified its earlier order. That does not, however, concern us here.

88. Granted, none of the parties to the litigation has brought to the Court’s notice its earlier judgment in *Bormalnath*. Nor has anyone informed the Court that *Ashoka Kumar Thakur* stands overruled in *Pramati Educational and Cultural Trust* on the point the petitioners relied: imposing reservation on private unaided institution constitutes an unreasonable restriction upon a person’s fundamental right guaranteed by Article 19(1)(g) of the Constitution to establish and run educational institutions.

89. That said we cannot miss out on the fact that *Pramati Educational and Cultural Trust* has addressed the reservations in admissions to schools, but not in employment.

***Bhairavanth Shikshan Mandal:***

90. Another decision in the series is *Bhairavanth Shikshan Mandal*,

*Khed v. State of Maharashtra*<sup>23</sup>, to which one of us (B. R. Gavai J) is a party. Contrary to the earlier cases, in this one the petitioners not only raised a plea against Clause (2) of 2011 GR but also persisted with it. So the Court had to rule on it.

91. The petitioners invoked *T.M.A. Pai Foundation*, *P. A. Inamdar*, and *Pramati Educational and Cultural Trust* to contend that the unaided schools cannot be imposed with the burden of reservation policy. The petitioners have also asserted that when they have undertaken to follow the reservation after they are given the grant-in-aid, there is no reason for the Government to insist on its compliance as a condition precedent. The petitioners have also invoked Article 21A of the Constitution. *Bhairavnath* has considered both *Bormalnath* and *Radhey*. It has held that *Radhey* was rendered in ignorance of *Bormalnath*, the latter of the two coequal Bench decisions. Besides that, *Bhairavnath* has also declared *Radhey per incuriam* both because it conflicts with *Bormalnath* and because it follows *Ashoka Kumar Thakur*, a Supreme Court judgment that had been overruled. So *Bhairavnath* has held that compliance with the policy of reservation “is a basic requirement even for making an application for assessment to be admitted to the grant in aid.”

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23 WP 8961/16 dt. 7.6.17

92. About the incorrectness of *Radhey*, *Bhairavnath* has further elaborated. It has, first, observed that the imposition of reservation on unaided institutions stands judicially accepted in *Pramati*. That is, the Ninety-third Constitutional Amendment, which inserted Clause (5) of Article 15, has been upheld; it has neither abrogated Article 19(1)(g) nor affected the basic structure of the Constitution. Then, *Bhairavnath* has traced *Radhey's* journey to the Supreme Court.

***Radhey's* Result in Supreme Court:**

93. Evidently, the State took the matter to the Supreme Court. Through its Order, dated 9<sup>th</sup> December 2016, the Supreme Court was “not inclined to interfere with the order passed by the High Court. The special leave petitions are dismissed.” It has, however, clarified that “the respondent will be entitled to grant-in-aid from the date on which it fulfils the requirements of the [GR], dated 15.11.2011, to the [Government's] satisfaction.”

94. It seems, in *Radhye's*, the school's complying with reservation to “the satisfaction of [the Government]” has raised doubts: is that compliance a condition-precedent to the grant-in-aid or a condition-subsequent? So the respondent school filed a clarification petition before the Supreme Court. In

the clarification petition, it raised these points: (a) the Government cannot reject the salary grant because the school has not followed the reservation policy even before its applying for the grant (b) because the findings in this respect from the Bombay High Court have become final, as have been confirmed by the Supreme Court; (c) the purported backlog, anterior to the school's applying for the grant, cannot affect its claim. But, through an order, dated 10<sup>th</sup> March 2017, the Supreme Court dismissed the clarification petition.

### **Merged or Survived?**

95. Has the High Court's Judgment in *Radhey's* survived or got merged with the Supreme Court's, if any? To put it pithily, does the High Court's *Radhey* attracts the doctrine of merger. We reckon we need not labour on that score. Not only *Radhey* but also *Bormalnath* and *Bhairavnath* can be distinguished. So the question of *Radhey's* merger or its survival renders itself academic.

96. In all these three cases, the schools were granted recognition on "permanent unaided basis". Later, because of the representations from many such schools, the Government took a benevolent view, removed the tag "permanent" from the schools' unaided status, and considered their cases for grant-in-aid. And for that purpose, it has brought out GR 2011.

97. The decisional dust thus settled, can we bring down the curtain on the issue? No not. We ought to examine whether the holding of *Bormalnath Shikshan Sanstha* and *Shri Bhairavnath Shikshan Mandal* apply to the facts of this case? Indeed, a decision gets robbed of its precedential value if its ratio stands divorced from its facts. After all, a case-holding—that is, the binding precedent—is the happy combination of fact and law.

### **The Scope of GR, dated 15<sup>th</sup> November 2011:**

98. *Radhey* has set out and examined para (2) of the 2011 GR. And it reads:

#### (2) Eligibility of schools:

The proposal of those schools which comply with the below-mentioned requirement would be accepted for evaluation. The proposal of those schools which do not comply with these requirements be not considered for evaluation.

(a) The school should observe the terms and conditions decided by the Government from time to time for granting recognition.

(b) At the time of making an application for the evaluation, the school should have followed the reservation policy in respect of recruitment of employees in the school.

(c) . . .

(d) The evaluation be made as per the revised norms of those unaided schools which are not yet receiving the grant in aid.

**The issue to be addressed:**

99. As we have already mentioned, to get the grant-in-aid, an educational institution needs to comply with the statutory regime: following the reservations in its employing staff and faculty. But should that reservation be pre- or post-grant? In other words, is it a condition precedent or a condition subsequent? If the institution must implement the policy of reservation as a condition precedent, the State tends to apply the constitutional mandate horizontally; if the requirement, on the other hand, is only a condition subsequent, the mandate applies vertically. Granted, most modern constitutions are vertical, a few adhering to horizontality, though. Indian constitution has avoided either extreme; it has, instead, adopted the indirect horizontality, so to say.

100. In the sphere of education, Article 21A, read with Article 15 (5), of the Constitution applies a constitutional mandate—free and compulsory education—horizontally and ropes in even the private unaided educational institutions. And *Pramati Educational and Cultural Trust* upholds this constitutional horizontality, as did *Society for Unaided Private Schools of Rajasthan*. In the sphere of employer, no such parallel development is seen.

101. As the petitioners' schools had been assessed by A.Y. 2009-10, only

the GR, dated 17th February 2004, and the Government Circular, dated 3rd January 2005, applied to those schools. On the other hand, the revised norms or procedure found in GR, dated 15th November 2011, applied prospectively to the erstwhile permanently-unaided schools or other schools that had to be assessed afresh beyond AY 2009-10. Indeed, Para 2 (d) of the 2011 GR directs that “those unaided schools which have not yet been brought under grant-in-aid,” must be assessed as per the revised norms mentioned in that GR.

102. The Petitioner schools maintain that the condition about the schools’ complying with the reservation came to be prescribed for the first time through clause 2 [b] of the Government Resolution, dated 15<sup>th</sup> November 2011. That said, we must also note that the first respondent issued the 2011 GR to prescribe the norms for providing a grant to the “permanent unaided” Primary and Secondary Schools. Even the Education Department attests to this fact.

103. Section 16 of the MEPS Act does empower the Executive to bring in subordinate legislation retrospectively, but that retrospectivity cannot prejudicially “affect the interests of any person to whom such rule may be applicable.” The GR, dated 17th February 2004, allows the Government can

change “the formula for grant-in-aid taking into consideration the availability of the financial resources and the needs of the State and their priority.” We wonder whether this change in policy as the Government now insists on—and with retrospective effect, at that—has anything to do with the State’s financial resources or its needs, even priorities. We must read “the financial resources, needs and priorities” *ejusdem generis* for they all relate to the formula of the grant-in-aid and the fund availability.

104. Further probed, we find from GR, dated 11<sup>th</sup> December 2012 that the proposals for the grant from these schools were received by December 2010. And these schools, in fact, were evaluated “as per the norms in the GR No. SSG/1003/[516/03]/SE1, dated 17.2.2004 and No. NGSS/1804/[656/04] SE1, dated 3.1.2005.”

### **The Conclusion:**

- (1) The GR, dated 15th November 2011, was issued to convert the permanently non-aided schools into simple unaided schools and then to evaluate them for grant-in-aid;
- (2) By the time the GR 2011 was issued, the petitioner schools had been evaluated; they received in-principle approval, but could not have the funds allotted and disbursed for the reasons unconnected with their eligibility. So the legislative, administrative, or even

policy changes shall not affect these schools adversely;

- (3) All the three decisions—*Bormalnath Shikshan Sanstha*, *Radhey Shikshan Vikas Mandal*, and *Bharavanth Shikshan Mandal*—differ on one vital factor from the cases we are now called upon to adjudicate: the previous decisions concern the schools granted recognition on “permanent unaided basis”. To have that tag removed and to have them considered for grant-in-aid, the Government has brought out GR 2011.

**Result:**

105. We, therefore, allow the writ petitions. We set aside GR, dated 15th November 2011 and all other consequential GRs and letters in so far as they insist on the petitioners’ complying with the reservation mandate retrospectively. Instead, it will suffice if the schools comply with the mandate from the date they are provided the grant-in-aid, for which the schools have already secured the official acceptance, as is evident from the official correspondence. And we also clarify that the petitioners’ schools have no right to claim the grant-in-aid retrospectively. Nevertheless, besides exercising its discretion about when the grant is to be extended to the petitioners’ schools, the Government will introduce no new norms to stifle the schools’ entitlement for the grant. Even in distributing its largesse, if it

were, the State's action ought to conform to some principles which meet the test of reason and relevance, besides being rational and non-discriminatory.

No order on costs.

(DAMA SESHADRI NAIDU, J)

(B.R.GAVAI, J)

L.S. Panjwani, P.S.