BOMBAY HIGH COURT

Sakharkherda Education Society

Vs.

State of Maharashtra

Special Civil Applns. Nos. 694 of 1965 and 420 and 421 of 1966

(Patel and Deshmukh, JJ.)

02.12.1966

JUDGMENT

Patel, J.

1.These three civil applications arise out of the action of the State Government under the Grant-in-aid Code for Secondary Schools.
Civil Application No. 420 of 1966

2. Petitioner No. 1 is a Society registered under the Societies Registration Act of 1860 at Anjansinghi, Taluka Chandur, District Amravati, and petitioner No. 2 is its President. The Society made an application for permission to Open a Secondary School, and it was proposed to start in the first year 9th class, as there was sufficient arrangement in the village for education up to standard VIII in the Zilla Parishad schools. First such application was made in 1963, which was rejected by respondents 1 and 2. Second was made in 1964 which met a similar fate. The Society made another application on October 30, 1965. It appears that respondent No. 3, which is another educational Society which operated in Ashok Nagar, about 6 miles away from this village, also applied for permission to open a Secondary School at this village and in the first year to open class IX. The Deputy Director of Education, Nagpur, by order (Annexure 3) dated April 12, 1966, informed the petitioners that their request cannot be granted because the need of the place had been fulfilled by permitting another Society to open a school at the place. It also contained a threat that in case and school were started even when permission was not granted and pupils were admitted, serious view would be taken by the Department. Appeal made by the petitioners to the State Government was dismissed, as shown by Annexure 5. The petitioners seek to challenge this order on several grounds.
Spl. Civil Appln. No. 421 of 1966.

3. Petitioner No. 1 is a Society registered under the Societies Registration Act and started the

residents of village Shrikhed, taluka Morshi, district Amravati. Petitioner No. 2 is its President. As in the case of the first Society, this Society also applied to start the school. An application was made on November 3, 1965, as required by the Act though the first application was made on October 29, 1965. Annexure No. 1 but it was not in the prescribed form. Respondent No. 3 which is another Society at Lengaon also made an application to start a school at Shrikhed which was an outside agency. The petitioners' application was rejected on the ground that the application was made after the prescribed date and that the Society was not registered. It also contained a similar threat as in the other case.

Spl. Civil Application No. 694 of 1965.

4. This application is made by Sakharkherda Society, operating at Sakharkherda and is registered under the Societies Registration Act, 1860. The total number of the students of the school from standard V to standard X in 1954 appeared to be 435. The Zilla Parishad runs a middle school in this village and the students number approximately 150. After passing the middle school examination, the boys join the petitioners' school. An application was made by Mehkar Shri Shivaji Education Society to open another school at this village but the permission was refused. It appears, the President of this Society one S.V. Deshmukh, a Pleader, is a Member of the Legislature and on March 9, 1965, he put certain questions in the Legislative Assembly. The question and answers are : (1) If it was the policy of the Government not to grant permission to open another High School, if in a village there is already a High School, and the answer "Yes, taking into account the population of the village and also of adjoining area". (2) If so, why was such permission granted to open High School at Lonar and why not at village Sakharkherda ?"

> "Answer : In village Sakharkherda permission to open a new High School was refused in 1964-65; for Lonar, the permission was given by Madhya Pradesh Govt. in 1953."

The respondent No. 3, the Mehkar Society then made an application for opening a school at this village. The Government seems to have granted permission to that Society to open Standards VIII and IX for 1965-66 and the petitioners seek to challenge this order on the ground that it contravenes the rules made by me Government for grant of such permission.

5. In the first two petitions, the rules of the Grant-in-aid Code are challenged on various grounds.

6. The rules of the Grant-in-aid Code are not framed under any particular statute. These rules purport to be framed under the Rules of Business under Article 166 of the Constitution and enable the State Government to utilize fund allocated in the Budget for educational purposes. Rule 2 provides for an application for starting and recognition of a school. It provides that an application shall be made in the form given in Appendix 1 (1), It further provides that the reply must be made by the Deputy Director within three months of the receipt of the application or the subsequent date on which complete information is furnished. School should not be started unless previous permission has been granted and a school started without such previous permission

shall not ordinarily be considered for recognition. Of importance is rule 3 which prescribes conditions for recognition of a school. These are :-

> "(1) The school is actually needed in the locality and it does not involve any unhealthy competition with any existing institution of the same category in the neighborhood.
> (2) The Management is competent and reliable and is in the hands of a properly constituted authority or managing committee.
> (3) Its financial stability is assured.
> (4) Its premises are sufficiently healthy, well-lighted and ventilated There are about in all sixteen clauses with which we are not at present concerned., Challenge is made to sub-rules (1) and (2) since nothing can be urged apparently against the other rules which are intended to achieve certain specified objects, such as the existence of proper premises which ensures the health and well-being of the boys and the girls, satisfactory standard of education, obeyance to directions regarding scales of fees and other matters, well-being of the staff, maintenance of proper records, proper discipline in the school, etc. These can be regarded as reasonable conditions for the marking of grants.

7. Section 13 of the said Code relates to grants and rule 86 defines the kind of grants and rule 87 lays down what amount of grant is to be given in proportion to the expenditure incurred by the school.

8. Closely connected with these are the Maharashtra Secondary Education Board's Regulations, 1966, and. more particularly under item 19, which is headed 'Procedure for Recognition of Institutions by Division Boards. Clause (2) is as follows :-

> "(2) An application for recognition shall set out in full details the following particulars and shall be submitted in triplicate :-
> * * * *
> (iv) Whether the school has been recognized by the Education Department and if so, die standards for which it has been permitted to make provisions and the academic year in which it proposes to establish or has established the several standards.

(This is one matter amongst others that has to be mentioned.)

> (6) No secondary school which is not recognized by the Divisional Board concerned shall be permitted to present candidates for any final examination conducted by it.
> (7) No secondary school shall be recognized or continued to be recognized by a Divisional Board unless it fulfills the following requirements, namely :-
> (i) The Standards V, VI and VII attached the secondary school, if any, continue to be recognized by the Education Department.
> * * * *

(xvi) The school shall comply with the provisions of the Secondary Schools Code of the State Government in so far as they are not inconsistent with the provisions of the Act and the Regulations."

The effect of these regulations is that if a school is not recognized by the Education Department under the Grant-in-aid Code, the Secondary School Board cannot recognize it and no student taking education In such a school could appear for the S.S.C. School Leaving Certificate held by these Boards.

9. It has been held that rules made by the Grant-in-aid Code are merely executive instructions or directions and have no statutory force, in *Dwarka Nath v. State of Bihar*[1] In this case it was held that that being the position, such rules cannot be saved; cannot, therefore, deprive the appellants of their rights in the properties of the school under its management. It is, therefore, argued that the rules contravene provisions of Article 19(1)(c), 19(1)(g) and 19(1)(f) on the ground that the petitioners have fundamental right to form an association, to carry on or to undertake legitimate activity of running secondary school at Anjansinghi and the rules which enable the State Government to refuse recognition are not saved by clause (4) as they do not contain any guidance to the authorities concerned in the matter of refusing permission to start a school and they have no connection with public morality, etc., and hence are void. During argument it was also contended that rule was arbitrary and intended to enable discrimination between institution and institution and was hit by Article 14.

10. The first objection of Mr. Dharmadhikari is that the Society is not a citizen as it is a registered body, and, therefore, it has no right to make an application claiming rights under Article 19 which are available only to citizens. He relies upon the decision in *State Trading Corporation of India Ltd. v. Commercial Tax Officer*[2], and *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*[3], the Court adopted the doctrine of what is called lifting the veil. In the first case it was held that the State Trading Corporation, a company registered under the Indian Companies Act, 1956, is not a citizen within the meaning of Article 19 of the Constitution and cannot ask for enforcement of fundamental rights granted to citizens under the said article. In the latter case, it was held that if the Company itself cannot make an application for enforcement of fundamental rights, shareholders cannot be permitted to do so by permitting the lifting of the veil. In our view, these decisions have no application. In *Servants of India Society, Poona-4 v. The Charity Commr. of Bombay*[4], it was held by this Court that a Society registered: under the Societies Registration Act, 1860. is not a corporation, but is merely an association of persons, though for certain purposes it is recognized as an entity. This view has been later affirmed by the Supreme Court in Board of Trustees. *Ayurvedic and Unani Tibia College, Delhi v. State of Delhi*[5], Though, therefore, such a Society can sue through its President by reason of the provisions of the Act, the suit must be still regarded as being on behalf of the members who constitute the Society. It is indeed not every association of persons who do business or carry on trade that can be regarded as falling within the decision of the Supreme Court in the State Trading Corporation ease. AIR 1963 Supreme Court 1811, referred to above. To extend it to such association would mean that it

would extend to a partnership or even a joint family inasmuch as a partnership can sue in its partnership name and the joint family can sue through its Karta. The petition must be regarded as one made on behalf of the members of the Society who are all citizens of India and it is, therefore tenable.

11. Second objection of Mr. Dharmadhikari is that opening of an educational institution cannot be regarded as business and in support reliance is placed on *University of Delhi v. Ram Nath*[6], The question in the said case was whether the work of imparting education conducted by the educational institution like the University of Delhi and the college run by it was industry within the meaning of Section

[1] AIR 1959 SC 249 [3]AIR 1965 SC 40 [5] AIR 1962 SC 458
[2] AIR 1963 SC 1811 [4] AIR 1962 Bom 12 [6] AIR 1963 SC 1873

2(j) of the Industrial Disputes Act, 1947, and the Court held that it was not. This is no authority for the proposition that it is not a profession, or occupation or business. These are words of wide import and whether or not gain is made by an institution, it cannot cease to be business. A contention was also made that inasmuch as Article 30(1) refers especially to educational institutions, Article 19(1)(g) could not be intended to include such institutions. The scope of Article 19(1)(g) and Article 30 very much differ. : Article 19(1)(g) is a general guarantee of a particular kind of fundamental right in wide words, while Article 30 is intended to guarantee certain rights to minorities and unless in the enumeration of the rights, the right of education were mentioned probably, it would have been excluded. The difference in wording, therefore, cannot support this contention.

12. Mr. Deshpande contended first that the right to form association carried with it the right to carry on all activities of an association and since the rule prohibited the Society from running the school it must be held to be invalid. The rule does not prevent the formation of an association. It may have the effect of not allowing the Society to run the school and this is clearly the subject-matter of Article 19(1)(g).

13. Under Article 19 reasonable restrictions can be imposed in the interest of general public. The test of reasonableness has to be applied to each individual provision. In doing so, the Court must consider the nature of the right infringed, the underlying principle of the restrictions, the extent and the urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions. See *State of Madras v. V.G. Row*[7] and *Virendra v. State of Punjab*[8], The restriction must be also reasonable from substantive as well as procedural point of view. *Dr. Khare v. State of Delhi*[9], and *Gurbachan Singh v. State of Bombay*[10], Restriction of the right based on the subjective satisfaction of the executive is regarded as prima facie unreasonable, See *Raghubir Singh v. Court of Wards*[11], If the right is curtailed without there being an opportunity of being heard, restriction cannot be sustained.) *Dwarka Prasad v. State of U.P*[12].,

14. It is true that sometimes even subjective satisfaction may be regarded as reasonable provided it is otherwise controlled by proper safeguards as by prescribing the conditions for the exercise of

them. In deciding the reasonableness of the restriction the Court indeed is not concerned with the policy or the likelihood of its abuse. The tests however formulated above must be satisfied.

15. Clause (1) of Rule 3 is too vague to afford any standard whatsoever both as to need in the locality and also as to unhealthy competition with existing institution. Clause (2) is also equally vague as competency and reliability of the management without any standard is meaningless. Again, there is no provision that any particular authority shall make a reasonable inquiry into each of these matters and thereafter impartially determine each of the elements necessary to be considered. These rules, therefore, cannot be regarded as reasonable or reasonably necessary. The question as to whether they are in the public interest must also be considered in this connection. It is well known that the schools are very much congested and every sensible person will wish that the number of students in each class are limited so that the teacher could easily attend to all the students and impart
proper instruction. The public is tasting the fruits of monopoly businesses. It is well

[7]1952 SCR 597 [9]1950 SCR 519 [11]1953 SCR 1049
[8] AIR 1957 SC 896 [10](1952) SCR 737 [12] AIR 1954 SC 224

experienced that it is only competition that induces efficiency. If there are 2 or 3
institutions in a locality, those who want to study have not a choice and they would necessarily select the institution where the standard of education imparted is very high. In para 2 of the affidavit on behalf of the first two respondents made on August 19, 1966. in justification of this rule, it is said : -

> "Every year provision is made in the Budget Estimate for payment of grant-in-aid to the secondary schools. Having regard to the funds available, it is necessary to regulate the number of secondary schools to be opened every year and the payment of these grants. The Code contemplates giving of certain benefits and facilities by the Government to the secondary schools and the grants are paid in accordance with Rule 87 of the Code. In para 4, it is said :-
> "The provisions in the Code are made in the interest of the students and the institutions for serving the cause of education. They are also made to duly safeguard the interest of the Department and also of the parents and guardians. The provisions of the Code have been made for securing a healthy system of imparting education for the coming generation of the citizens."

In para 5, it is said : -

> "The provisions of Rule 2 of the Coda are made in order to ensure the excellence of the institution to be permitted, recognized and aided..... Therefore, it is in the public interest and also in the interest of the institution, parents and students to have a check at the very inception..... It is not difficult to perceive that the said rule is in the public interest and is

> designed to prevent, apart from other things, unhealthy competition in the field of Education which itself indirectly would have deleterious Influence on the general public..... The grant-in-aid which is given by the Government to a recognized school is on a percentage basis of admissible expenditure regulated by the provisions of Chapter 13 read with Schedule A of the Code."

In para 6 unhealthy competition is explained by saying –

> "There is ground to believe that pressure is brought upon the students as well as their guardians in one way or the other for leaving one school to join the other mostly without consideration of the quality of education imparted. Many times the authorities have received complaints that schools are opened by persons with the ulterior motive which has got many times group rivalries as its genesis."

It also refers to certain malpractices.

16. It is hardly possible for any person to subscribe to the view that merely because there nave been malpractices in the past, the very opening of an institution should be prevented in the expectation that every institution that is. started will commit malpractices. The prevention of unhealthy competitions, i.e., undue pressure either on students or on parents can be prevented by appropriate rules and not by refusing to recognise a school altogether in its inception. Though justification is sought to be made for this rule, the facts of the third petition clearly indicate that merely because some influential person asked a question in the Legislature, permission was granted within a very short time to start a school, though conditions were not fulfilled and it would result into competition as complained by Sakharkherda Educational Society. Regarding the competency of the management, no standards are laid down and in the affidavits submitted no particular reason is given for making such a provision. Originally, clause (2)(ii) of rule 2 provided that a management intending to start Standards V, VI, VII and VIII must deposit a sum of not less than Rs. 3,000 in cash and for such subsequent standard must deposit additional sum of Rs. 1,000 in cash. Financial stability can be assured by some such provision. Competency and reliability can be assured by proper rules in this connection. Such vague undefined standards cannot be used for refusing to recognize certain schools and recognize others. Such vague terms afford the executor to confer patronage.

17. As to the availability of funds in the budget it can hardly be accepted that refusing permission to start a school is the remedy. Instead of giving a sum in proportion to the allowable expenditure of a school, the grant could be based on so much percentage per student on the basis of so much number of students in a class. In such a case all schools would be treated fairly and equally.

18. As to the enquiry, on behalf of the State it was urged that a Committee was constituted consisting of Chairman, Education Committee of Zilla Parishads, (2) Parishad Education Officer,

Zilla Parishad and (3) a member of Secondary School Certificate Examination Board. It was also said that a circular was Issued which laid down certain principles for the guidance of these authorities. No provision, however, is made anywhere requiring compliance with rules of natural justice, i.e., of being heard in the matter. No obligation is laid upon the authority to hear the matter and decide impartially. These instructions are again not adequate and cannot serve the purpose. There is justification in the grievance. Admittedly the petitioners were not heard. Some sort of enquiry was made behind their back, probably from respondent No. 3 as alleged in their reply. This was wholly one-sided. There is no record of the same and there are no findings based on proper material.

19. In para. 5 of the same affidavit referred to above, it is stated, in days when no permission was needed, some schools were started and they never fulfilled conditions prescribed for recognition. Ultimately, students who went to such schools, their parents and teachers all suffered, including the general public. It is, therefore, said that these rules are necessary. This can be assured by proper rules. Merely because, in few cases there was cause for complaint such vague rules are not a remedy. It is not unknown that every great institution of today in the field of activity rose from very humble beginnings and as time went ft prospered and grew into fine educational institution. In the beginning each one of these had also to struggle and by maintaining proper standards of education to attract students. Our attention is invited to the decision in *State of Assam v. Ajit Kumar Sarma*[13], where Mr. Justice Wanchoo says :

> "What grants the State should make to private educational institutions and upon what terms are matters for the State to decide. Conditions of these grants may be

[13] AIR 1965 SC 1196

> prescribed by statutory rules; there is however no law to prevent the State from prescribing the conditions of such grants by mere executive instructions which have not the force of statutory rules."

Having observed as above, the Court held that :

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[14] AIR 1965 SC 1196

[15] AIR 1965 SC 1196

Having observed as above, the Court held that :

"Such conditions and instructions as to grant-in-aid confer no right on the teachers of the private colleges and they cannot ask that either a particular instruction or condition should be enforced or should not be enforced." The said observations of the Supreme Court contained a truism and cannot but be accepted. Thus, the rules related to grantsl public. It is, therefore, said that these rules are necessary. This can be assured by proper rules. Merely because, in few cases there was cause for complaint such vague rules are not a remedy. It is not unknown that every great institution of today in the field of activity rose from very humble beginnings and as time went ft prospered and grew into fine educational institution. In the beginning each one of these had also to struggle and by maintaining proper standards of education to attract students. Our attention is invited to the decision in *State of Assam v. Ajit Kumar Sarma*[16], where Mr. Justice Wanchoo says :

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20. It was also argued that the Societies having made applications for recognition under the self-sam grants the State should make to private educational institutions and upon what terms are matters for the State to decide. Conditions of these grants may be prescribed by statutory rules; there is however no law to prevent the State from prescribing the conditions of such grants by mere executive instructions which have not the force of statutory rules."

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interest, they must be held to be invalid.

20. It was also argued that the Societies having made applications for recognition under the self-same rules now really be estopped from challenging the rules. In support reliance is placed on the decision in *Mahant Narayana Dessjivaru v. State of Andhra, Hyderabad*[17], Whatever may be the position under other statutory provisions, rule of estoppel cannot apply in respect of fundamental rights as held in *Behram Khurshid Pesikaka v. State of Bombay*[18],

21. Mr. Dharmadhikari relied upon the decision in *Sidhrajbhai Sabbai v. State of Gujarat*[19], in support of his contention that whatever may be the result of non-recognition, the matter cannot fall within Article 19. In this case, the petitioners who were Christians belonged to the United Church of Northern India. They were conducting in the State of Gujarat, 42 primary schools and a training college for teachers at Borsad. The teachers trained in this institution were absorbed in the Society's primary schools and those not so absorbed, were employed by other Christian Mission schools conducted by the United Church of Northern India. It was receiving grant-in-aid from the Government. This college was recognized by the Government of Bombay for training students for examination held by the Education Department for granting certificates for trained teachers. In 1952, the Government ordered all private training colleges in the State to reserve 60 per cent of seats for training Muncipal Boards' school teachers nominated by the Government. The Society protested against the order as a result of which there were some negotiations in 1955. the Government directed that the reserved seats should be 80 per cent. As the Society refused to admit the quota of 80 per cent of the teachers in its school, the Government informed the Society that if the Society failed to communicate its willingness to comply with the requirement within seven days, the Government would be constrained to withdraw recognition accorded to the first year training college under Rule 11. The Society-moved the Supreme Court for a writ of mandamus against the Government. The Society contended that their fundamental rights guaranteed by Article 30(1)(f) and Article 26(a), (b), (cl and (d). Article 19(1)(f) and (g) were violated. It appears that the Government held examinations for granting certificates to successful candidates as trained teachers and the scholars receiving training in recognized institutions alone were entitled to appear at the examination in the absence of recognition by Government, the training in that college would have little practical value and without the grant of the Government, it would be very difficultgnised institutions alone were entitled to appear at the examination in the absence of recognition by Government, the

[17] AIR 1959 And Pra 471 [19] AIR 1963 SC 540
[18] AIR 1955 SC 123

training in that college would have little practical value and without the grant of the Government, it would be very difficult for the institution to function. The Court, while holding that rule 5(2) made by the Bombay Government for Primary Training C in that college would have little practical value and without the grant of the Government, it would be very difficult for the institution to function. The Court, while holding that rule 5(2) made by the Bombay Government for Primary Training Colleges and Rules 11 and 14 for recognition of private training institutions

in relation to reservation of seats violated the institution to function. The Court, while holding that rule 5(2) made by the Bombay Government for Primary Training Colleges and Rules 11 and 14 for recognition of private training institutions in relation to reservation of seats violated the fundamental freedom guaranteed to the petitioners under Article 30(1), observed, "No attempt is made by the order of the State toand Rules 11 and 14 for recognition of private training institutions in relation to reservation of seats violated the fundamental freedom guaranteed to the petitioners under Article 30(1), observed, "No attempt is made by the order of the State to deprive the petitioners of their right to property, and fundamental freedom guarantee by Article 10(1)(f) of the Constitution is therefore not violated. Nor is the right of the petitioners to practise any profession, or to carry on any occupation, trade or business guaranteed under Article 19(1)(g) of the Constitution infringed by the impugned rules and directions." In our judgement, this decision cannot be regarded as an authority for holding that if the effect of the rule is such as to deprive the petitioners of their right to conduct the school, Article 19(1)(g) cannot be violated. In that case, the Government was conducting examinations not under any statutory provisions, but in its executive powers. The School Board Examinations are held under the Maharashtra Secondary Education Board's Regulations and, therefore, by mere executive action, under the rule-framing power, the Government cannot deprive the petitioners of their right to conduct the school! and send pupils for the said examination.

22. Mr. Dharmadhikari relied upon the decision in *Ram Jawaya v. State of Punjab*[20], , in support of his contention that in exercise of its State functions, the Government would be entitled to carry on business which may have the effect of preventing others from doing similar business because of the nature of the business, cannot be said to infringe the fundamental right guaranteed under Article 19(1)(g). He says, if the Code in made in exercise of the executive function of the State, then it must be regarded as law. The above decision has no bearing on the point sought to be made. The State itself in its affidavit has recognized in para 12 of the affidavit dated July 4, 1965, that these are executive instructions being administrative in nature and have no statutory force. The above decision cited cannot apply because it merely held that the Government is entitled without any specific legislative sanction to do the business of printing and publishing school text-books and the mere fact that the private publishers who were till then supplying such books could not sell their books did not give them a right to question the business of the Government. In the present case S.S.C. Board's Examination is not something that is being privately done by the Government in its executive power. The examinations are held by a statutory Board and the Government cannot by mere framing of rules in such a way as to prevent boys taught in unrecognized schools from appearing only on the ground that it is not recognized by Government.

[20] AIR 1955 SC 549

23. There is another way of looking at the matter. Even if the rules framed in the Grant-in-aid Code are mere executive instructions, only for the purposes of making grants available to schools and the Government could prescribe conditions for making the grant, one cannot forget that the Government is dealing with public funds. It is not as in ancient days where the grant made by the

Government in aid of educational institutions was regarded as a bounty. While distributing the grant, it must comply with the fundamental requirements of the Constitutional law, one of them being the requirements of Article 14 of the Constitution, which provides against discrimination of any kind. The effect of these rules is that schools which are not recognized, cannot be recognized by the Secondary School Boards, and, boys taught in such schools cannot appear in examinations held by the Board. This examination is the foundation for University Education and the net result of these rules is that these boys cannot also take University education. These rules, therefore, offend Art 14, and must also be regarded as invalid.

24. It has not been argued before us that the fundamental right guaranteed by Article 19 is not available, because Proclamation of Emergency is in operation and Article 358 of the Constitution provides against it. In our view, even if it had been argued, prima facie it would not have made any difference to the result in the present applications. Article 356 says, "While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that part be competent to make or to take..." The rest is not material for the present. It is apparent at once on the plain reading of the Article that the restrictions contained in Article 19 would not affect the power of the State to make a law or to take any executive action if it is otherwise in its power. It is admitted in the present case that the State has not made any law as such and what is done is sought to be justified only under its executive functions under Rules of Business. Rules of Business provide for disbursing the funds set apart for giving aid to educational institutions. Under Article 162 of the Constitution, the executive power of the State extends to the matters with respect to which the Legislature of the State has power to make laws. But the said power is subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. There is no statute under which the executive is entitled to act and act to prevent legitimate activities of the citizens. It is true that in *Emperor v. Sibnath Banerjee*[21], the Judicial Committee held that the term "executive power" is wide enough to include not only the carrying out of the decisions but making of the decisions and in AIR 1955 Supreme Court 549, the Supreme Court held that the power extends to doing business without specific authority from the Legislation. Even so, it is hardly possible to contend that by relying on the article the executive can do away with legislation altogether and do what it likes in matters affecting citizens. This being so, as there is no basis enabling the executive to prevent by such a flat a legitimate activity of the Society, such rules in this respect, which have that effect, cannot be held to be within the powers of the Government. Article 358, therefore, prima facie, cannot save the said rules.

25. A grievance was also made by the petitioners that they were not even heard when their applications were rejected. In the third petition, the petitioner has urged that it was not even heard even though opening of another school would have affected it. There is

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justification for the grievance. But in view of what we have already said, it need not be

considered further.

26. The result is, clauses (1) and (2) of Rule 3 of the Grant-in-aid Code must be held to be invalid. It must further be held that the applications of the first two Societies were wrongly rejected. In their case, therefore, we make the rule absolute, direct that they be granted permission to start the school. In view of our judgment, the petitioner in the third case cannot make any grievance for the granting of permission to respondent No. 3 therein to start a school. The only way for it to attract students is to maintain better standards of education and better atmosphere. Its application, therefore, must fail and the rule must be discharged. Having regard to all the circumstances, in our view, there should be no order as to costs.
Petitions partly allowed.