

BOMBAY HIGH COURT

Miss Sophy Kelly

Vs.

State of Maharashtra

Special Civil Appln. No. 131 of 1966, (with Spl.Civil Appln. No. 132 of 1966)

(Tarkunde and M.V. Paranjpe, JJ.)

09.09.1966

JUDGMENT

Tarkunde, J.

1. These two petitions have been filed under Article 226 of the Constitution. They relate to a matter of vital importance connected with the maintenance of educational standards in secondary schools and the preservation of their internal autonomy. The question raised by the petitioners is whether the Maharashtra State Board of Secondary Education can lawfully compel heads of secondary schools to forward the applications of candidates wishing to appear for the Secondary School Certificate Examination (S.S.C. Examination) irrespective of whether in the opinion of their teachers the candidates have made adequate academic progress during the final year.

2. The petitioner in Special Civil Application No. 131 of 1966 is the Principal and Proprietress of Hill Grange, High School Bombay. The second petition (Special Civil Application No. 132 of 1966) is a representative petition filed by the trustees of the Bharda New High School, Bombay, on behalf of about 230 members of the Bombay Association of Heads of Secondary Schools, and also on behalf of other heads of Schools in "the Poona Division". The Poona Division consists of Greater Bombay and the districts in the Maharashtra State which were formerly a part of the old Bombay State. In both the petitions the first respondents are the State of Maharashtra, the second respondents the Maharashtra State Board of Secondary Education, and the third respondents the Poona Divisional Board of Secondary Education.

3. The Maharashtra Secondary Education Boards Act, 1965 was brought into force on 1st January 1966. In former times an examination called the Matriculation examination used to be held by the Bombay University in the State of Bombay. Thereafter a corresponding examination called the School Leaving Certificate Examination was held for some time by the Bombay Government. In 1948 the Bombay Legislature passed the Bombay Secondary School Certificate

Examination Act, 1948, and the Board formed under that Act began to hold an examination called the Secondary School Certificate Examination (S.S.C. Examination). The Board under the said Act continued to hold the examination after the formation of the Maharashtra State in those areas which came to Maharashtra from the old Bombay State. The Board had made regulations under the Act of 1948, and out of these regulation 27 related to the eligibility of candidates for the said examination. One of the conditions prescribed by that regulation was that the candidate should have a certificate from the head of the school that "his progress, conduct and attendance at the school have been satisfactory". The certificates as to progress used to be given by the heads of schools on the basis of the academic performance of the pupils. In some schools the academic performance of the pupils was judged on the basis of the results of the preliminary examination which was held in the schools prior to the S.S.C. Examination. In some schools the progress certificates used to be given on the basis of the pupils' performance in the preliminary as well as the earlier examinations held during the final year in the school. In the Hill Grange High School it was the established practice to take a monthly test of the pupils in the final year (Standard XI), a terminal examination at the end of the first term, and a preliminary examination in the month of December every year. For the purpose of issuing progress certificates the academic performance of the pupils was judged by the Principal and the Head Master on the reports of all the teachers concerned submitted and discussed at a special staff meeting. There were some schools in the Poona Division, however, which used to send up all the pupils in the XI Standard to the S.S.C. Examination by giving them progress certificates as a matter of course. It was averred by the petitioners, and was admitted by the learned Advocate General on behalf of the respondents, that the system of holding a preliminary examination and of detaining students who were not fit to pass it had prevailed for a period of nearly 100 years in the Bombay State and in the areas of the Bombay State which are now included in Maharashtra.

4. In the districts of Vidarbha which came to the Maharashtra State from the former State of Madhya Pradesh, secondary, education was regulated prior to 1st January 1966, by the Madhya Pradesh Secondary; Education Act, 1951, and by regulations made by a Board under that Act. That Act was more comprehensive in its scope than the said Bombay Act of 1948. The purpose of the Bombay Act of 1948, as stated in its preamble, was to establish a Board for the purpose of holding and conducting an examination at the end of the high school education stage and for prescribing courses of studies for such examination. The purpose of the Madhya Pradesh Act of 1951, as stated in its preamble, was to establish a Board "to regulate secondary education in Madhya Pradesh" . The regulations made by the Madhya Pradesh Board did not require that candidates desiring to appear for its examinations should secure a progress certificate from Head Masters. What is more, one of the regulations laid down that heads of schools shall not withhold the applications of candidates who have fulfilled the prescribed conditions for appearing at the examinations. At the same time, a method was provided in the regulations which enabled the heads of schools to assess the academic performance of pupils in the final year. In each subject taken by the pupil in the Board's examination, 20 per cent of the marks were given by the head of the school on the basis of an internal assessment made by him of the academic performance of

the pupil during the final year and the remaining 80 per cent of the marks were assigned for the written examination conducted by the Board. This system had prevailed in the Vidarbha area for many years.

5. In the Marathwada districts, which came to the Maharashtra State from the old Hyderabad State, there was not statute regulating the holding of the final examination prior to 1st January 1966. There the final examination was held directly by the Government. Under the rules made by the Government in that behalf, candidates wishing to appear for the final examinations required a certificate of satisfactory academic performance from their heads of schools.

6. As stated above, the Maharashtra Secondary Education Boards Act of 1965 (hereafter referred to as the Act) came into force on 1st January 1966. It provided for the setting up of a State Board called the Maharashtra State Board of Secondary Education (hereafter referred to as the Board) and three Divisional Boards for the Poona Division, the Nagpur Division, and the Aurangabad Division respectively. The three Divisions comprised areas from the old Bombay State, the old Madhya Pradesh State and the old Hyderabad State, as mentioned above. In the course of this judgment we will have to examine in some detail the scheme of the said Maharashtra Act of 1965. It would suffice at this stage to notice that Section 36 conferred powers on the Board to make regulations for the purpose of carrying into effect the provisions of the Act, and that Section 37 provided that the first regulations shall be made by the State Government and shall continue to be in force until new regulations are duly made by the Board under Section 36. While bringing into force the said Act on 1st January 1966, the State Government also brought into force on the same day regulations made by them under Section 37 of the Act. Regulation 42 of these regulations related to the eligibility of regular candidates for admission to the S.S.C. Examination to be conducted in the Poona Division by the Poona Divisional Board. Clause (1) of this regulation required that, in order to be eligible for the examination, the candidate should have from the head of his school a certificate as to his conduct and attendance at the school, and a certificate as to his character, but not a certificate regarding his academic progress. For the final examination in the Nagpur Division the regulations continued the old system which did not require any progress certificate as a condition of eligibility and under which the heads of schools were required to forward the applications of all eligible candidates, but which empowered the heads of schools to assign 20 per cent of the marks in each subject on an internal assessment of the performance of the candidates. As regards candidates wishing to appear for the final examination conducted by the Aurangabad Divisional Board the relevant regulation required that candidates should have from the heads of their schools a certificate that they had "satisfactorily" prosecuted a regular course of study prescribed for the examination.

7. Although these Regulations were brought into force along with the Act on 1st January 1966, they do not appear to have been known to the heads of secondary schools till after 17th January 1966. The preliminary examinations in the secondary schools comprised in the Poona Division were held, as usual, in the month of December 1965, and the heads of schools forwarded to the

Poona Divisional Board on or about 10th January, 1966 the applications of candidates who had received the requisite certificates including the progress certificates. Following the practice of previous years the heads of several schools did not forward the applications of candidates who in their opinion did not make adequate academic progress and who, therefore, had not received progress certificates. On 17th January, 1966 the Secretary of the Poona Divisional Board sent a Circular to all the heads of secondary schools in the Poona Division and enclosed with that Circular an extract from the said regulation 42 framed under the new Act. By the said Circular he informed the heads of secondary schools, "that candidates who could not be sent up for the S.S.C. Examination of March 1966, merely on the ground of unsatisfactory progress may approach if they so desire, the heads of their respective schools and fill in the prescribed form of application." It was further stated in the Circular, "Application forms of all such candidates together with relevant accompaniments and fees should be forwarded by the Schools to the Divisional Secretary, Poona Divisional Board, Poona-10, not later than 31st January, 1966" . The President, of the Bombay Association of Heads of Secondary Schools, which consists of Head Masters of about 230 High Schools in Bombay and of which the petitioners in both the petitions are members sent a telegram on 19th January, 1966 to the Poona Divisional Board inquiring whether under the said Circular of 17th January, 1966 it was obligatory upon the Head Master of a school to forward the applications of candidates irrespective of their progress. By its letter dated 21st January 1966 the Secretary of the Poona Divisional Board informed the petitioners that it was no longer necessary to certify the progress of a candidate and that a candidate's application cannot be withheld for want of academic progress. The Bombay Association of Heads of Secondary Schools held a meeting on 22nd January, 1966 and resolved unanimously to convey its protest against the new regulation on the ground that it was "uneducational" . Representatives of the said Association interviewed the Minister for Education, but were informed that their request not to enforce the regulation could not be acceded to. Thereupon the present petitions were filed on 31st January 1966 for an appropriate writ or order quashing the said regulation 42(1), the said Circular dated 17th January, 1966 and the said letter dated 21st January, 1966, and for a direction to the respondents to desist from enforcing them. On filing the petitions the petitioners prayed for and obtained an interim injunction restraining the respondents from implementing the said Circular against the secondary schools in the Poona Division.

8. As the S.S.C. Examination was to be held in the month of March 1966 and the matters in issue were very urgent, the petitions were ordered to be heard peremptorily on 7th February 1966. The petitions were accordingly heard between 7th and 11th February 1966 before a Bench consisting of Mr. Justice H.R. Gokhale and myself. During those arguments Mr. Palkhiwala appeared for the petitioners and the learned Advocate General for the respondents.

9. In view of what followed it is desirable to record the substance of the main contentions which were advanced by Mr. Palkhiwala before that Bench. His argument was two-fold. He argued in the first place, that regulation 42(1) was not correctly interpreted in the said Circular letter dated 17th January 1966 and the said letter of 21st January 1966. Under regulation 42(1) a progress

certificate from the Head Master of a school was no longer a condition of eligibility of a candidate desiring to appear for the examination. It was therefore, open to the Head Master to forward the application of a candidate to the Divisional Board even if the academic progress of the candidate in the opinion of the Head Master was not satisfactory. However, regulation 42(1) did not, according to Mr. Palkhiwala, interfere with the right of the Head Master to present only those candidates as the candidates of his school who have shown adequate academic progress. Mr. Palkhiwala argued that the right of the Head Master to withhold the applications of those pupils who have failed to make adequate academic progress operates as a check on indiscipline and promote habits of regular study on the part of the students. Abrogation of this right of the Head Master would amount to a serious encroachment on the internal autonomy of secondary schools. Regulation 42(1) could not, therefore, be interpreted, in the absence of express words to that effect, as casting an obligation on Head Masters to forward the applications of all candidates irrespective of their academic progress in the final year at the secondary schools. Mr. Palkhiwala contrasted the wording of regulation 42(1) which related to the eligibility of "regular" students with other Regulations which dealt with ex-students, failed students, etc. He also pointed out that Regulation 78(5), which applies to the Nagpur Division contains an express provision that the heads of secondary schools shall not withhold the applications of candidates who have fulfilled the prescribed conditions for appearing for the final examination, and that no such express provision was found in the corresponding regulation (regulation 49) which related to secondary schools in the Poona Division. Mr. Palkhiwala accordingly contended that regulation 42(1) did not affect the Head Masters' right in the Poona Division to withhold the applications of those pupils who did not make adequate academic progress in the final year. Mr. Palkhiwala argued in the second place that if it were held that regulation 42(1) was correctly interpreted in the said Circular and the said letter, and if it required the Head Master of a secondary school to forward the applications of candidates irrespective of their academic progress, the regulation was ultra vires the regulation-making powers granted under Section 36 to the Board and Section 37 to the State Government. According to Mr. Palkhiwala, no provision of the Act conferred any right on the Board or the Government to make such a regulation, and that the regulation was also bad because it was calculated to defeat the main purpose of the Act which was to maintain standards of education in secondary schools. Apart from these two main contentions, Mr. Palkhiwala also advanced a supplementary argument that regulation 42(1) was discriminatory because it purported to take away from the Head Masters in the Poona Division the right, which the Head Masters in Aurangabad Division continued to have, of keeping back those students who did not make adequate academic progress.

10. Before the arguments were over the parties arrived at interim consent terms which were submitted to the Court on 11th February 1966. As the interim consent terms were suggested by the Court, the reasons why they were suggested may be noted. It was felt that those students who were kept back from appearing for the examination to be held in March 1966, had already received the advantages which were claimed by the petitioners for the previous regulations. Those students, like the other students whose applications had been forwarded to the Divisional

Board, had assumed that they would not be able to appear for the S.S.C. Examination unless their academic progress was found to be satisfactory by their Head Masters. Standards of study and discipline were not likely to be adversely affected if these students were allowed to appear for the S.S.C. Examination of March 1966 as desired by the respondents. On the other hand, it was admitted by the learned Advocate General that the Government had not consulted the opinion of educationists in making these regulations. Section 37 of the Act provided that the first regulations made by the State Government under that section were to continue in force until new regulations are duly made by the Board and sanctioned by the State Government under Section 36. The learned Advocate General agreed that the newly formed Board would invite the views of educationalists and others, and make a fresh decision on the question in dispute without being influenced by the existing regulation 42(1). The learned Advocate General also felt that it was necessary to have greater uniformity in the regulations operating in the Poona, Nagpur and Aurangabad Divisions in regard to the matters in dispute.

11. Under the interim consent terms the respondents agreed that the Board will consider the question of the right claimed by the heads of secondary schools to withhold the applications of candidates for the final examination on the ground that their academic performance is not satisfactory. The Board agreed to decide this question without being influenced in any way by regulation 42 as interpreted by the respondents and after inviting the views of educationists and other affected persons, and after hearing a deputation of the Bombay Association of Heads of Secondary Schools. The petitioners on their part agreed to present for the S.S.C. Examination to be held in March, 1966, the pupils who had been kept back for want of academic progress. The petitioners agreed to do so without prejudice to their rights and contentions in the petitions. It was further agreed that in the event of the petitioners not being satisfied with the decision which might be taken by the Board, the petitions would proceed to a final hearing after such amendments therein as might be found to be necessary. As one of the petitions has been filed in a representative capacity, the Court certified that the terms of the proposed compromise were in the interest of all the heads of secondary schools represented by the petitioners in that petition and granted leave to the petitioners to agree to the interim consent terms. After recording the interim consent terms, the hearing of the petitions was adjourned.

12. The Board thereafter followed the procedure agreed upon, invited the views of educationists and others, heard a deputation of the Bombay Association of Heads of Secondary Schools, and passed on 29th June, 1966 certain regulations which have been designated "the Third Regulations". These Third Regulations, instead of assuaging the grievance of the petitioners, augmented it. We will presently indicate the nature of these regulations, but will first notice the steps taken by the parties in pursuance of the interim consent terms.

13. After the consent terms were recorded and the hearing of the petitions was adjourned, the Board issued a questionnaire on some of the matters in dispute. A questionnaire was also issued by the Bombay Association of Heads of Secondary Schools. The questionnaire of the Bombay

Association was sent to various persons including Principals, Headmasters, parents etc. The replies received by the Bombay Association to its questionnaire were 1495. An analysis of those replies has been produced on behalf of the petitioners. On the question whether the candidates' performance in the preliminary examination or the other tests conducted by the school should be an essential condition of eligibility for the S.S.C. Examination, 1468 replies were in the affirmative and 22 replies in the negative. On another question 1464 persons as against 16 agreed that if pupils in the S.S.C. Examination class take it for granted that forms would be given to them as of right it would result in neglect of daily work, indifference towards school routine and consequent deterioration in the standard of education. The questionnaire issued by the Board was more detailed. The questions related to the criteria for deciding the eligibility of regular candidates for appearing at the final examination, with particular reference to attendance at school and the requirement of a progress certificate. The questionnaire was sent to all Heads of the Secondary Schools in the State of Maharashtra, Federation and Head Masters' Associations in Western Maharashtra. President and Secretary of the Secondary Teachers' Association in Western Maharashtra and their Federation, all members of the Maharashtra State Board of Secondary Education and the three Divisional Boards of Poona, Nagpur and Aurangabad, all members of the erstwhile Secondary School Certificate Examination Board, all members of the former Board of Secondary Education of Vidarbha, experts and members of the former S.S.C. Examination Board, and all Parishad Education Officers. Regional Deputy Directors of Education, Inspectresses for Girl's Schools in the State of Maharashtra and the Educational Inspector of Greater Bombay. Some of the questions were addressed to all those to whom the questionnaire was sent, but some questions were confined to the heads of those schools in the Poona and Aurangabad Divisions who had been following for a number of years the practice of sending up all the pupils in the final standard for the S.S.C. Examination, and some other questions were directed exclusively to heads of secondary schools in the Nagpur Division where no progress certificate was required and the Head Masters had no authority to detain pupils for want of academic progress. The Board received 629 replies prior to 25th April 1966, and an analysis of this set of replies was available to the members of the Board before they passed "the Third Regulations" on 29th June 1966. Between 26th April and 11th May 1966, 276 more replies were received by the Board to its questionnaire and a separate analysis of this set of replies has been filed by the Board in these petitions. Considerable reliance was placed before us on behalf of the petitioners. on the analysis given by the Board to the two sets of replies received by it. On the question "What in your opinion should be the criteria for deciding the eligibility of Regular candidates for appearing at the S.S.C. and H.S.S.C. Examinations" , 85.9 per cent of the replies in the first set and 92.8 per cent of the replies in the second set were in favor of the progress certificate being one of the criteria of eligibility. Again on the question "Are you in favor of prescribing a certificate of the candidate's satisfactory progress in school, to be issued by heads of secondary schools, as a condition for admission to the Board's examinations," 79.2 per cent of the replies in the first set and 86.2 per cent of the replies in the second set were in the affirmative. Out of the questions which were addressed exclusively to those Heads of Secondary Schools in the Poona and Aurangabad Divisions who had been following for a number of years the practice

of sending up all the pupils" in the final standard for the S.S.C. Examination one question was "Do you find that students do not take to their studies or school examinations, during the final year, seriously in the absence of the fear of detention ?" . To this question, 65.9 per cent of the replies in the first set and 68 per cent of the replies in the second set were in the affirmative. Another question addressed to the above Heads of Secondary Schools in the Poona and Aurangabad Divisions was "Have the S.S.C. Examination results of your school been adversely affected on account of your practice of sending up all the pupils in the final standard for the S.S.C, Examination ?" On this question 61.8 per cent of the replies in the first set and 88.4 per cent of the replies in the second set were in the affirmative. Another question addressed to the same Heads of Secondary Schools was "Are you, for any reasons, inclined to adopt the practice of detention of pupils in the final standard of your school ?" . On this question 60.6 per cent of the replies in the first set, and 63.6 per cent of the replies in the second set were in the affirmative. Turning to the questions which were addressed exclusively to the Heads of Secondary Schools in the Nagpur Division where there was no practice of detaining pupils in the final standard, one such question was "Do you think that the practice of sending up all the pupils in the final standard for the S.S.C./H.S.S.C. Examination has affected the general tone and discipline in the final standard in any way ?" To this question, 54.8 per cent of the replies in the first set and 53 per cent of the replies in the second set were in the affirmative. Another question in the same group was "Has this practice resulted in any loss of seriousness among the pupils in respect of school work and examination ?," 42.3 per cent of the replies to this question in the first set and 55 per cent of the replies in the second set were in the affirmative. In assessing the value of the replies received from the heads of secondary schools in the Nagpur Division, it must be borne in mind that the Head Masters of those schools have the power of assigning 20 per cent of marks in each subject of the final examination on the basis of their internal assessment of the performance of each candidate during his final year at school. A noteworthy feature of the questionnaire issued by the Board was that it did not contain any direct question on whether the Heads of secondary schools in the Poona and Aurangabad Divisions should or should not be required to forward the applications of all candidates irrespective of their academic performance in the final standard. It seems to have been assumed by the Board, when they framed the questionnaire, that if the condition of the progress certificate was dispensed with the Head Masters would automatically lose the right of withholding the applications of their pupils on the ground of want of adequate progress. We will have an occasion to comment on this feature of the questionnaire at a later stage.

14. Prior to the meeting of the Board in which "the Third Regulations" were adopted the results of the S.S.C. Examination in the Poona Division had been declared on 4th June 1966. It was agreed before us on both sides that about 1,50,000 students appeared for the examination, and that about 44 per cent of them were declared successful. Out of these 1,50,000 students, about 7,500 (5 per cent of the total) were students who had been Initially kept back by their Head Masters for want of academic progress, and were subsequently sent up as a result of the Circular dated 17th January 1966 issued by the Divisional Board and the subsequent interim consent

terms recorded in these petitions. These students will be referred to as the "kept back" students. Some of the results of the kept back students were available to the members of the Board before they adopted "the Third Regulations" . The available results were from three urban areas - Bombay and Greater Bombay, Poona City and Camp, and Sangli City - and from one rural area. viz. Sangli district other than Sangli City. These results were of 2,960 students out of the 7,500 students who had been initially kept back. The result showed that about 20 per cent of the students from the urban areas (Bombay and Greater Bombay, Poona City and Camp and Sangli City) passed in the examination, whereas from the rural areas of the Sangli district only 3 out of the 111 kept back students succeeded in the examination. The Bombay Association of Heads of Secondary Schools had also collected the results of students from 101 schools in Greater Bombay. Their analysis showed that out of the students who had been sent up on progress certificates (i.e. who were not kept back) 75.9 per cent were successful, whereas the success of the kept back students was 16.4 per cent.

15. The meeting of the Board at which "the Third Regulations" were passed was held on the 27th, 28th and 29th of June 1966. The meeting heard a deputation of the Bombay Association of Heads of Secondary Schools and also heard their counsel in some of the points of law involved. By a majority of 26 in favor and 6 against, with 3 abstaining, the Board resolved that "a certificate of satisfactory progress from the Head of the Secondary School should not be necessary and it should be made obligatory on the Head of the Secondary School to forward applications of all eligible candidates." In pursuance of this and the other resolutions passed at the meeting the Board adopted on 29th June 1966, "the Third Regulations" - For our purposes it is enough to notice some of the features of the new regulation 42 and the new regulation 49 comprised in the Third Regulations. Whereas the old regulation 42 (framed by the State Government under Section 37 of the Act) had provided in a negative form that no candidate shall be admitted to the final examination unless he fulfilled the conditions mentioned in that regulation, the new regulation 42 (adopted by the Board as a part of the Third Regulations) provided that a candidate "shall be eligible" to appear for the S.S.C Examination on fulfilling the conditions mentioned in that regulation. Both the old as well as the new regulation 42 did not prescribe a progress certificate from the head of a secondary school as a condition of eligibility of a candidate for appearing for the S S.C. Examination. A more material change was brought about by the Board in regulation 49 which related to the applications of candidates for the examination. In that regulation the Board incorporated a new clause being clause No. (8), to the following effect :-

" (8) Heads of Secondary Schools shall not withhold the applications of candidates who have fulfilled the conditions prescribed for appearing at the Examination, without previous sanction of the Divisional Chairman."

By this amendment the Board purported to negative the right claimed by the petitioners of withholding the applications of their pupils if they fail to show adequate progress during their

final year at school.

16. After the result of the Board meeting was communicated to the petitioners, they got the petitions amended so as to challenge the validity of "the Third Regulations" . In the amended petitions the petitioners claimed that the percentage of success of the kept back students in the S.S.C. Examination held in March 1966 cannot offer any guidance on the likely impact of the "Third Regulations" on the pupils who will hereafter appear for the examinations of subsequent years. The petitioners averred that the kept back students who appeared for the March 1966 examination had prepared and appeared for all the school tests including the preliminary examination with the knowledge that their performance at the said tests and the preliminary examination would be taken into consideration by the heads of schools for their being sent up for the S.S.C. Examination. On the other hand, the pupils who would hereafter appear for the S.S.C. Examination would, the petitioners alleged, know from the beginning that they need not appear nor prepare for any of the tests conducted by the schools including the preliminary examination and that they would be able to appear for the S.S.C. Examination irrespective of their academic progress or performance. It was further claimed by the petitioners that the "Third Regulations" would remove the incentives which were hitherto available to the pupils in the final standard for regular and systematic work and would undermine the very basis of the Head Master's authority and his right to decide whether a pupil should be presented as the candidate of his school for the final examination. The relevant averments in the amended petitions were denied in an affidavit in reply filed by the chairman of the Board. With his affidavit in reply he produced, amongst other documents, the minutes of the Board meeting held on 27th, 28th and 29th June 1966, and a statement regarding the educational qualifications and other particulars of the members of the Board.

17. At the hearing of the petitions before us, Mr. Palkhiwala argued for the petitioners and the learned Advocate General for the respondents. At the end Mr. Sorabjee replied on behalf of the petitioners as Mr. Palkhiwala was not then available. As my learned brother was not present at the first hearing of the petitions, all the questions in dispute were argued again and at considerable length. Before dealing with the arguments from either side and in order to appreciate them, it is desirable to examine the general scheme and some of the specific provisions of the Act.

18. According to its preamble the object of the Act is "to regulate certain matters pertaining to secondary education in the State of Maharashtra and for other purposes hereinafter appearing." It will be noticed that on the one hand the object of the Act, is not confined, like that of the Bombay Secondary School Certificate Examination Act of 1948, to the holding and conducting of the S.S.C. Examination and prescribing courses of studies for the examination, and that on the other hand the object of the Act, is not so wide as that of the Madhya Pradesh Secondary Education Act of 1955 which was "to establish a Board to regulate secondary education in Madhya Pradesh" . The present Act is designed to regulate "certain matters" pertaining to

secondary education and not to regulate secondary education generally. Section 2(1) of the Act defines the term "recognized by a Divisional Board" with reference to a secondary school as meaning "recognized by a Divisional Board for the purposes of admission to the privileges of that Board." The term "secondary education" is defined in Section 2(o) as meaning "such general, technical, vocational or special education which is designed to meet the needs of the period of adolescence and which follows immediately primary education and precedes immediately education controlled by Universities established by law in India." Section 3 provides for the establishment of the State Board and the three Divisional Boards, and Sections 4 to 17 define the constitution of these Boards, and provides for their mode of functioning. Of these sections, Section 5 deals with constitution of the State Board. It shows that the Board is to consist of 44 members of whom 8 are officials and the rest non-officials. Most of the non-official members, however, are nominees of the State Government. Out of the 44 members of the Board, 35 are nominated by the State Government and 9 are elected. 6 by each of the University in the State, 2 by the Legislative Assembly and 1 by the Legislative Council. Section 18 defines the powers and duties of the State Board. Under Section 18(a) one of the functions of the Board is to advise the State Government on matters of policy relating to secondary education in general. Under Section 18(b) the Board can lay down guiding principles for determining curricula and syllabi for the entire secondary course, and to determine the curricula and detailed syllabi for the final examination. Section 18(c) relates to recommendation of text-books. Under Section 18(d) the Board can prescribe standard requirements in respect of staff, buildings, furniture, equipment, stationery and other things required for secondary schools. Section 18(f) is important for our present purpose. It empowers the Board to prescribe conditions for admission to the final examination, for regular and private candidates" . Under Section 18(1) the Board can call for any information from any secondary school recognized by a Divisional Board "to ensure maintenance of academic standards in secondary education" . Section 18(m) empowers the Board to recommend measures to promote physical, moral and social welfare of students in institutions recognized by the Divisional Boards, and to prescribe conditions of their residence and discipline. Section 18(t) empowers the Board "to make regulations for the purpose of carrying into effect the provisions of this Act." Under Section 18(v) the Board can "exercise such other powers and perform such other duties as may be conferred or imposed on it by or under this Act." Under Section 18(w) the Board can "do all such acts and things as may be necessary to carry out the purposes of this Act." Then Section 19 defines the powers and duties of a Divisional Board. Under Section 19(f) one of the functions of a Divisional Board is " to conduct in the area of its jurisdiction the final examination on behalf of the State Board." Under Section 19(h) a Divisional Board admits candidates for the final examination " according to the regulations made by the State Board in this behalf" . Section 19(m) empowers a Divisional Board "to generally evaluate the performance of students in all examinations in secondary schools including the final examination and make necessary recommendations to the State Board in that behalf." Under Section 19(n) a Divisional Board has a power "to grant recognition to secondary schools or withdraw the same in the prescribed manner." Under Section 19(o) a Divisional Board can call for any' information from a recognized secondary school "to ensure maintenance of

academic standard," and to withdraw recognition of schools who failed to maintain "the required academic standard" . Under Section 19(q) a Divisional Board is authorized "to require institutions recognized by it and the Education Department to extend their co-operation in the conduct of the final examination." Section 34 gives power to the State Government to issue to the State Board such directions consistent with the Act as it may think fit. Section 36 relates to the power of the State Board to make regulations. Sub-Section (1) of Section 36 lays down that the State Board may make regulations "for the purposes of carrying into effect the provisions of this Act." Sub-Section (2) of Section 36, enlists the particular topics on which such regulations may be made without prejudice to the generality of the power granted by Sub-Section (1). The topic mentioned under Section 36(2)(c) is "the admission of candidates to the final examinations and conditions governing such admission" . The topic under Section 36(2)(f) is "the arrangements for the conduct of final examinations by the Divisional Boards and publication of results." Sub-Section (3) of Section 36 provides that no regulation made under this section shall have effect until the same has been sanctioned by the State Government. As already mentioned, Section 37 lays down that the first regulations shall be made by the State Government and that they shall continue to be in force until new regulations are duly made and sanctioned under Section 36.

19. Section 38 empowers the State Board to make bye-laws "consistent with this Act and the regulations made thereunder" for the purpose of providing for such matters as the procedure to be followed at the meeting of the State Board and the Divisional Boards, the compensatory allowance which may be drawn by members of the Boards and other matters solely concerning the Boards and their Committees. By Section 40 the Bombay Act of 1948 and the Madhya Pradesh Act of 1951, which have been referred to above, were repealed.

20. The old regulation 42 framed by the State Government having been replaced by the new regulation 42 framed by the Board, the attack of Mr. Palkhiwala at the resumed hearing was directed towards clause (2) of the new regulation 42 which dispensed with the progress certificate as one of the conditions of eligibility of candidates for the S.S.C. Examination and clause (8) of regulation 49 which purported to take away the right of heads of secondary schools to withhold the applications of candidates who have failed to make satisfactory academic progress, in the final year. One of the arguments advanced by Mr. Palkhiwala in this behalf can be dealt with separately from the rest of his arguments. This argument was not pursued by him on the ground that it was unnecessary to do so, but was not formally given up. He argued that the powers which have been granted under the Act to the State Board and the Divisional Boards are powers of delegated administration and not of delegated legislation, and that therefore the regulations framed by the State Board cannot impose any obligation or interfere with any rights where such imposition or interference is not expressly provided for by the Act. The expression "delegated administration," used by Mr. Palkhiwala was perhaps not an appropriate one. The legislature being not an administrative body, the conferment of administrative powers under an enactment cannot be looked upon as an act of delegation. However, what Mr. Palkhiwala meant was that the regulations which the State Board was empowered to make under the Act are in the nature of

administrative orders and cannot have the force of law. We do not find it possible to accept this argument. The regulations made under the Act are capable of being enforced by judicial means and this implies that the regulations have the force of law. For instance, one of the regulations is to the effect that a student who gets 35 per cent marks in each subject at the S.S.C. Examination is to be declared by the Divisional Board as having succeeded in the examination. There can be little doubt that if a student sets the requisite number of marks and is not shown to have succeeded in the examination, he or his guardian can adopt appropriate judicial means to require the Divisional Board to declare him as having succeeded in the examination. Instances of this type can be multiplied. We are accordingly of the view that the regulations made under the Act have the force of law.

21. The other arguments of Mr. Palkhiwala can be summarised under the following heads :-

- (a) the new regulation 42(2) and regulation 49(8) are ultra vires, because -
 - (i) they are not covered by the regulation-making powers which the Act has granted to the Board, and because
 - (ii) they are contrary to the main purpose of the Act which is the maintenance of standards of education in secondary schools.
- (b) that the said regulations are discriminatory and bad under Article 14 of the Constitution as they introduce inequality between the Head Masters of secondary schools in the Poona Division and the Head Masters of secondary schools in the Nagpur Division.

An additional point which was taken in the petition was that the impugned regulations amount to an unreasonable encroachment on the fundamental right of the petitioners to conduct and run the business or vocation of an educational institution efficiently and in the proper interest of the pupils and were therefore violative of Article 19(1)(g) of the Constitution. This contention was not pressed by Mr. Palkhiwala in view of the effect of Article 358 of the Constitution during the operation of the Proclamation of Emergency.

22. We pointed out to Mr. Palkhiwala at an early stage of his arguments that it would not be possible for the Court to grant any relief to the petitioners in respect of their grievance about the new regulation 42(2). It was within the competence of the Board to lay down the conditions of eligibility of candidates for the S.S.C. Examination. The mere fact that regulation 42 does not contain one of the conditions of eligibility (viz. the requirement of a progress certificate from the head of the school) which was founded in the corresponding regulation 27 made under the earlier Bombay Act of 1948 cannot afford any legitimate ground for holding that regulation 42 is either ultra vires or unreasonable or repugnant to the general law. Regulation 42 was a fresh regulation under the present Act, and cannot be looked upon as mere amendment of regulation 27 which was framed under the old Act. It is true that from the point of view of the petitioners the new regulation 42 had another objectionable feature, It stated in a positive form that a candidate "shall be eligible to appear for the Secondary School Certificate Examination" on fulfilling the

conditions laid down in that section. Such language was probably used by the Board in order to emphasise what was expressly stated in clause (8) of regulation 49 that the heads of secondary schools shall not be entitled to withhold the applications of candidates on any ground other than those mentioned in the new regulation 42. If, however, clause (8) of regulation 49 is found and declared to be invalid, the new regulation 42 cannot by itself have the effect of depriving the heads of schools of the power claimed by them to withhold applications of candidates on the ground of inadequate academic progress. By itself and in the absence of clause (8) of regulation 49, the new regulation 42 will merely imply that the Divisional Boards shall admit all candidates whose applications have been forwarded and who are found to be eligible according to the conditions laid down in that regulation. Mr. Palkhiwala accepted this view and confined his attack under the above heads to clause (8) of regulation 49.

23. One of the questions canvassed before us was whether the regulations framed under the Act were in the nature of statutory rules or bye-laws. This question is relevant in considering the second part of Mr. Palkhiwala's arguments, viz. that regulation 49(8) is bad because it is unreasonable and because it is repugnant to the general law. According to Mr. Palkhiwala, regulation 49(8) is ultra vires the powers of the Board irrespective of whether that regulation is looked upon as a statutory rule or a bye-law. The latter question will accordingly be considered while dealing with the second part of Mr. Palkhiwala's arguments.

24. In considering whether regulation 49(8) is ultra vires the powers of the Board, it is very important to know by what right the petitioners claim to be entitled to withhold the applications of candidates on the ground that their academic progress is unsatisfactory. It will be found that the vires of regulation 49(8) as well as its alleged unreasonableness depend on the existence of the above right claimed by the petitioners as heads of secondary schools. The nature of that right was explained by Mr. Palkhiwala in the course of his arguments with reference to a passage from Halsbury which will be presently quoted. When the learned Advocate General commenced his reply, he on behalf of the respondents and Mr. Sorabjee on behalf of the petitioners agreed that the nature of the right claimed by the petitioners should be specified in the form of an amendment to the petitions. Paragraph 12(aa) was accordingly added to the petitions by way of an amendment and a supplementary affidavit in reply was filed by the respondents.

25. According to the petitioners, the right claimed by them arises from the implied terms which the common law attaches to the contract to educate. These implied terms are the basis of the internal autonomy of educational institutions. In Halsbury's Laws of England, in the volume dealing with Education, the following portion appears under the heading "Common Law Rights and Duties" and the sub-heading "The Contract to educate" (Halsbury, Third Edition, Volume 13, page 590, paragraphs 1241 and 1242) :-

"1241. Parents and school proprietors :-

In schools which are not maintained by local education authorities the relations between the parent and the proprietor of the school are governed by the terms express or implied of the contract for the education of the child. Subject to the express terms of the contract, there is an implied term that the proprietor shall continue to be responsible for the education of the child so long as the child's conduct does not warrant his expulsion from the school."

" 1242. Position of schoolmasters:- The authority of a schoolmaster is, while it exists, the same as that of a parent. A parent, when he leaves his child with a schoolmaster, delegates to him all his own authority, so far as is necessary for the welfare of the child, and so far as necessary to maintain discipline with regard to the child committed to the teacher's care. The delegation is revocable, and in case of conflict the authority of the parent must prevail and he may have a habeas corpus if the master detains the child against his wish. The parent undertakes that the master shall be at liberty to enforce with regard to the child the rules of the school, or at all event such rules as are known to him and to which he has expressly or impliedly agreed. The master is bound to take such care of his pupils as a careful father would take of his children."

Applying these principles to the case before us, it seems clear that when a parent sets his child admitted to a secondary school he undertakes that the Head Master shall be at liberty to enforce with regard to the child such rules of the school as are reasonably designed to promote the education of the child and to maintain discipline in the school. The main purpose of education in secondary schools is to prepare pupils for the S.S.C. Examination. A few secondary schools in the State prepare some pupils for another examination called the Indian School Certificate Examination which has a higher standard than the S.S.C. Examination. It was, however, common ground such before us that only those secondary schools who teach in the English medium, are allowed to prepare students for the Indian School Certificate Examination, and that even these schools usually have a section which prepares students for the S.S.C. Examination. Since the main purpose of education in the secondary school is to prepare pupils for the S.S.C. Examination, it follows that a parent who sets his child admitted to secondary school undertakes that the Head Master shall be at liberty to enforce with regard to the child such rules of discipline as are reasonably designed to prepare him for that examination, Under the implied terms of the contract the Head Master is entitled to withhold promotion of a pupil from one standard to the next, if the pupil does not show satisfactory academic progress. The same right is exercised by Head Master in respect of pupils in the final standard by refusing to grant them leave to appear for the S.S.C. Examination unless satisfactory progress is made by them. Such a rule is obviously designed to promote habits of regular and diligent study in the pupils. The Head Masters claim the right to judge the academic progress and performance of their pupils before presenting them for the S.S.C. Examination, but that right results from the more basic rule enforced in the school that only those students will be presented for the S.S.C. Examination who have studied regularly in the course of the year and made adequate academic progress.

26. It was averred by the petitioners, and was not denied by the learned Advocate General, that in actual practice the Head Masters in the Bombay Province exercised the right for well-nigh 100 years of presenting for the final examination only such students as were found to be fit to pass the preliminary examinations held by the schools. We have no evidence" whether this practice originated in a conscious recognition of the common law rights of educational authorities, but it does appear that the practice coincided with those rights. It seems, moreover, that the right was recognised by the Bombay University in respect of the Matriculation Examination which used to be held by the University. A form of application for admission to that examination was required to be endorsed by the Head Master with a statement that the student had the "permission" of the Head Master to present himself or herself for the Matriculation Examination of the particular year. The right is still recognized by the University of Cambridge Local Examinations Syndicate which is responsible for the holding of the Indian School Certificate Examination in India and similar examinations in the other parts of the world. The candidates appearing for that examination are described as having been "presented" by affiliated schools and entry forms are prescribed for "school candidates." The settled practice which is followed in presenting candidates to the Indian School Certificate Examination has been described in an affidavit filed by the petitioners of Reverend G. Ridding, who is the Convenor of the Bombay Branch of the Council for the Indian School Certificate Examination and the Principal of the Cathedral and John Connon Boys' School in Bombay. He stated :

" In fact the Principals of the Schools are free to detain pupils who are not fit and whose academic progress was unsatisfactory and not to present them as candidates of their schools if in their *bona fide* judgment they so think fit and proper and are further free to withdraw even a listed candidate."

It appears from the rules that the Principals of schools are required to send the applications of candidates for the Indian School Certificate Examination such in advance of the end of the academic year. They are, however, entitled to withdraw the name of a listed candidate, if by the end of the academic year they find that his progress is not satisfactory. We find that this practice is recognized by the University of Cambridge Local Examination Syndicate itself. In the Introductory notes to their Regulations of 1962 the Syndicate stated –

" Owing to the long interval between the date of entering and the examination it sometimes happens that a school withdraws a candidate who has been duly entered, on the ground that he has not yet reached the standard required."

Even in the present regulations framed under the Act, expressions have been used which indicate that the heads of secondary schools have the right to "present" candidates for the S.S.C. Examination. Regulation 19(6) for instance lays down that "no secondary school which is not recognised by the Divisional Board concerned shall be permitted to present candidates for any final Examination conducted by it." Such an expression is also used in regulation 47(1). It is safe

to conclude that heads of schools have a common law right which has been recognized in practice of presenting only such of their pupils for the final examination as have shown adequate academic progress and of not presenting the others.

27. The learned Advocate General argued in this connection that the common law rights on which the petitioners rely are contractual rights, that the terms of the contract express or implied are only binding on the parties to the contract, and that those terms have no relevance for the public examination held by the Board. The learned Advocate General argued that the schools have no common law right to send up students for a public examination. The right to send up students for a public examination depends upon the recognition of the school by the authority which conducts the examination and the right is subject to such rules as may be made by that authority. The learned Advocate General further argued that the right of withholding the applications of candidate on the ground of want of academic progress was granted to Head Masters by law, and what was granted by law could always be taken away by law. Hence the Head Masters cannot, according to the learned Advocate General, claim any right to withhold the applications of candidates for the S.S.C. Examination.

28. It appears to us that these arguments miss the point in dispute. It was not claimed on behalf of the petitioners that the implied terms of contract between the head of a school on the one hand and the pupil's guardian on the other bind any person other than the parties to the contract. The whole concept of the internal autonomy of educational institutions arises from such implied terms which are not binding on third parties. As far as the S.S.C. Examination is concerned, the effect of the implied contractual terms is that a student is not entitled without the permission of his Head Master to appear for the examination, unless a right to that effect is validly conferred on him in supersession of the contractual terms. The point in dispute is whether the Board has been authorized by the legislature to grant such a right on the student in supersession of the implied contractual terms. It is not disputed that the legislature could itself have passed a law to that effect and it is also not disputed that the legislature could have authorized the Board to make a regulation to the same effect having the force of law.

29. In support of his argument the learned Advocate General relied on a decision of the Kerala High Court in *Joseph Valamangalam v. State of Kerala*¹. In that case the Court held inter alia that schools which had sought recognition and accepted aid from the State Government were bound by the extensive powers of control which the Government had given to themselves by rules made in the Travencore Education Code. That decision offers no assistance in the present case, because Travencore Education Code was body of executive instructions having no statutory limitations. It is obvious that in the absence of any statute relating to the powers, of the Government to grant aid to schools, the Government can make any rules to control the management of schools which seek and accept Government aid provided those rules do not violate any fundamental right guaranteed by the Constitution. The learned Advocate-General also relied on certain passages from the opinion given by the Supreme Court in *In Re Kerala Education Bill*², and the decision

of the Supreme Court in *Prabhakar Ramkrishna Jodh v. A.L. Pande*³, to show that extensive interference in the right of management of educational institutions can be brought about by a legislative enactment or by rules validly made thereunder. That position however, is not disputed by the petitioners.

30. It was further argued by the learned Advocate General that the Head Master's authority under the implied terms of the contract to educate a pupil is revocable at the instance of the parent, and that the Head Master cannot therefore claim, on the basis of such authority, a right to disallow the pupil from appearing for the final examination. We are unable to accept this argument also. In the context of the right claimed by the Head Masters in the present case, the parent can revoke the authority delegated by him to the Head Master only by withdrawing the pupil from the school. He cannot by exercising the powers of revocation compel the Head Master to forward the pupil's application for the S.S.C. Examination, just as he cannot in the exercise of that right compel the Head Master

¹ AIR 1958 Ker 290

³(1965) 2 S.C.R. 713

²1957, 1959 S.C.R. 995 : AIR 1958 SC 956

to promote the pupil from one standard to the next.

31. We may accordingly conclude that the head of schools represented by the petitioners have a right, which is contractual in nature and which is binding on pupils and their guardians, of not permitting the pupils to appear for the S.S.C. Examination if the Head Masters find that the pupils have failed to make adequate progress, and that this right is capable of being overridden by a valid regulation.

32. That leads us to the question whether the Board in the present case was authorized by the Act to make regulation 49(8) so as to override the above right of the heads of schools. Section 18 of the Act defines the powers of the Board and the only provision of that section which directly relates to this topic is contained in clause (f). Clause (f) of Section 18 empowers the Board "to prescribe conditions for admissions to the final examination, for regular and private candidates." It was claimed by the learned Advocate General that this provision enables the Board to confer on students the right to be admitted to the final examination, on their satisfying the conditions prescribed by the Board. Now, it cannot be disputed that where a power is granted to a subordinate legislative body to impose conditions for the exercise of right and conditions in that behalf are imposed by that body, the right in question can as a matter of course be exercised if the conditions so imposed are fulfilled. It is, however, clear that the right itself does not arise from the power to impose conditions on its exercise. It follows that if the students in the final standards of the secondary schools had a right to appear for the S.S.C. Examination, then on their fulfilling the conditions prescribed by the Board under Section 18(f) they would be entitled to appear for the examination. Their right to appear for the examination cannot, however, be derived from the power given to the Board under Section 18(f). The point involved can be brought out by an illustration. Municipalities are authorized by law to impose conditions on persons who want to start certain types of business in the area of their jurisdiction. In pursuance of that power a

municipality may make a bye-law that no person can construct a theatre or start a hotel without obtaining a license, which would be given if certain conditions are fulfilled. On fulfilling those conditions any person desiring to construct a theatre or to start a hotel is entitled to get a license from the municipality. His right to construct a theatre or to start a business of a hotel is not, however, derived from the power granted by the Act to the municipality of prescribing conditions for the exercise of that right. His right arises independently of the power granted to the Municipality. We must accordingly hold that the power granted to the Board under Section 18(f) to prescribe conditions for admission of students to the final examination does not by itself enable the Board to confer on students the right to appear for the examination, if that right has been already surrendered to the heads of schools under the implied terms of the contract of education.

33. Notice must be taken in this connection of another argument advanced by the learned Advocate General. He argued that the heads of schools represented by the petitioners claim in effect the power to decide the eligibility of candidates for the S.S.C. Examination, whereas the power to make that decision has been granted by the legislature to the Board. Since the right to prescribe the conditions of eligibility of students has been granted by the legislature to the Board the Head Master cannot, according to the learned Advocate General, exercise the same right and override the regulation made by the Board in that behalf by withholding the applications of students wishing to appear for the examination. This argument overlooks the fact that the right claimed by the Head Masters has nothing whatever to do with the right granted by Section 18(f) to the Board. The right of the Board to prescribe conditions of eligibility arises from the Act, whereas the right of the Head Masters arises from the implied terms of the contract of education. The Board prescribes conditions of eligibility of all students wishing to appear for the examination, whereas the Head Masters make a disciplinary rule for their own students that they would be permitted to appear for the examination if they study properly and make adequate progress during the final year. There is no conflict whatever between the statutory power of the Board and the contractual right of the Head Masters.

34. A reference may then be made to Section 36(2)(c) of the Act which provides that one of the topics on which the Board may make regulations is "the admission of candidates to the final examinations and conditions governing such admission." It will be noticed that the clause has two parts : (1) admission of candidates to the final examination and (2) conditions governing such admission. The second part of this clause corresponds to the power granted on the Board by Section 18(f). Mr. Palkhiwala argued, and in our opinion rightly, that the first part of clause (c) of Section 36(2) is intended to cover such procedural matters as the date before which candidates must apply for admission to the examination, the authority to whom the applications should be sent, and so forth, and that regulations affecting rights of admission to the examination can only be made under the second part of that clause, to the extent allowed by Section 18(f). This follows from the fact that Sub-Section (1) of Section 36 empowers the Board to make regulations "for the purpose of carrying into effect the provisions of the Act" and the relevant provision in this

connection is contained in Section 18(f). This position was not contested by the learned Advocate General, who however, argued that the forwarding of applications of candidates by the heads of schools is merely a matter of procedure and can be covered by the first part of clause (c) of Sub-Section (2). The learned Advocate General argued that it was administratively convenient to the Board to have the applications of all candidates forwarded through the heads of recognized schools. The learned Advocate General supported this argument by referring to several regulations. He also referred to Section 19(q) which provides that a Divisional Board can require institutions recognized by it (i.e. recognized schools) to extend their co-operation in the conduct of the final examination. Now, if the heads of schools had no common law right to decide which of their students should be permitted to appear for the final examination, the forwarding of the applications of candidates by these heads of schools could have been looked upon as a purely procedural matter. In that case regulation 49(8) which provides that heads of schools shall not withhold the applications of candidates who have fulfilled the conditions prescribed by the Board could have been held to be covered by the regulation-making power specified in Section 36(2)(c). We have, however, found that the heads of schools have a substantive right of withholding the applications of their pupils for want of academic progress, and regulation 49(8) cannot therefore be looked upon as mere matter of procedure covered by the first part of clause (c) of Section 36(2).

35. We must accordingly hold that there is no express provision in the Act which enables, the Board to compel the heads of schools to forward the applications of all candidates irrespective of their academic performance.

36. The learned Advocate General, however, argued that in the absence of an express provision to that effect, the Board has the power of making regulations for carrying out the general purposes of the Act and not merely the purposes of its specific provisions and that regulation 49(8) can be held to have been made in the exercise of that power. In support of this argument the learned Advocate General referred to Section 18(v) which provides that the Board can "exercise such other powers and perform such other duties as may be conferred or imposed on it by or under this Act" . The learned Advocate General argued that the expression "under this Act" means under the regulations made under the Act. In support of this argument he relied on the decision of the Madras High Court in *G. Narayanaswamy Naidu v. Krishnamurthi*⁴, and the decisions of Supreme Court in *Dr. Indramani Pyarelal Gupta v. W.R. Nathu*⁵, The learned Advocate General further argued that under Section 36(1) the Board has been empowered to make regulations "for the purpose of carrying into effect the provisions of this Act" , that one such provision is contained in Section 18(v) referred to above, and that therefore the Board has the power to make regulations for carrying into effect not only the provisions, but also the general purposes of the Act. He further contended that the general purposes of the Act include the purpose of regulating secondary education, and that therefore regulation 49(8) was within the regulation-making powers of the Board. We must observe that we found this line of argument very confusing. In the first place, the purpose of the Act, as stated in the preamble, is "to regulate

certain matters pertaining to secondary education in the State of Maharashtra and for other purposes hereinafter appearing." It is clearly not the purpose of the Act to regulate secondary education in all its aspects. What matters pertaining to secondary education are intended to be regulated, and what other purposes are intended to be fulfilled, can be ascertained only from the provisions of the Act. Moreover, Section 18(t) empowers the Board "to make regulations for the purpose of carrying into effect the provisions of this Act" , and Section 36(1) also says that "the State Board may make regulations for the purpose of carrying into effect the provisions of this Act" . It follows that the Board cannot assume power to make regulations on a topic which is not covered by any of the provisions of the Act, We agree that the expression "under this Act" in Section 18(v) means under the regulations made under the Act. But it seems to us clear that the power of the Board to make regulations cannot be derived from or extended by what is stated in Section 18(v). This is because, in the first place, Section 18(v) is preceded by Section 18(t) which, as already stated, provides that the Board may make regulations for the purpose of carrying into effect the provisions of this Act. Section 18(v) enables the Board to exercise such "other" powers and such "other" duties as may be conferred or imposed on it by or under this Act. Obviously the powers and duties referred to in Section 18(v) are other than the powers and duties referred to in the earlier provisions Including clause (t) of Section 18. There is also another reason why we cannot accept the argument of the learned Advocate General. His argument implies that the power of the Board to make regulations can be derived either from the provisions of the Act or from the regulations made under the Act. It appears to us obvious that the power to make regulations cannot be derived from the regulations themselves. It can only be derived from the provisions of the Act. It is not difficult to ascertain what type of powers and what type of duties are meant to be covered by the expression "under this Act" occurring in Section 18(v). The Board may provide by regulations that it may 'grant exemptions in certain cases or may give special awards and certificates, and so forth.

⁴ AIR 1958 Mad 343

⁵(1963) 1 SCR 721 : AIR 1963 SC 274

Such powers and duties, granted to or imposed upon the Board under the regulations, would be covered by the expression "under this Act" in Section 18(v).

37. It was also argued by the learned Advocate General that the Board has the power to prescribe conditions for the recognition of schools, that one such condition is found in regulation 49(8), and that therefore the regulation cannot be ultra vires of the powers of the Board. The Act, however, does not say that the Board can prescribe any conditions which it likes on schools which seek recognition from one of the Divisional Boards. Substantial powers have been granted to the Board by clauses (b) to (o) of Section 18 of controlling certain matters relating to the upkeep and functioning of secondary schools. Neither these provisions, nor any other provisions of the Act. empower the Board to interfere with the right of the heads of secondary schools to make and enforce disciplinary rules for ensuring diligent study on the part of their students. The Board cannot lawfully interfere in the internal autonomy of secondary schools, beyond what is allowed by the specific provisions of the Act, under the garb of prescribing conditions for the recognition of these schools.

38. We are accordingly of the view that regulation 49(8) is not covered by any of the regulation-making powers of the Board and is ultra vires.

39. The second ground urged by Mr. Palkhiwala in support of his contention that regulation 49(8) is ultra vires the powers of the Board was that the regulation is calculated to defeat the purpose of the Act which is the maintenance of standards of education in secondary schools. In appreciating this argument we must assume that the Board had the power to make a regulation on the topic covered by regulation 49(8) and we must consider on that assumption whether that regulation is ultra vires on the ground that it tends to defeat the main purpose of the Act as stated above. We will have to notice the arguments advanced by Mr. Palkhiwala in this connection in deciding whether regulation 49(8) being a bye-law, is invalid on the ground of unreasonableness. If we were to assume, however, that regulation 49(8) is a statutory rule and not a bye-law, that its reasonableness cannot be examined by the Court, and also that it is covered by the rule-making powers of the Board, we do not think it would be right to hold that the regulation is ultra vires on the ground that, in our view, it is contrary to one of the main purposes of the Act which is the maintenance of academic standards in secondary schools. Hardly any arguments were addressed before us in support of this submission, apart from arguments relating to the alleged unreasonableness of the regulation, which we will presently notice.

40. We will next turn to the question whether regulation 49(8) is invalid, because it is unreasonable and because it is repugnant to the general law. In dealing with this question, we have first to consider whether the regulations made under the Act are bye-laws or statutory rules.

41. The distinction between these two types of subordinate legislation is well known. Where an Act lays down the general policy of the legislature and delegates to some authority the function of filling in the details of that policy, the regulations made by that authority are in the nature of statutory rules. Such power is usually granted by the legislature to the executive, but where the matter relates to judicial procedure the power is sometimes given to the judiciary. On the other hand, where the legislature provides for the constitution of a local authority or a statutory Corporation, defines its purpose, and empowers it to make provisions for carrying into effect the purpose for which it was constituted, the regulations made by the local authority or the statutory Corporation are in the nature of bye-laws.

42. A bye-law was explained by Lord Russell of Killowen C.J. in the well known case *Kruse v. Johnson*⁶, The Court was concerned in that case with the validity of a bye-law made by a county council under the Local Government Act of 1888. The learned Judge observed :-

" A bye-law, of the class we are here considering, I take to be an ordinance affecting the public, or some portion of the public imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some

sanction or penalty for its non-observance."

It will be noticed that in that case the authority which made the bye-law had been set up by a statute.

43. The term was also defined in Odgers on the Common Law. The learned authors say (1927 Edition page 92) :-

"The term" bye-law includes any order, rule or regulation made by any local authority or statutory corporation subordinate to Parliament."

A bye-law was thus explained by Lindley, L.J. in *London Association of Shipowners v. London Docks Committee*⁷. at p. 252.

" A bye-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants but members of the public who come within the sphere of their operations, may be properly called bye-law."

A Division Bench of our Court considered the nature of a bye-law as distinguished from a statutory rule in *Mulchand Gulabchand v. Mukund Shivram Bhide*⁸, After pointing out that a statutory rule cannot be challenged in a Court of law on the ground of unreasonableness, Chagla, C.J. delivering the judgement of the Division Bench observed :

" Now, there is a clear distinction between statutory rules and bye-laws. Bye-laws are usually framed by corporations under their inherent powers in order to carry out the purposes of the corporation or they are framed by public authorities set up by Parliament and as it is left to the corporations or the public authorities to frame these bye-laws and carry out their purposes, the Courts have retained certain amount of control over the bye-laws considering their reasonableness. But statutory rules stand on entirely different footing. Parliament or Legislature, instead of incorporating the rules into the statute itself, ordinarily authorises

⁶(1898) 2 QB 91 ⁸54 Bom LR 285 : (AIR 1952 Bom 296)

⁷(1892) 3 Ch. 242

Government to carry out the details of the policy laid down by the Legislature by framing the rules under the statute, and once the rules are framed, they are incorporated in the statute itself and become part of the statute, and the rules must be governed by the same principles as the statute itself. And, therefore, although a bye-law may be challenged on the ground that it is unreasonable, a statutory rule cannot be so challenged."

These observations were quoted with approval by a Divisional Bench of the Madhya Pradesh

High Court in *Dukhram Gupta v. Co-operative Agricultural Association Ltd. Kawardha*⁹,

44. On these authorities it is clear that the regulations under the present Act are in the nature of bye-laws and not statutory rules. The legislature in this case constituted; the State Board, defined the scope of its powers and duties, and gave it authority to make regulations for the purpose of carrying into effect the provisions of the Act.

45. The learned Advocate General argued that the regulations under the Act are statutory rules and not bye-laws. According to him, there is no distinction in principle between the two, and that the nomenclature given by the legislature is determinative of the category in which the provisions fall. The learned Advocate General relied on the definition of the term 'rule' in Section 3(39) of the Bombay General Clauses Act, 1904 which says :-

"'rule' shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment."

According to the learned Advocate General, therefore, the fact that the legislature empowered the Board to make "regulations" meant that those regulations were "rules" and had the force of statutory rules. A reference was then made by the learned Advocate General to the decision of the Supreme Court in the *Chief Inspector of Mines v. Karam Chand Thapar*¹⁰, In that case the "Coal Mines Regulations" made by the Government under the Mines Act were treated as statutory rules. A reference was also made to the decision of the House of Lords in *Wicks v. Director of Public Prosecutions*¹¹, where "the Defence (General) Regulations" made under the Emergency Powers (Defence) Act, 1939 were held to have the effect of an enactment. The learned Advocate General urged that the question whether a provision amounts to a statutory rule or a bye-law cannot depend upon whether it was made by the Executive, and referred in this connection to Sections 122 and 129 of the Code of Civil Procedure which grant extensive powers to High Courts to make rules regarding the procedure to be followed in civil cases. It was further argued by the learned Advocate General that the present Act requires the State Government to make the first regulations, that the legal status of these first regulations cannot be different than that of the regulation which may be subsequently made by the Board, and that the first regulations made by the State Government as well as subsequent regulations made by the Board should both be held to have the effect of statutory rules.

46. These contentions of the learned Advocate General do not persuade us to hold that the regulations under the Act are statutory rules and not bye-laws. The definition of the word

⁹ AIR 1960 Madh. Pra. 273

¹¹1947 AC 362

¹⁰(1962) 1 SCR 9 : AIR 1961 SC 838

"rule" in Section 3(39) of the Bombay General Clauses Act, 1904 does not advance the argument of the learned Advocate General in any way, because it does not say that every regulation is a rule, but says that only a regulation which is "made as a rule" is a rule. Whether regulation 49(8) was "made as a rule" is the very question which we have to answer, and this question is not

answered by recourse to Section 3(39) of the Bombay General Clauses Act, 1904. The reference to the two cases mentioned above is also of no assistance, because in those cases the regulations were obviously in the nature of statutory rules. That the term 'regulation' is not confined to statutory rules can be easily demonstrated. In Craies on Statute Law, Sixth Edition (page 298), delegated legislation has been thus classified :

" Delegated legislation falls under two main heads :-

(a) Statutory instruments,

(b) Bye-laws or regulations made -

(i) by authorities concerned with local Government;

(ii) by public corporations or societies clothed with statutory or common law-powers."

In this instance the learned author has used the term regulation as having the same meaning as a bye-law. We have already quoted from Odgers on the Common Law (1927 Edition, page 92) where the term bye-law has been defined as including "any order, rule or regulation" made by any local authority or statutory corporation subordinate to Parliament. That certain types of statutory rules are sometimes made by the judiciary does not require us to hold that there is no difference in principle between a bye-law and a rule, or that the legislature can give the effect of a bye-law or a rule to any provision by mere nomenclature. In Craies on Statute Law, "Rules made by Judges" have been put into a separate category, distinct from bye-laws (Sixth Edition, page 318). In Salmond on Jurisprudence (Eleventh Edition, page 142) it has been stated that there are five chief forms of subordinate legislation : (1) Colonial, (2) Executive, (3) Judicial, (4) Municipal, and (5) Autonomous. The present regulations fall in the fifth category of autonomous subordinate legislation. It seems clear that municipal and autonomous subordinate legislation has the character of bye-laws and the rest of rules. It is true that the first regulations under the present Act are to be made by the State Government, but they partake of the character of bye-laws as they are liable to be replaced by regulations made by the Board. We are accordingly of the view that regulation 49(8) is a bye-law and not a statutory rule.

47. For appreciating the arguments advanced for the petitioners against regulation 49(8) as a bye-law, the following passage in Halsbury's Laws of England on the validity of bye-laws is relevant (Third Edition, Vol. 24, page 515, paragraph 948) :

" Four elements are essential to the validity of a bye-law; it must be intra vires the local authority who makes it; it must not be repugnant to the law of England; it must be certain and positive in its terms, and it must be reasonable."

Before us regulation 49(8) was challenged on two of these grounds, viz. that it is repugnant to the general law, and that it is unreasonable. In considering the arguments advanced on behalf of the petitioners in the this behalf, we will assume that regulation 49(8) is covered by the topics on which the Board has been empowered to make regulations and is intra vires. On that assumption,

we will first consider whether that regulation is unreasonable.

48. The grounds on which a bye-law may be held to be unreasonable were thus stated by Lord Russel of Killowen, C.J. in (1898) 2 QB 91 :-

" But unreasonable in what sense ? If, for instance, they (the bye-laws) were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith: if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded."

In Halsbury, Volume 24, Third Edition, page 517, paragraph 952 the same test has been given of the unreasonableness of a bye-law :-

" Bye-laws must be reasonable. - A bye-law to be valid must be reasonable. Unless it is manifestly unjust, capricious, inequitable or partial in its operation, or involves oppressive gratuitous interference with the rights of those subject to it, the question of its reasonableness is one to be decided by the authority making it"

49. On behalf of the petitioners regulation 49(8) was claimed to be unreasonable on the ground that it amounts to a gratuitous as well as an oppressive interference with the rights of the heads of schools. According to the petitioners, the regulation is not only gratuitous in the sense that it serves no useful purpose, but is positively harmful as it is calculated to lower standard of education and discipline in secondary schools. The non-observance of the requirements of regulation 49(8) is likely to lead to the cancellation of the recognition of secondary school, for that is the only sanction behind that regulation. Recognition for the purpose of presenting candidates to the S.S.C. Examination is necessary for the very existence of a secondary school. It was accordingly claimed that the imposition, by the threat of withdrawal of recognition, of a bye-law which required the heads of secondary schools, to surrender their right of enforcing a beneficial disciplinary rule, was clearly oppressive, besides being gratuitous.

50. In dealing with this issue it is necessary to consider a connected question which was raised before us. The question is whether we should presume, till the contrary is proved, that the impugned regulation is reasonable and that it deserves to be supported as far as possible. The following observations of Lord Russell of Killowen, C.J. in (1898) 2 QB 91 are relevant in this connection :-

"the great majority of the cases in which the question of bye-laws has been

discussed are not cases of bye-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the Courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered."

The Board in the present case is not a representative body. As stated before, 115 out of its 44 members are nominated by the Slate. On the other hand the Board is also not a profit-making concern. It was urged before us by Mr. Sorabjee on behalf of the petitioners that since the Board is not a representative body, the so-called rule of benevolent construction referred to in the above quotation has no application in considering the reasonableness or otherwise of regulation 49(8). It appears to us that in setting up a public corporation consisting largely of specialists in a particular field, the legislature may often find that the mode of nomination is preferable to that of election. That consideration may well apply to the composition of the Board whose purpose is to advise the State Government on matters of policy relating to secondary education and to regulate certain matters pertaining to secondary education. A statement of the educational qualifications and other particulars of the Board has been produced on behalf of the respondents, and it shows that 23 out of the 44 members of the Board are or have been teachers in either schools or colleges. On the whole, therefore, we think that it would be proper to approach the question of the reasonableness of the impugned regulation by assuming that the regulation is reasonable until the contrary is shown, and that it should be supported as far as possible.

51. It is necessary, however, in view of the multiplicity of the arguments advanced before us, to specify the question in issue. It is regulation 49(8) which is challenged on the ground of unreasonableness and not regulation 42(2). The question is not whether it was reasonable on the part of the Board to dispense with the progress certificate as a condition of admission of candidates to the S.S.C. Examination. It was open to the Board to dispense with that condition, and yet keep intact the discretion of heads of secondary schools to present for the examination only those candidates whose academic progress and performance was in their judgement satisfactory. The question at issue is whether it was reasonable for the Board to have cast an obligation on the Head Masters to forward the applications of all candidates irrespective of their academic progress and performance.

52. It will be noticed that the question has two aspects - one relating to the rights of the Head Masters and the other to the interests of the students. We are of the view that there is not and cannot be, any conflict between the two. The rights of the Head Masters coincide with the interests of the students. It is the duty of the Head Masters to offer proper tuition to the students, and their right to enforce such rules of discipline as would advance that purpose. Correspondingly, it is the right of the students to receive proper tuition, and their duty is to study diligently and to abide by such rules of discipline as may be properly made by the Head Masters. There is no conflict between these duties and rights, because they arise from the common object of giving proper education to the students. Before us, however the question was argued on behalf of the respondents on the supposition that there was a conflict between the rights of the Head Masters on the one hand and those of the students and their parents on the other. The fact is that the parent requires for his child a good school, which means a school having a good standard of education and proper rules of discipline. Students attending secondary schools are of immature age, their parents as well as the Head Masters know that rules of discipline are necessary in order that they may study with diligence. It is true that some parents may feel aggrieved if their children are either detained or not promoted on the ground of want of adequate progress. Such a grievance, however, does not represent a conflict between the interest of the students and their guardians on the one hand and of the Head Masters on the other.

53. It follows that the result must be the same whether the issue of reasonableness of the impugned regulation is approached from the point of view of the rights of the Head Masters or from that of the interests of the students. The former approach leads to the question "Was it reasonable for the Board to interfere with the rights of the Head Masters to forward the applications of only those students who in their judgment had made adequate academic progress during the year?" The latter approach leads to the question "Was it reasonable for the Board to deprive the students of the advantage of a rule of discipline which required that no student would be presented as a candidate to the S.S.C. Examination who failed to make adequate academic progress during the year?" The questions cannot be differently answered.

54. It appears to us that the approach which was adopted by the Board on both aspects of this issue was basically wrong. On the one hand, the Board was, not even aware that the Head Masters had a right at common law of disallowing their students from appearing for the S.S.C. Examination on the ground of unsatisfactory progress. This is quite clear from the procedure adopted by the Board in passing the impugned regulation. The questionnaire which was issued by the Board was confined to the criteria, such as attendance and progress certificate, which were to be adopted in prescribing the conditions of admission of regular students to the final examination. It was assumed that if the requirement of a progress certificate was dispensed with, it would automatically follow that the Head Masters would have to forward the applications of all eligible candidates irrespective of their academic progress. There were in fact three alternatives before the Board - (1) to retain the progress certificate as a condition of eligibility, (2) to dispense with that condition and leave it to the discretion of the Head Masters to forward the application of

all students or to detain some of them for want of satisfactory progress, and (3) to dispense with the progress certificate and also to abrogate the right of the Head Masters to withhold the applications of their students for unsatisfactory progress. The Board did not realize that the second of these alternatives was open to It and proceeded to adopt regulation 49(8) by merely deciding that a progress certificate from the head of a secondary school should no longer be a condition for admission to the final examination. Before us also it was denied by the Board that the Head Masters had any right to detain some of their students for want of adequate progress.

55. What is worse, the approach of the Board was, in our view, basically wrong in considering the second aspect also, viz. the interests of the students. In deciding whether the progress certificate should be retained as a condition of eligibility the Board did not consider what was in the interest of the students as a whole, but virtually confined themselves to the question whether it was in the interest of the detained students that they should be detained. It appears to us that the Board failed to realise that the detention of a few students by the Head Masters was merely the result of the enforcement of a rule which was beneficial to all students and which required that they should study properly and diligently throughout the year so that their applications may be forwarded by the Head Masters. When a Head Master detained a student for want of progress, the cause of the detention was not that the student would not pass if he were allowed to appear for the S.S.C. Examination, It was always possible that the student may have better luck and may pass in the S.S.C. Examination despite his inadequate progress. It was also possible that the student may study better after his preliminary examination and pass the S.S.C. Examination as a result of that study. The student was detained in such a case because the rule, which operated for the benefit of all students and which required that all students should make proper progress during the course of the final year, had to be enforced. The enforcement of that rule must unavoidably result in some students being prevented from appearing for the S.S.C. Examination even though they might have some chance of success in that examination. The Board themselves approved of another condition which had the same purpose, the condition being that only those candidates who had attended the final year in the school for 75 per cent of the days would be allowed to appear for the S.S.C. Examination. There can be little doubt that if the students who had neglected to attend school for the requisite number of days are allowed to appear for the S.S.C. Examination, some of them may pass out. The condition of minimum attendance has been imposed, not in the interest of those students who fail to attend for the requisite number of days, but in order that the students as a whole should be regular in their attendance. The condition of the progress certificate had similar purpose. Its purpose was not that those students who fail to make adequate progress should be detained, but that all students should study diligently and regularly throughout the year and should satisfy their Head Masters about their academic progress and performance. We are no longer concerned with whether the progress certificate should have been retained as a condition of eligibility. The point, however, is that the Board adopted the same faulty approach in deciding whether the Head Masters should be required to forward the applications of all candidates irrespective of their academic progress.

56. The learned Advocate General advanced several arguments in support of the reasonableness of regulation 49(8). Before dealing with those arguments, we will enumerate the main considerations which support the petitioners' submission that the said regulation amounts to a gratuitous and oppressive interference with the rights of Head Masters. In the first place, students in the final standard in secondary schools are of an immature age (their average age is about 16), that left to themselves they are likely to postpone studies till the examination draws very near, and that the power which vests in the Head Masters of not presenting them for the final examination if they do not make proper progress is necessary for inculcating habits of regular and diligent study amongst them.

57. Secondly, before the impugned regulation was adopted, the Board had before it the replies sent to its questionnaire, and the replies show that a decisive majority was in favor of the said authority of the Head Master being retained. As previously stated, the replies received by the Board have been analyzed in two sets, one set consisting of replies received up to 25th April 1966 and the other of replies received between 26th April 1966 and 11th May 1966. 85.9 per cent of the replies in the first set and 92.8 per cent of the replies in the second set were in favor of the progress certificate being retained as one of the criteria for deciding the eligibility of regular candidates for the final examination. It must be noted that these replies included those from the heads of secondary schools in the Nagpur Division who were in a materially different position from the heads of secondary schools in the rest of the State. Twenty percent of the marks in each subject in the final examination were given by the Head Masters in the Nagpur Division to every student on the basis of the internal assessment of his performance during the final year in school. The necessity of a progress certificate as one of the criteria for deciding the eligibility of regular candidates for the final examination was bound to be felt much less keenly in the Nagpur Division than in the rest of the State. It must also be noticed that the Board's questionnaire had been sent to several other categories of persons than the heads of secondary schools in the State. The questionnaire had been sent to all members of the Board, to all members of the three Divisional Boards of Poona, Nagpur and Aurangabad, to all members of erstwhile Secondary School Certificate Examination Board, to all members of the former Board of Secondary Education of Vidarbha, to experts and members of the former S.S.C. Examination Board, and to all Parishad Education Officers, Regional Deputy Directors of Education, Inspectresses for Girls' Schools in the State of Maharashtra and the Educational Inspector at Greater Bombay. There was no adequate reason for the Board to disregard this overwhelming opinion in favor of the progress certificate being retained as a criteria of eligibility, and for not only dispensing with the progress certificate but also overriding the right of the Head Masters to withhold the applications of students for unsatisfactory progress.

58. Thirdly, the system of detaining students for want of academic progress had stood the test of time for nearly 100 years in the Bombay Province, the old Bombay State, and the part of the old Bombay State which was included in the State of Maharashtra. That the system was found to be beneficial is established from a Circular which was sent by the Director of Education to all Heads

of Secondary Schools as late as on 19th June 1959 and which has been produced at exhibit "B" to the petitions. With reference to certain previous instructions it was stated in the Circular :

" These instructions appear to have created a wrong impression that all the pupils in the S.S.C. class who fulfil the condition regarding attendance are to be automatically sent up for the Examination irrespective of their progress during the year."

After observing that the pupils should not be mechanically sent up for the S.S.C. Examination, the Circular stated :

" The Head Master is required to send up only those candidates whose progress is satisfactory during the year and he cannot possibly issue the necessary certificate in respect of candidates to be sent up for the S.S.C. Examination mechanically without assessing their capacity and work."

The Circular ended by saying :-

" They (heads of schools) are also requested to see that promotions in all standards are judiciously made and no pupil who is not fit for promotion is promoted particularly so in the case of Standard X and XI as the tightening of promotions would go a long way in raising the standard of education."

59. Fourthly, the impugned regulation 49(8) is bound to operate with relatively greater harshness on the better schools which insist on maintaining high standards of education and academic performance. In such schools not only the teachers would be highly qualified, but the tests to which the students have to submit would be more strict. A student who gets 35 per cent marks in a paper in the preliminary examination of such school may easily get 50 % marks in the same paper in an inferior school. Since the reputation of these schools depends on the high standard maintained by them, they are bound to suffer very gravely if students in the final year are not required to prepare for any of the school tests and are allowed with impunity to become slack in their studies. The regulation will not operate with the same degree of severity on those schools in which the standards of education and discipline are comparatively low.

60. In connection with this last submission of the petitioners the learned Advocate General advanced an argument, which appeared to us to be open to a serious objection. The learned Advocate General assured us that what he stated was the opinion of the Board. The learned Advocate General said that standards are to be maintained in relation to the students for whom the examination is provided and with proper regard to factors, economic, social and educational, which affect the student population. Attempts must be made to improve the economic and social conditions in the country, but at the same time the standards of examinations must be kept constantly in review. In particular, if the number of students in Secondary Schools increases and if social and economic conditions do not improve a lower standard has got to be fixed for the

examination. Since the maintenance of educational standards is admittedly the main responsibility of the Board, we do not appreciate how the Board can claim the right of fixing a lower standard for the S.S.C. Examination if it finds that the number of students has increased and that the social and economic conditions in the State have not shown adequate improvement. The Board, in our view, has no power to consciously fix a low standard for the examination, when the Legislature has charged it with the duty of maintaining educational standard. What the learned Advocate General stated, however, does not have a direct bearing on the question before us, because he was speaking of the standard of the S.S.C. Examination, and not the standard of education to be maintained in secondary schools. Even supposing the Board is entitled to reduce the standard of the S.S.C. Examination, it is clearly not entitled to make regulations so as to lower the standard of education in secondary schools. The learned Advocate General added that those schools who wanted to maintain a high standard of education can present their candidates to the Indian School Certificate Examination instead of the S.S.C. Examination held by the Board. That obviously is no solution. There is no reason why schools wishing to prepare students for the S.S.C. Examination should be required to lower their educational standard. Moreover, it was admitted that only those secondary schools who teach in the English medium are entitled to present students to the Indian School Certificate Examination.

61. In this connection notice must be taken of another argument advanced by the learned Advocate General. He argued that the principle of equality enunciated in Article 14 of the Constitution requires that all pupils in different secondary schools who acquire a certain minimum academic standard should be able to appear for the S.S.C. Examination, and that it is therefore not permissible for any school to maintain a higher standard for its own students for being allowed to appear for the examination. The learned Advocate General added that if regulation 49 had left it open to the school authorities to forward or not forward the application of their students according to their respective standards, the regulation would have contravened Article 14 of the Constitution. It appears to us very fortunate that we are not required to accept this argument, which would require a uniform standard of dull mediocrity to be maintained in all secondary schools. The principle of non-discrimination enunciated in Article 14 does not require standards to be uniform, for diversity of standard can itself be a basis of reasonable classification, It is well known that many parents want their children to be admitted in the better type of schools. This is because what the parents want is not that their children should somehow scrape through the S.S.C. Examination, but that they should succeed with distinction. The parents send their children to the better type of school, not in spite of the higher standard of education and discipline maintained there, but because of that standard. The policy behind the impugned regulation is calculated to deprive the parents and their children of such type of schools.

62. We will now turn to the arguments advanced by the learned Advocate General in support of the reasonableness of regulation 49(8). The learned Advocate General pointed out that according to the affidavit in reply to the amended petition filed by the Chairman of the Board, it was the considered view of the members of the Board, as educationists charged with the duty of

maintaining standards of education and of acting in the interest of the students, that the power of detaining students in the final standard claimed by the heads of secondary schools was "unnecessary and unjustified" . According to the Board, the detaining power of the Head Masters was unnecessary because it served no useful purpose, and that it was unjust because its results were harmful. We will consider both of these contentions.

63. The detaining power is unnecessary, according to the Board, because it is not required as claimed by the heads of schools for the purpose of developing regular habits of study in the students of the final XIth standard. It was claimed for the Board that if a school has properly promoted a student from standard to standard, and not merely pushed him up, the student should be fit for admission to the S.S.C. Examination at the end of his term in the final standard, and would not be required to be kept back. On behalf of the petitioners it was pointed out that the model rules of promotion which were made by the Education Department of the State Government did not allow a proper academic level to be maintained in promoting students from one standard to the next, and that in particular a student had to be promoted from the Xth standard to the final (XIth) standard even if he barely scrapes through six subjects and miserably fails in the seventh, provided he drops in the XIth standard the subject in which he had miserably failed and takes a new one. We will, however, assume that the model promotion rules allow a proper discretion to be exercised in promoting student from one standard to the next, including the final standard. Even so, we do not see how if the promotion rules are properly observed it is unnecessary for the students in the XIth standard to have a rule which requires that they shall study diligently and regularly and would not be presented for the final examination unless their academic progress is satisfactory. Obviously the students who are promoted from the Xth to the XIth standard under the best of the promotion rules differ widely in their educational attainments. Some of them might have passed with the minimum 35 per cent marks, some with 40 percent, marks, some with 50 per cent, marks, and so forth. Some of them might have developed the habit of regular study and some not. We do not see how a disciplinary rule which was salutary for them in the Xth standard becomes suddenly unnecessary in the XIth standard. What is more, the final year at school is surely a crucial year for all students. The course of studies in that year is bound to be higher than the course of studies in the previous year. The Head Masters' power of detention is, therefore, at least as necessary in the final year as it was in the previous year.

64. The learned Advocate General put the above argument of the Board in a somewhat different form. He said that the difference between the Board and the petitioners was only whether strictness in the matter of promotion should be observed in the Xth standard or in the XIth, that two opinions were possible on this question, and that therefore, the choice made by the Board cannot be regarded as unreasonable. In our view, this argument is even more damaging to the position of the Board than the one we have considered above. It may be correct for the Board to say that proper rules should be observed in promoting students from the Xth to the XIth standard, but not that more strictness than usual should be exercised in that promotion. Pupils in the Xth standard are younger in age than those in the XIth. Their sense of responsibility is less

developed. Strictness is less appropriate in their case than in the case of students of the higher standard. Moreover, if they are detained they are to wait for a whole year before they are promoted to the next standard, whereas those who are detained in the XIth standard and not permitted to appear for the S.S.C. Examination in the month of March are entitled to appear for the same examination after six months in the month of October.

65. We must accordingly hold that there is no substance whatever in the contention of the Board that the detaining power of the Head Masters is "unnecessary" . It is necessary in the interest of the general body of students, and because it is necessary it is justified unless its alleged harmful effects outweigh its advantages.

66. That takes us to the arguments advanced on behalf of the Board to the effect that the detaining power of the Head Masters is not justified. The main reason why the Board says that the detaining power is not justified is that, according to the Board, it was not justified by the results of the kept back students in the S.S.C. Examination of this year. It appears that it was mainly on a consideration of the results of the kept back students that the Board came to the conclusion that the detaining power of the Head Masters should be abrogated. As already stated, the meeting of the Board which adopted the impugned regulation had before it the results of the kept back students in three urban areas (Bombay and Greater Bombay, Poona City and Camp, and Sangli City) and one rural area (Sangli District other than Sangli City). The success of the kept back students from the said urban areas was about 20 per cent, and that of the kept back students from the said rural area was about 3 per cent. The total number of kept back students was about 7,500, and out of these, the result of 2,960 students from the said four areas was available to the Board. It was argued on behalf of the Board that this result demonstrated the injustice caused by the detaining power of the Head Masters because it showed that 20 per cent, of the kept back students did not deserve to be kept back. Before commenting on the validity of this conclusion, we may observe that the figures which w* have quoted above and which were before the meeting of the Board cannot be regarded as being representative. It is quite possible that the standard of education and academic performance is considerably lower in rural areas than in urban areas. The result of the kept back students was available to the Board from only one rural area (Sangli District other than Sangli City), and from that area only 3 out of 111 kept back students passed the examination. It was alleged by the petitioners in one of their affidavits that the result of the kept back candidates from the Kolhapur district WBS very negligible and the petitioners produced in support a telegram received by them from the Secretary of the Kolhapur District Secondary Schools Association. In their reply, the respondents did not deny the averment and did not refer to the telegram. According to the petitioners, the overall result of success of the kept back student in the examination was not likely to be more than 10 per cent. The second observation which is required to be made on this result is that it does not show that two tests which were applied by the heads of Schools in deciding to detain these, students were improper. There is an element of chance involved in all examinations, and the S.S.C. Examination is not claimed to be an exception to the rule. A student whose performance is very

unsatisfactory in the preliminary examination of his school may pass in the S.S.C Examination, if the questions set in the question papers happen to be on those parts of the subjects in which he was relatively better prepared. It is also possible that the students, whose progress was found to be unsatisfactory at the time of the preliminary examination, studied better in the remaining two months and succeeded in the S.S.C. Examination. It may also be that some of the students passed in the S.S.C. Examination, because the standard of that examination was lower than the standard traditionally maintained in their respective schools. A reference may be made in this connection to the results of the kept back students of a well known school in Bombay which have been referred to in the affidavit filed by the Chairman of the Board in reply to the amended petition. It was stated in the affidavit that 12 students had been initially kept back by this school and that, when these students were subsequently allowed to appear for the S.S.C. Examination, all of them succeeded with between 38 and 54 per cent of marks. It appears to us safe to assume that the percentage of marks obtained by the students from the same school who had not been kept back must have been much higher.

67. A further observation is required to be made regarding the success of these kept back students. Last year, during the period they were students of the XIth standard, they worked with the knowledge that their performance in the school tests and in the preliminary examination would be taken into consideration by their respective Head Masters. They, like the rest of the students, had received the advantage of the rule which required that they would be presented for the examination only if their progress was found by their Head Masters to be satisfactory. As previously stated by us, this fact was taken into consideration when the interim terms of the compromise were suggested by the Court to the parties at the first hearing of these petitions. The figures of the percentage of success of the kept back students cannot, therefore, be a reliable guide in ascertaining the effect of the impugned regulation 49(8) under which the students' admission to the examination will no longer depend on the progress which they make during the final year at school.

68. What we have stated above does not mean that proportion of the students who might otherwise have been detained by their Head Masters on the ground of unsatisfactory progress may not succeed in the S.S.C. Examination if they are allowed to appear for it. It seems to us clear, however, that this possibility has little relevance to the question whether the detaining power of the Head Masters is justified. The detaining power is exercised in the interest of the whole body of students and not of that minority which is eventually detained by the Head Masters. Last year 7,500 students out of the total number of 1,50,000 students who appeared for the S.S.C. Examination had been initially kept back and were subsequently allowed to appear. The kept back students were thus 5 per cent of the total. We will assume in favor of the Board that 20 per cent, of these students i.e. 1 per cent of the total number of students who appeared for the examination, passed out. This means in effect that, for the benefit of 1 per cent, of the students, the Board abrogated the detaining power of the Head Masters which was for the benefit of 100 per cent, of the students. It is thus clear that the Board applied a wrong test in considering

the justification of the Head Masters' detaining power. The results of the kept back students do not, and they cannot, support the Board's conclusion that the Head Masters' detaining power was not justified.

69. Another ground urged on behalf of the Board in support of its view that the Head Masters' detaining power is not justified was that no systematic attempts are made in most of the schools for the training of those students who are kept back from the March examination of the Board, and who have to appear for the next October examination. Some questions in that connection were included in the questionnaire issued by the Board. Those questions were addressed exclusively to the secondary schools in the Poona and Aurangabad Divisions who had been following the practice of detaining pupils in the final standard on the ground of unsatisfactory progress. One of the questions was whether any provision was made for the separate instruction of the kept back pupils "from January to April" . About 30 per cent, of the schools replied that they give separate instruction, e.g. by holding extra classes, while the rest replied that no separate instruction was given. Another question was whether any provision was made for enabling such students to attend the school in the first term of the next year and to equip them better for the October examination. 35 out of 124 schools who sent replies in the first set and 34 out of 79 schools who sent replies in the second set answered the question in the affirmative, and indicated that such students were either allowed to attend classes without fees or that special classes were held for them. The rest replied that no arrangements were made for these pupils. We do not see how any inference with regard to the justification or otherwise of the detaining power of the Head Masters can be drawn from these facts. In the first place, the detaining power is not exercised exclusively in the interest of the detained students. Detention of some of the students is an unavoidable necessity arising from the enforcement of the rule that students must study properly and show satisfactory progress if they are to be allowed to appear for the S.S.C. Examination. Secondly, no effort was made by the Board to ascertain whether the parents of the kept back pupils wanted any extra tuition to be given to those students and were prepared to pay extra fees for that purpose. It is not the case of the Board that parents wanted extra tuition to be given to these pupils ,and the schools refused or neglected to make arrangements for that purpose. Moreover, the problem involved is much bigger and is not confined to the comparatively small minority of students who are detained by the Head Masters for want of satisfactory progress. The bigger problem is of the tuition to be given to the students who fail in the March examination of the Board. In respect of subsequent tuition after they are detained, the position of the kept back students is not different from that of the students who fail in the March examination. We are told that 56 per cent, of the students who appeared in the last S.S.C. Examination failed to pass, and it is well known that the percentage of failure in that examination in previous years was always more than 50 per cent. On an inquiry made by us we were told that no arrangements for the subsequent tuition of these failed students have been made so far. For all these reasons we must hold that the fact that special training is not given to detained students in many schools is wholly irrelevant to the question whether the detaining power of the Head Masters was or was not justified.

70. It was then argued that a pupil who is detained for unsatisfactory progress feels frustrated and humiliated, and that the detaining power of the Head Masters was rightly abrogated to avoid that consequence. It appears to us obvious that the efficacy of any rule of discipline depends upon the rule being enforced in proper cases, that the enforcement of such rule does result in some penal consequences, but that the rule itself does not deserve to be scrapped on that account. Here again the Board has failed to see that the detaining power of the Head Masters is exercised for the benefit of the students as a whole and not for the exclusive benefit of the students who happen to be detained at the end of the year. There might have been some force in the above argument advanced on behalf of the Board, if the Board had found that the detaining power was being exercised by the Head Masters recklessly and without discrimination. That, however is not the case of the Board. From the replies received by the Board to one of its questions included in the questionnaire, it was clear that about 15 per cent of the total number of students were detained in the final standard by those schools in the Poona and Aurangabad Divisions who followed the practice of detaining pupils for want of satisfactory progress. Thus, about 85 per cent, of the students were sent up for the S.S.C. Examination. As already stated, less than 50 per cent, of the total number of students used to pass at that examination. It is clear from these figures that the detaining power was being sparingly used by the Head Masters.

71. It may be added that one of the questions which was included in the Board's questionnaire and was addressed to all the persons to whom the questionnaire was sent was whether any malpractices, corruption and coercion were resorted to in secondary schools in sending up candidates for the Board's examination. The answers show that such malpractices existed on a very meagre scale. The learned Advocate General told us with his usual fairness that this was not one of the factors which influenced the Board in its decision to do away with the Head Masters' right of detaining pupils for unsatisfactory progress.

72. In urging that regulation 49(8) was a reasonable provision the learned Advocate General laid considerable stress to a statement contained in a letter which one R.A. Sathe, Honorary Secretary of the Head Masters' Association of Poona City District, had written on 28th January, 1966 to the Divisional Secretary of the Poona Divisional Board. A copy of that letter was produced by the petitioners themselves along with their affidavit in rejoinder which had been filed prior to the first hearing of these petitions, In that letter the said R.A. Sathe had written :-

" It should be made clear here that many schools, traditionally, send up all their candidates for the final examination, and with results ranging from 80 to 100 per cent. Those of us who have detained a few candidates propose to withhold the sending up of their forms till 31st January 1966. It is hoped that the decision to submit or not submit these forms will be left to our discretion."

It is clear that what Sathe wanted to convey was that the detaining power was sparingly used, and

that the discretion in the use of that power should be left with the Head Masters. The learned Advocate General, however, referred to this passage with a view to show that the detaining power of the Head Masters was not necessary for the proper education of the students, and that results ranging from 80 to 100 per cent were achieved by schools which did not make use of that power. Now, the learned Advocate General himself told us that in view of this statement contained in Sathe's letter some questions were included in the Board's questionnaire which were exclusively addressed to the heads of secondary schools in the Poona and Aurangabad Divisions who had been following for a number of years the practice of sending up all pupils to the S.S.C. Examination. To one of these questions, 65.9 per cent, of the replies in the first set, and 68 per cent, of the replies in the second set, were to the effect that in the absence of the fear of detention students do not take up their studies or their school examinations seriously in the final year. Again 61.8 per cent of the replies in the first set, and 88.4 per cent in the second set were in the affirmative to the question "Have the S.S.C. Examination results as your school been adversely affected on account of your practice of sending up all the pupils in the final standard for the S.S.C. Examination?" It is not possible to understand why the Board preferred to place reliance on the statement of R.A. Sathe quoted above in preference to the considered opinion given by a clear majority of those very Head Masters from the Poona and Aurangabad Divisions who had been following for a number of years the practice of sending up all pupils to the final examination irrespective of their, academic progress. Moreover, these Head Masters did have the right of detaining students for unsatisfactory progress, but were as a rule not exercising that right. They found that the non-exercise of, that right was harmful, that it had an adverse effect on the study of the pupils and their performance in the S.S.C. Examination. The opinion of these Head Masters clearly shows that the detaining power was necessary and justified, and should not have been scrapped.

73. Finally, in order to show that regulation 49(8) was a reasonable provision the learned Advocate General referred us to the regulations of some of the other States In the country where such a provision was found. The regulations referred to by him were those of Madhya Pradesh, Punjab, Rajasthan and Mysore. He argued that the impugned regulation 49(8) should not be held to be unreasonable when a similar provision is found in some of the other States. We examined the regulations of the other States relied upon by the learned Advocate General and came to the conclusion that those regulations were not comparable with the regulations which have been made under the present Act in respect of the Poona Division. The regulations of the Madhya Pradesh State are similar to the regulations made by the Board for the Nagpur Division. There a progress certificate is not a condition for admission of candidates to the final examination, and the Head Masters are also disallowed from withholding the applications of candidates who satisfy the conditions of eligibility. The regulations of Madhya Pradesh however, provide, like the regulations applicable to the Nagpur Divisions here, that 20 per cent, of the marks in each subject of the Board's examination shall be given in the Head Masters on an internal assessment of the performance of the student in the final standard. This provision serves to a larger extent the same purpose as the detaining power which was being hitherto enjoyed by Head Masters in the Poona

Division. Students of the final standard have to work regularly and diligently, in one case for securing the maximum number of the 20 per cent marks reserved for internal assessment, and in the other for getting the permission of the Head Master to appear for the final examination. In the Punjab regulations also, a progress certificate is not a condition of admission to the final examination and the Head Masters are not allowed to withhold the applications of eligible candidates. But the Punjab regulations contain provisions to the effect that 25 per cent, of the marks in the "core subjects" , and 50 per cent, of the marks in the "elective group of subjects" , in the final examination are to be given by the Head Masters on the internal assessment of the performance of their students. In Rajasthan, students for the final examination are not required to apply for admission through their respective schools, and therefore, the question of the Head Masters withholding their applications does not arise. It appears, moreover, that the Rajasthan regulations do not prescribe a progress certificate from the Head Masters as a condition for the admission of students to the final examination. The regulations, however, contain elaborate provisions for the "cumulative record" of each student throughout the final year to be kept by his teachers for which 10 per cent, of the marks in each subject of the final examination are reserved. The Mysore regulations prescribe a progress certificate as a condition of admission to the final examination, but the certificate relates to the academic performance of the pupils in standards other than the final standard in respect of which no progress certificate is required. The Head Masters are also not allowed to withhold the applications of eligible candidates. The Mysore regulations, however, are not made under any statute. They are in the nature of executive orders made by the State Government and enforced as conditions of recognition for Government aid and for the privilege of ending candidates to the final examination. As the regulations have not been made under any statute their reasonableness is not open to judicial review. As against the practice prevailing in the States mentioned above, it was brought to our notice that the progress certificate as a condition of admission to the final examination has been prescribed in the regulations which obtain in the States of Gujarat and Orissa. It was also brought to our notice that the regulations which obtain in Bihar provide for an internal assessment by the teachers and at the same time do not contain a provision requiring the heads of schools to forward the applications of all students irrespective of their academic progress.

74. Having started with the presumption that the impugned regulation is reasonable unless the contrary is shown, and that it should be supported if possible, and after having considered all the arguments in that behalf advanced by the learned Advocate General, we have come to the conclusion that the impugned regulation is manifestly unreasonable. It would be an understatement to say that it amounts to a gratuitous interference in the rights of the Head Masters. If the impugned regulation had been useless as well as harmless, it could have been characterized as gratuitous. In our view, it is fraught with great harm. It is likely to lead to a lowering of standards of education and of discipline in the final year in secondary schools. Its impact will be particularly harmful on precisely those schools which require to be recognized and encouraged, i.e. schools which try to maintain high standards of education. It is also oppressive because it compels heads of schools not to act in the best interests of education, on pain of the

recognition of their schools being withdrawn. The learned Advocate General impressed upon us that if two reasonable views are possible on this question, we should not hold the impugned regulation to be invalid on the ground of unreasonableness. We are of the view, however, that it cannot be reasonably doubted that the impugned regulation amounts to a gratuitous and oppressive interference with the rights of the Head Masters. The Board appears to have adopted the impugned regulation partly because it was not aware of the existence of the Head Masters' common law rights, and partly because it failed to see that the Head Masters' right of detention was beneficial to the students as a whole and that its justification was to be determined by assessing its impact on the general body of students, and not on that minority which comes to be detained. We must accordingly hold that regulation 49(8) is invalid on the ground that it is unreasonable.

75. It was argued by Mr. Palkhiwala that regulation 49(8) is also bad on the ground that it is repugnant to the general law. We do not think that this argument is sound. What the impugned regulation does is to forbid the Head Masters from doing what they were entitled to do at the common law, viz., to withhold the applications of their students on the ground of unsatisfactory progress. A bye-law which is intra vires the powers of the authority which made it cannot be held to be invalid on the ground of its repugnancy to the general law, if it merely forbids a person from doing what he is entitled to do at common law. In *Powell v. May*¹², Lord Goddard, C.J. observed :

" There is no question but that a bye-law which is repugnant to the general law is invalid, but it is not so easy to determine what is covered by the word "repugnant" , and under what circumstances a bye-law is to be held invalid on that ground. Obviously, it cannot permit that which a statute expressly forbids nor forbid that which a statute expressly permits, though it can, of course, forbid that which otherwise would be lawful at common law, otherwise no prohibitory bye-law could be valid."

The impugned regulation in the present case does nothing further than "forbid that which otherwise would be lawful at common law", and cannot therefore be held to be repugnant to the general law.

76. The attack of Mr. Palkhiwala on the impugned regulation on the ground of discrimination cannot also be sustained. He argued that by adopting regulation 49(8) the Board has brought about an unjustified difference in the powers and status of Head of schools in the Poona Division as compared to the heads of schools in the Nagpur Division. Prior to the adoption of regulation 49(8) the heads of schools in the Poona Division were in a position to withhold the applications of their students for want of satisfactory progress, whereas the heads of schools in the Nagpur Division were able to assign 20 per cent, of the marks in each subject of the final examination on an internal assessment of their students. By adopting regulation 49(8) the Board deprived the heads of schools in the Poona Division of the rights of detention without granting them the Tight

of internal assessment and thereby discriminated against them in comparison to the heads of schools in the Nagpur Division. In reply to this contention it was stated in the affidavit filed by the Chairman of the Board that the system of internal assessment has been prevailing in the Vidarbha area for many years, that there is no similarity in the

¹²1946 K. B. 330

system of detention and the system of internal evaluation, that in any case the Board is going to consider whether the system of internal evaluation which prevails in the Nagpur Division should be introduced in other parts of the State, and that this consideration is bound to take some time. It was averred that the difference in the systems of the Nagpur Division and the other Divisions is due to historical reasons, and is not discriminatory. In our view, regulation 49(8) cannot by itself be regarded as discriminatory, because it actually removes the difference which existed in the regulations applicable to the Nagpur and the Poona Divisions. Regulation 78(5), which applies to the Nagpur Division provides that heads of secondary schools shall not withhold the applications of candidates who have fulfilled the prescribed conditions for appearing at the final examination without the previous sanction of the Divisional Chairman, and the same provision has now been introduced in the Poona Division by regulation 49(8). It is true that there is a substantial difference at present in the powers of the Head Masters in the Nagpur Division and those in the Poona Division, arising from the system of internal assessment in the Nagpur Division, which is absent in the Poona Division. The system of internal assessment has been prevailing in the Nagpur Division since before the time the Vidarbha area came to be included in the Maharashtra State. In *Anant Prasad Lakshminivas Generiwal v. State of Andhra Pradesh*¹³, the Supreme Court found that there were two laws in force in two parts of the State of Andhra Pradesh with respect to religious endowments, and that the two laws were different in many matters. The reason why two different laws on the same subject prevailed in two parts of the State was that one of the parts came to the State from the former Madras State and the other from the former Hyderabad State. The Supreme Court were informed on behalf of the State of Andhra Pradesh that steps were being taken to assimilate the laws in the two parts of the State and to bring them under a common pattern, but that time was required for the complete assimilation of the laws. The Supreme Court held under these circumstances that the difference in the two parts of the State where the two laws on the same subject prevailed was due to "geographical classification on historical basis," and was not discriminatory. In the present case also the difference between the Nagpur and Poona Divisions has to be upheld on the ground of "geographical classification on historical basis."

77. We accordingly find that regulation 49(8) is invalid on the ground that it is ultra vires the powers of the Board, and also on the ground that supposing it is intra vires, it is unreasonable. Regulation 49(8) is, therefore, quashed and the respondents are directed not to enforce it.

78. As to costs Mr. Sorabjee for the petitioners and the learned Advocate General for the respondents agreed that respondent Nos. 1 and 2 shall pay to the petitioner in Special Civil Application No. 131 of 1966 Rs. 5,000 and to the petitioners in Special Civil Application No.

132 of 1966 Rs. 500 by way of costs, and that should our decision be reversed in appeal the petitioners will not only refund the amounts of Rs. 5,000 and Rs. 500 respectively but will also be liable to pay the same amount, i.e. Rs. 5,000 by the petitioner in Special Civil Application No. 131 of 1966 and Rs. 500 by the petitioners in Special Civil Application No. 132 of 1966 to respondent Nos. 1 and 2 by way of their costs in this Court. It is accordingly directed that respondent Nos. 1 and 2 will pay by way of costs of these petitions Rs. 5,000 to the petitioner in Special Civil Application No. 131 of 1966 and Rs. 500 to the petitioners in Special Civil Application No. 132 of 1966.

¹³1963 Supp. 1 SCR 844 : AIR 1963 SC 853

M.V. Paranjpe, J.

79. I respectfully agree with the conclusions and the reasoning in support of those conclusions, given in the judgment of my learned brother. But, I would like to add my own reasons in support of the conclusion that Regulation No. 49(8) is ultra vires the regulation-making power of the State Board-Whether the Regulation is regarded as a rule or a bye-law properly so called.

80. I would like to approach the problem from the point of view that the State Board is a creature of statute and it derives its powers from the provisions of the statute which brought it into existence. No inherent powers, as such, can be claimed by the State Board and, therefore, the Regulation must be justified on the basis of the provisions contained in the Maharashtra Secondary Education Boards Act, 1965.

81. My learned brother has exhaustively discussed the scheme of the Act with reference to the several provisions contained in the Act and I do not propose to repeat that discussion here. But after analyzing the various provisions of the Act I think that the provisions can be classified in four different groups : (1) Provisions relating to the constitution and composition of the Divisional Board and the State Board, its capacity, to sue and be sued, to hold and dispose of property, etc., (2) provisions which deal with advisory functions of the State Board; (3) provisions which deal with matters connected with secondary education up to the stage of final examination; and (4) provisions dealing with the final examination as such. We are not concerned with the provisions relating to the constitution and composition of the Boards and other incidental matters. We are also not concerned with the advisory powers of the State Board. I will not therefore refer to those provisions in my judgment. We are concerned with the provisions relating to matters concerning secondary education up to the stage of final examination (which provisions hereinafter I will refer to as provisions falling in the first category), and with the provisions which relate to the final examination itself (which provisions hereinafter I will refer to as provisions falling in the second category). The provisions in the first category are inter alia contained in Sections 18 and 19 read with Section 36 and also read with the definitions contained in Section 2 of the Act, Section 36 of the Act gives power to the State Board to make regulations for the purpose of carrying into effect the provisions of the Act.

81-A. "Secondary education" has been defined in clause (o) of Section 2 of the Act and it is in the following terms : "Secondary education" , means such general, technical, vocational or special education (including any combined course thereof), which is designed to meet the needs of the period of adolescence and which follows immediately primary education and precedes immediately education controlled by Universities established by law in India."

82. Clause (b) of Section 18 confers power upon the State Board to lay down guiding principles for determining curricula and syllabi for the entire secondary course, to approve the detailed syllabi prepared by the Divisional Boards for all standards except the final standard and to determine the curricula and detailed syllabi for the final examination. Clause (b) of Section 19 confers power upon a Divisional Board to prepare for the consideration of the State Board detailed syllabi for all standards, except the final standard, and make suggestions for the syllabi for the final examination. Clause (c) of Section 18 confers power upon the State Board to formulate general principles for recommending text-books by the Divisional Boards for sanction of the State Board, and also to sanction such books from amongst those recommended by the Divisional Boards, subject to such conditions, if any, as the State Board may deem fit to impose. Clause (c) of Section 19 confers power upon the Divisional Board to recommend to the State Board for sanction text-books for all standards, except the final standard. The provisions contained in clause (d) of Section 18 enables the State Board to prescribe standard requirements in respect of staff, buildings, furniture, equipment, stationary and other things required for secondary schools. Clause (e) of Section 18 enables the State Board to prescribe and prepare text-books for the standards leading to the final examination. Clause (k) of Section 18 gives power to the State Board to demand and receive such fees as may be prescribed, from secondary schools recognized by the Divisional Boards, whereas clause (1) of that section enables the State Board to call for special reports and information from the Director of Education or other officer of the Education Department and any information from any secondary school recognized by a Divisional Board in order to ensure maintenance of academic standards in secondary education. Clause (m) of that section enables the State Board to recommend measures to promote physical, moral and social welfare of students in institutions recognized by the Divisional Boards, and to prescribe conditions of their residence and discipline. Clause (n) of Section 19 gives power to the Divisional Board to grant recognition to secondary schools or withdraw the same in the prescribed manner. Clause (o) of Section 19 gives power to the Divisional Board to call for any information from any secondary school recognized by it to ensure maintenance of academic standard and to call for special reports and information either on being referred to by the State Board or on its own initiative from the Regional Deputy Director of Education concerned on secondary schools recognized by it not maintaining the required academic standard, to withdraw recognition granted by it, and to recommend to the Director of Education or the Directorate of Technical Education, as the case may be. withdrawal of recognition granted under the Secondary Schools Code, in cases of poor academic results and grave academic irregularities. These are the provisions which deal with matters connected with secondary education up to the stage of final examination. To sum up, these provisions give power to the State Board for laying down curricula and syllabi, for prescribing text-books, granting or withdrawing recognition to a

secondary school and laying down standard requirements in respect of staff, building, furniture, equipment, stationary and other things required for secondary schools. But this list does not exhaust all the matters pertaining to secondary education up to the stage of final examination. There are still certain other matters pertaining to secondary education up to the stage of final examination which are not within the purview of these provisions, for instance the teaching itself or the method or manner of teaching in schools, maintenance of discipline in schools as also instilling study habits in students and helping them to learn application of mind. These are matters which obviously are not covered by the provisions mentioned above.

83. The provisions falling in the second category, namely, provisions relating to the final examination itself, are contained in clauses (f), (g), (h), of Section 18 and clauses (f), (g), (h), (i), (i), (k) and (l) of Section 19 of the Act. These provisions enable the State Board to make regulations prescribing conditions for admissions to the final examination, awarding certificates to candidates passing the final examination, instituting and awarding scholarships, stipends, medals, prizes and other rewards, and prescribing conditions therefore. Further, these provisions enable the Divisional Board to conduct the final examination and for that purpose to appoint paper setters, translators, examiners, moderators, supervisors and other necessary personnel for evaluation of candidates' performance. Power is also given by these provisions to declare the results of the candidates appearing at the final examination. Thus, all the aspects dealing with the final examination have been entrusted to the two Boards together constituted under the Act.

84. Now, as stated above, besides laying down curricula and syllabi and other standard requirements as contemplated by clause (d) of Section 18, there are other matters pertaining to secondary education which are not within the purview of the Act. That is because as the preamble itself, makes it clear, the present Act is not for the purpose of regulating the entire secondary education in all its aspects, but the Act is intended only for the purpose of regulating certain matters pertaining to secondary education. Therefore, obviously the Legislature intended that matters which are not referred to in the above clauses of Sections 18 and 19 and which pertain to secondary education up to the stage of final examination to be left out of the regulation-making power of the State Board. Therefore, the control of the State Board on matters connected with secondary education up to the stage of final examination is envisaged to the extent of these provisions and no further. I have already detailed these provisions and on a plain reading of those provisions it is clear that these provisions are intended to give power to the State Board to lay down minimum standards in respect of matters mentioned in those clauses of Sections 18 and 19 of the Act. Matters which are not covered by these clauses and matters which pertain to secondary education above the minimum prescribed by the State Board are entirely left to the school authorities. It must not be forgotten that the function which is left to the school authorities, namely, teaching, is a function complementary to the function of holding the final examinations, and I should say that this function which is left to the school authorities is at least as important, if not more, as the function of holding the final examination itself. The Legislature has contemplated this division, namely, that matters which pertain to secondary education up to

the stage of final examination, subject to the observance of the minimum standards laid down by the State Board as indicated above with reference to the several provisions mentioned earlier), are left with the school authorities and the function of holding the final examination has been exclusively entrusted to the State Board. If the Legislature intended that the teacher should carry on the function of teaching and other matters connected with secondary education up to the stage of final examination, subject to the observance of the minimum standards laid down by the State Board, and the State Board should be exclusively in charge of the final examination, can it be said that the Legislature intended that the State Board will regulate its own function, namely, the function of holding the final examination in such a manner as to interfere with or adversely affect the function of teaching ? Can it be said that the Legislature intended that the State Board should have such power as to adversely affect the function of teaching, which must precede the holding of final examination and which is intended for the final examination ? In my opinion the answer is that the Legislature did not contemplate that the State Board should so exercise its function as to adversely affect the first part of secondary education namely matters connected with secondary education including teaching up to the stage of final examination. If that is so, then it follows that we must read these sections which give power to the State Board to exclusively perform the function of holding the final examination in such a way that the State Board shall not carry on the function in such a manner or regulate that function in such a manner that it will adversely affect the function of teaching. In other words, there is an implied limitation on the regulation-making power of the State Board that the regulations framed by the State Board for the purpose of holding the final examination will not be such as to interfere with the function of teaching, which is still retained by the Legislature with the teachers. To explain my point further, I will say that the Legislature has left the task of teaching to the teachers subject to the observance of minimum standards which are to be prescribed by the State Board. This will involve that the Legislature has left to the teachers to inculcate study habits amongst students, to instil discipline amongst students, to help the students to learn the application of mind and to do all other things which are necessary for the purpose of enabling the students to develop their natural faculties, including a desire to acquire more and more knowledge. If the process of teaching envisages all these things, naturally we must assume that the Legislature never intended that the State Board, while making regulations for the purpose of governing or regulating its function, namely of holding the final examination, will frame those regulations in such a manner as will encourage disobedience amongst the students or as will detract application of the mind of students or as will bring about a result whereby the teacher may not be in a position to maintain his authority in the school. Therefore, I am inclined to take the view that the regulation-making power of the State Board shall be so exercised as not to affect the function of teaching which is still retained with the teachers or the schools.

85. All this discussion was necessary because the validity of Regulation No. 49(8) was sought to be justified on the basis that the State Board has the power to prescribe conditions for admission to the final examination of regular candidates, as conferred by clause (f) of Section 18 of the Act. The validity of this regulation was also sought to be justified on the provisions of clause (q) of

Section 19, which says that a Divisional Board will have the power to require institutions recognized by it and the Education Department to extend their co-operation in the conduct of the final examination. If the limitations mentioned by me are to be read in the regulation-making power of the State Board, I should think that the Board is not entitled to make a regulation prescribing conditions for admission to the final examination of regular students in such manner that that regulation will encourage disobedience amongst the students or will detract the authority of the teachers. That regulation must be so framed as not to encroach upon the function of teaching, which is still left by the Legislature to the teachers subject to the power of the State Board to prescribe the minimum standards therefore under Section 18. If clause (f) of Section 18 or clause (q) of Section 19 is to be so read, it would naturally mean that the regulation-making authority will be transgressing that limit if a regulation is made by it which has the tendency to interfere with or adversely affect the function of teaching. That Regulation No. 49(8) has that tendency has been sufficiently discussed by my learned brother In his judgment and I do not repeat the same here. I merely want to point out that here is a regulation which says that whatever may be the academic achievements of a student who somehow has managed to get into the XIth Standard he must be sent to the final examination by the school authorities even though the school authorities conscientiously feel that the student is not fit to appear for the examination. In fact, this authority with the school teachers, namely, not to send the candidate to the final examination, does always have a salutary effect of keeping the students on their guard and of persuading them to devote more to their studies; and if this instrument is removed one can very well imagine what the effect would be. The student will no longer be under the apprehension that he would be prevented from completing his secondary education by the school authorities if he does not satisfy the school authorities in the matter of academic progress and, for that matter, he need not have any academic progress at all in the XIth Standard, Because there is no fear of detention, there is no fear that he will not be allowed to complete his secondary education. I, therefore, feel that Regulation No; 49(8) has every tendency to encourage disobedience amongst students and it will obviously adversely affect the function of teaching and, as stated earlier, any such regulation which transgresses its limit will be ultra vires. Therefore, this regulation will be ultra vires on this additional ground.

86. There is another aspect of the matter from which the validity of this regulation can also be tested. It is true that the State Board has been given the power to frame regulations for the conduct of the final examination. Similarly the State Board has also been given the power to prescribe minimum standards in respect of certain educational matters mentioned in Section 18 up to the stage of the final examination itself. The State Board will have no authority to pass any regulation which will regulate matters connected with secondary education up to the stage of the final examination, excepting that of laying down a minimum standard. In other words, the school authorities are free to regulate those matters as they like and the State Board has no power to make any regulation in that behalf. By resorting to the powers for regulating the final examination itself, can the State Board assume to itself a power with regard to matters connected with secondary education up to the stage of the final examination ? I think the State Board cannot

do in an indirect way, what it cannot do in a direct way. If the State Board has no power to regulate matters connected with secondary education up to the stage of the final examination, excepting laying down minimum standards, that power cannot be assumed by the State Board in the garb of laying down conditions for admission of students to the final examination or in its power to regulate the final examination.

87. It is interesting to note how the regulation itself has been framed. According to me, it is a clever device adopted by the State Board to assume power which it did not possess. Regulation No. 19 deals with conditions to be complied with by a secondary school seeking recognition from the Divisional Board or to be complied with by a secondary school which desires the continuation of the recognition already granted to it. That regulation lays down the minimum standards in respect of matters pertaining to secondary education up to the stage of final examination which are to be complied with by such a school. Regulation No. 49(8) is not contained in the set of regulations which deal with recognition of schools, but is contained in the set of regulations dealing with matters pertaining to the filing of an application for admission to the final examination. Though in its form the regulation purports to lay down conditions for admission to the final examination in substance it is a regulation which interferes with or adversely affects the function of teaching; and if the real substance and the impact of the regulation is seen, it substantially touches a matter which is beyond the regulation-making power of the State Board. I therefore, feel that this is a clever device adopted by the State Board for assuming power to itself which it did not possess.

88. The regulation is also sought to be justified by powers conferred upon the Divisional Board to grant recognition to secondary schools or withdraw the same in the prescribed manner, as per clause (n) of Section 19 of the Act. Elaborate arguments were advanced before us as to the meaning and the real scope of clause (n) of Section 19 read with clause (o) of that section. In order to appreciate this argument, I will not be unjustified if I refer to the historical background of this clause, though the same has not been referred to in the arguments of either of the Counsel. In order to understand what the concept of recognition of a school means, I would like to see how the question of recognition originally arose so far as this part of the country is concerned. When the investigation is so made, one finds that prior to the establishment of the University of Bombay, which was the only University in this part of the country till 1948, there were several educational institutions which were imparting instructions to students. The Bombay University Act, 1857 (XXII of 1857) was passed whereby the University of Bombay was established. Section 12 of the said Act laid down qualification for admission of candidates for degrees, and the qualification was that the candidate was to present to the Chancellor, Vice-Chancellor, etc., a certificate from one of the institutions authorized in that behalf by the Governor of Bombay in Council to the effect that he had completed the course of instructions prescribed by the Chancellor, etc. This Act was further amended and modified by the Indian Universities Act, 1904 (VIII of 1904). Clause (o) of Section 25 of the said Act laid down that the Senate would have the power to make regulations with regard to the conditions to be complied with by schools desiring

recognition for the purpose of sending up pupils as candidates for the matriculation examination and the conditions to be complied with by candidates for matriculation, whether sent up by recognized schools or not. The provisions of Bombay Act XXII of 1857 were further modified after that Act itself was replaced by Bombay Act IV of 1928 Clause (kk) of Sub-Section (2) of Section 33 of that Act provided that the Senate was entitled to make statutes not inconsistent with the Act for the purpose of laying down the conditions to be complied with by schools desiring recognition for the purpose of sending up pupils as candidates for the Matriculation Examination and the conditions to be complied with by candidates for the Matriculation Examination whether sent up by recognized schools or not. It may be of interest to note here that the first Matriculation Examination in this part was held in October 1859 for the purpose of admission of students to the University (vide Gazetteer of Bombay City and Island, Vol. III, page 110) and after the abolition of the Public Service Certificate Examination the Matriculation Examination itself came to serve a three-fold purpose, namely, (1) providing qualification for admission to the University, (2) providing for the school leaving certificate, and (3) providing minimum qualification for employment in public service. By virtue of the powers derived by the University under Section 33(2) (kk) of the Act of 1928 the University of Bombay framed statutes laying down the conditions to be complied with by the schools in order to enable the schools to be recognized. The conditions which the University of Bombay laid down were as follows :-

- " (a) that the school maintains regular classes from the 4th Anglo Vernacular standard upwards or the corresponding standards of European and English teaching schools :
- (b) that the school supplies a need in the locality in which it is situated;
- (c) that the management is so constituted as to offer a reasonable prospect that 'the school will be well conducted;
- (d) that the qualifications of the teaching staff and the conditions governing their tenure of office are such as to make due provision For the courses of instruction to be undertaken by the school and to ensure a reasonable continuity of its teaching staff;
- (e) that the school is housed in suitable building and adequately equipped;
- (f) that the resources at the disposal of the management are such as to afford a reasonable expectation that the school will be efficiently maintained;
- (g) that the fee paid by the pupils will not involve such competition with any existing school in the same locality as would be injurious to the interest of education;
- (h) that the admissions and promotions of pupils have been made in accordance with the instructions issued by the Syndicate from time to time in that behalf."

These clauses will show that the purpose of recognition of an institution was to see that the institution possessed the requisite equipment and had the capacity to maintain the minimum educational standard. In the year 1948, after the establishment of another University, namely, the Poona University, in this region, a Board was constituted, namely, the Secondary School Certificate Examination Board. under the Bombay Secondary School Certificate Examination Act, 1948, for the purpose of holding the school certificate examination. A consequential

amendment was also made in the Bombay University Act in 1928 by addition of Section 28A. The result was that a student who had passed the school certificate examination was entitled to join the college and prosecute his studies in the Bombay University and a similar provision was also incorporated in the Poona University Act, though these Universities were given the power to hold entrance examinations. But a candidate who had passed the school certificate examination was entitled to get admission to the colleges without being required to appear for the University entrance examination. Clause (h) of Section 2 of the 1948 Act defined "recognized high school" to mean a high school recognized by the Director of Education, Bombay State, or an officer authorized by him in this behalf or a high school registered by any University established by law in the State. Under the present Act, by virtue of the provisions of clause (d) of Section 40(2), on the appointed day all institutions recognized and admitted to the privileges of any dissolved Board immediately before the appointed day shall be deemed to be recognized and admitted to the privileges of the corresponding Divisional Board established under this Act, save in so far as such recognition or privilege may be withdrawn, restricted or modified by or under the provisions of this Act. Therefore, when the present Act conferred the power on the Divisional Board to grant recognition to a secondary school it cannot be said that the purpose in granting recognition is different from the one which was envisaged under the enactment authorizing the University of Bombay that a student who had passed the school certificate examination was entitled to join the college and prosecute his studies in the Bombay University and a similar provision was also incorporated in the Poona University Act, though these Universities were given the power to hold entrance examinations. But a candidate who had passed the school certificate examination was entitled to get admission to the colleges without being required to appear for the University entrance examination. Clause (h) of Section 2 of the 1948 Act defined "recognized high school" to mean a high school recognized by the Director of Education, Bombay State, or an officer authorized by him in this behalf or a high school registered by any University established by law

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to recognise an institution be utilised for the purpose of saying that the school, which wants to maintain a higher academic standard, should not maintain that higher standard ? The schools which want to detain their candidates and not to forward their applications for the final examination want to do so for the purpose of maintaining an academic standard higher than the minimum prescribed by the State Board and also their educational reputation. But the effect of the present Regulation No. 49(8) is to tell such schools, "Do not do that. You need not maintain an academic standard higher than the one prescribed by the State Board. Do not bother about higher academic standard. Let all students be permitted to appear for the final examination."

89. The schools which want the power of detention want to tell their students that they are under constant threat of their applications being withheld and unless they achieve higher academic standard they will not be permitted to appear for the S.S.C. Examination and complete their secondary education, whereas the State Board says by Regulation No. 49(8) "Do not compel them to have higher standard. Let them be content with the minimum standard prescribed." and if the schools go against this, they will be threatened with withdrawal of their recognition under clause (7) of Regulation No. 19. The justification for the validity of Regulation No. 49(8) on the ground of powers of recognition comes to this, namely, that the State Board will tell the schools that it will refuse to recognise the schools if they want a higher educational standard. Is that the purpose of the Act ? I ask myself a further question. Does the State Board possess that power to tell the schools that you shall not have a higher educational standard ? I think the State Board does not possess that power. The argument advanced before us was in this form : That it is not the State Board which compels the schools to seek recognition. If the schools want any recognition, they must be agreeable to abide by any conditions that may be imposed by the Divisional Board and if the schools are not agreeable to comply with those conditions they will not get their recognition continued. This is tantamount to saying that the State Board, which is charged with the duty of maintaining academic standards and which has been given the power to recognize educational institutions which have the capacity to maintain minimum educational standards, wants to assume to itself a power that it will lay down a condition for recognition that the school shall not have a standard higher than the minimum prescribed by the State Board that school shall have no freedom to maintain higher standard. I think this power has not been conferred on the State Board by clause (n) of Section 19 of the Act. I, therefore, think that the validity of Regulation No. 49(8) also cannot be justified under clause (n) of Section 19 of the Act.

90. For these reasons I am of the opinion that Regulation No. 49(8) is ultra vires the regulation-making power of the State Board.

Order accordingly.