

NARAINDAS INDURKHYA

v.

THE STATE OF MADHYA PRADESH & ORS.

March 18, 1974.

[A. N. RAY, C. J., H. R. KHANNA, K. K. MATHEW, A. ALAGIRISWAMI,
P. N. BHAGWATI, JJ.]

Madhya Pradesh Prathamik Middle School Tatha Madhyamik Shiksha (Pathya Pustakon Sambandhi Vyavastha) Adhiniyam, 1973, S. 4(1) and 4(2)—Whether State Government could prescribe text books in exercise of executive power—Education Board not expressly empowered to prescribe books—if could prescribe text books on languages—Distinction between recommendation and prescription—Whether consultation with Chairman of the Board would amount to consultation with the Board.

Constitution of India —Art. 14 and 19(1)(g)—If the Act violates Art. 162—Scope of.

By Section 8 of the Madhya Pradesh Madhyamik Shiksha Adhiniyam, 1965 the Board of Secondary Education was empowered to prescribe courses of instruction in such branches of Secondary education as it may think fit. The Board claimed that the power to prescribe courses of instruction carried with it by necessary implication the power to prescribe text books, and did prescribe text books on languages. This Act was replaced by the Madhya Pradesh Prathamik Middle School Tatha Madhyamik Shiksha (Pathya Pustakon Sambandhi Vyavastha) Adhiniyam, 1973. Section 4(1) empowered the State Government to prescribe text books according to syllabi laid down under s. 3. The proviso to sub-section (1) enacted that the text books for secondary education shall not be prescribed without prior consultation with the Board. Sub-section (2) of this section stated that the text books prescribed by the State Government or the Board and 'in force' immediately before the appointed day shall, till they are changed in accordance with the provisions of this Act, be the text-books prescribed for the purpose of sub-section (1). Sub-section (3) prohibited the use of any books other than the text books prescribed under sub-section (1) or referred to in sub-section (2) in any approved school or recognised school from the appointed day, that is, 23rd March, 1973. In exercise of the powers conferred by section 4(1) the State Government issued a notification dated 24th May, 73 giving its approval to certain text-books for the Higher Secondary School Certificate Examination in which it was stated that the approval of these text books was given by the State Government in consultation with the Board of Secondary Education. A notification was issued by the Board on 28th March, 1973 giving directions that the scheme of examination for the higher secondary school certificate examination 1976 shall continue as per the same examination in 1975 and that except for the language subjects the text-books recommended or prescribed by the Board for higher secondary school certificate examination 1975 in respect of other subjects shall be the recommended or prescribed text-books for the same examination for the year 1976.

The petitioner carried on business in printing, publishing and selling text-books for use in schools in the State. The petitioner was one of the publishers who registered himself with the Board and submitted text-books published by him for the approval of the Board. From among the books received for approval the Board recommended certain text-books but none of the text-books prescribed or recommended by the Board was text book printed and published by the petitioner.

In a petition under article 32 of the Constitution it was contended (1) that before the 1973 Act the State Government had no statutory authority to prescribe any text-books and, therefore, the text-books published by the Text Book Corporation and prescribed by the State Government could not be said to be validly prescribed and they could not be regarded as text-books 'in force' immediately before the appointed day under s. 4(2) of the Act, (2) that there was no statutory provision empowering the Board to prescribe any text-books on languages and the notification prescribing the text-books was ineffective because it was issued

A by the Board and not by the State Government which alone could prescribe the text-books under s. 4(1); (3) that the text-books recommended by the Board could not be regarded as text-books 'in force' immediately before the appointed day under s. 4(2) and the notification dated 28th March, 1973 issued by the Board did not have the effect of prescribing any of these text-books (4) that though the notification dated 24th May, 1973 stated that the approval to the text-books was accorded by the State Government in consultation with the Board, there was, in fact, no prior consultation as required by the proviso to sub-section (1) of section 4 and the notification was, therefore, void, and (5) that section 4 imposed unreasonable restrictions on the petitioner's right to carry on his business in as much as it did not provide adequate machinery for selection of text books and left it to the unfiltered and unguided discretion of the State Government and so was violative of articles 14 and 19(1)(g) of the Constitution.

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D HELD: The text-books printed and published by the Text-books Corporation were validly and lawfully prescribed by the State Government in exercise of its executive power and they were 'in force' immediately before the appointed day. These text-books accordingly fall within the category of prescribed text-books under s. 4(2) and s. 4(3) of the Act. The action of the State Government in prescribing the text-books, printed and published by the Text Book Corporation, to the exclusion of other text-books on the subject, did not infringe any right of the petitioner and other publishers and it was within the executive power of the State. The State Government could act in exercise of executive power in relation to any matter with respect to which the State legislature had power to make laws even if there was no legislation to support executive action; but such executive action must not infringe rights of any person. The fact that prior to 1973 there was no statutory provision like s. 4(1) of the 1973 Act which empowered the State Government to prescribe any text-books did not mean that the State Government was not entitled to prescribe these books in exercise of its executive power under article 162 of the Constitution. [638-D; B-C; 636 G]

Rai Sahib Ram Jawaya Kapur v. State of Punjab, [1955] 2 S.C.R. 225 followed.

E *Bennett Coleman & Co. v. Union of India* [1972] 2 S.C.R. 788, *State of Madhya Pradesh v. Thakur Bharat Singh*, [1967] 2 S.C.R. 454 referred to.

F (2) The Board has undoubtedly the power to prescribe courses of instruction in languages, but it does not include, as necessarily incidental to it, the power to prescribe text-books on languages. It is not correct to say that the course of instruction in language cannot be laid down except by reference to text books prescribed for the purpose. The prescription of text books on languages was outside the power of the Board and hence it was *ultra vires* and had no binding effect which would oblige the schools to use only those text books and no others. It is only the State Government and not the Board which is given power under s. 4(1) to prescribe text books and therefore, the notification dated 28th March, 1973 which was issued by the Board and not by the State Government was futile and ineffectual and did not have the effect of prescribing these text books under s. 4(1). The Board is a creature of the statute and unless the statute creating it invests it with power to prescribe text-books so as to make it obligatory on the schools to adopt such text books and no other for study and teaching, it can not claim to exercise such power. The Board also, cannot in the absence of power expressly or by necessary implication conferred on it by the statute, make it a condition of recognition of schools that they shall follow only the text books prescribed by it and no other text books shall be used by them for study and teaching. The Act of 1965 under which the Board was created did not in express terms give power to the Board to prescribe text books, nor did it provide anywhere that the Board shall be entitled to make it a condition of recognition that the schools shall use the text books prescribed by it and no others. [639 B; 640 B-D; 638 E-G]

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H (3) The notification dated 28th March, 1973 cannot be read as representing exercise of power under s. 4(1) and the status of prescribed text books could not be accorded to the four text books on the strength of this notification. [641 B]

There is a basic distinction between recommendation and prescription of text books. Prescription of a text book carries with it a binding obligation to follow the text book. There is no such obligation when a book is merely recommended.

No conferment of statutory power is needed to enable the Board to recommend text books and no question of *ultra vires* can arise in such a case. The text books were merely recommended and not prescribed by the Board and being only recommended text books, they obviously could not be said to be 'in force' immediately before the appointed day. Section 4(2) did not, therefore, apply in respect of these text books. [640 E-H]

(4) The notification dated 24th May, 1973 must be held to be invalid as being in breach of the mandatory requirement of the proviso to section 4(1) of the Act. It is clear beyond doubt that there was no prior consultation with the Board before the State Government issued the notification. The proviso to section 4(1) clearly lays down a condition for the exercise of power and unless this condition is satisfied the power cannot be exercised by the State Government. It is settled law that where the validity of an order depends on the fulfilment of a condition precedent and there is a recital in the order that the condition precedent is satisfied, the presumption arises in favour of the satisfaction of the condition precedent and the burden is on the person challenging the satisfaction of the condition precedent to prove that in fact the condition precedent was not satisfied. In the instant case the question as to what text books should be recommended to the State Government for prescription was not placed before the general meeting of the Board, nor was any resolution passed by the general meeting of the Board recommending any text books. The recommendations in regard to the text books were made by the Chairman of the Board, which were not made as an emergency measure nor was any power of the Board vested in the Chairman by the regulations. There is nothing in the Act or the regulations which says that consultation with the Chairman would be tantamount to consultation with the Board. The consultation which Government had before issuing the notification dated 24th May, 1973 was consultation with the Chairman and not with the Board. [644 E; 641F]

Swadeshi Cotton Mills v. The State of U. P. [1962] 1 S.C.R. 422, referred to.

(5) No fundamental right guaranteed to the petitioner under article 19(1)(g) was infringed, if the State Government, in exercise of the statutory power conferred under s. 4(1), did not prescribe text books printed and published by them. It is not possible to say that arbitrary and uncontrolled power has been vested in the State Government and on that account Section 4(1) is bad. The power to select and prescribe text books is not an unguided and unfettered power which leaves it free to the State Government to select and prescribe such text books as it may wantonly or capriciously please, but it is a power which is confined and embanked within limits by the object and purpose for which it is conferred. The State Government has to exercise this power in the light of the policy or principle that the best possible text books should be made available to the students. [648A; 649 D,B]

It is true that the power conferred on the State Government is a large, discretionary power and no machinery is laid down by the legislature which would ensure just and proper execution of the power by the State Government, but on that account alone conferment of the power cannot be held to be invalid. Whenever a discretionary power is conferred on any authority there is always a potential danger of its exercise or abuse, however much the legislature may try to hedge it with safeguards. But the mere possibility that the power may be misused or abused cannot *per se* induce the court to deny the existence of the power. The State legislature has conferred this power not to any petty official but to the State Government and that itself is a guarantee that the power would be exercised in conformity with the policy or principle laid down in the statute. [649G]

Matajob Dobe v. H. C. Bhari, [1955] 2 S.C.R. 925.

ORIGINAL JURISDICTION : Writ Petition No. 1177 of 1973
(Under Article 32 of the Constitution for enforcement of the fundamental rights).

A *B. Sen with K. P. Munshi, U. K. Khaitan and S. R. Agarwala, for the petitioner.*

Y. S. Dharmadhi Kari with Ram Punjwani and. I.N. Sharff. for the respondent 1-3 (In W. P. 1177)

B *V. N. Ganpule and Urmila Sirur for the respondent 4-6 (in W. P. 1177)*

The Judgment of the Court was delivered by

C BHAGWATI, J.—The petitioner carries on business of printing, publishing and selling text books for use in Primary, Middle schools and Higher Secondary classes in schools in the State of Madhya Pradesh. On 1st November, 1956, as a result of the reorganisation of States under the States Reorganization Act, 1956, a new State of Madhya Pradesh was formed comprising of territories of the existing States of Madhya Pradesh known as Mahakoshal area, the territories of the existing State of Madhya Bharat, excluding Sunel Tappa, Sironj Sub-Division of Kotah District in the existing State of Rajasthan and the territories of the existing States of Bhopal and Vindhya Pradesh. We are concerned in this petition mainly with Mahakoshal and Madhya Bharat regions of the State of Madhya Pradesh and we shall, therefore, so far as any references to the position obtaining prior to the reorganization of the States is concerned, confine our attention only to those two regions. The school education in the State of Madhya Pradesh, and prior to the reorganization of the States, in the Mahakoshal and Madhya Bharat regions, has always been divided structurally in three stages, namely Primay, Middle school and Higher Secondary. Primay education consists of classes I to V, Middle School, of classes VI to VIII and Higher Secondary of classes IX to XI. Primary and Middle school education may be considered together, for barring a short period upto the enactment of the Madhya Pradesh Secondary Education Act, 1959 (hereinafter referred to as the Act of 1959), when Middle school education was clubbed together with Higher Secondary education and was treated differently from Primary education. Middle school education has always been treated on the same basis as Primary education in contrast to Higher Secondary Education. It is not necessary for the purpose of the present petition to trace the history of the regulation of Primary and Middle school education from the inception. It would be sufficient to state that Primary education at all times and Middle school education, so far as Mahakoshal region is concerned, after the enactment of the Act of 1959, and in other regions even before that time, were regulated by the State Government. The State Government prescribed the courses of instruction and syllabi for all classes of Primary and Middle school education and they were followed not only by Government schools but also by private schools, not because of any statutory authority, but because most of the private schools depended on grant-in-aid from the State Government and unless the courses of instruction and syllabi prescribed by

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the State Government were followed by them, they would not be recognized by the Board of Secondary Education so as to be able to present their students for the examination to be held by the Board *a sine qua non* for admission to a university—unless their Primary and Middle schools sections were recognized by the State Government. So far as the text books for use in Primary and Middle school classes, were concerned, the State Government prescribed 29 text books printed and published by it on different subjects for use in different classes. There was of-course, no statutory provision under which these 29 text books could be prescribed by the State Government and the prescription of these 29 text books had, therefore, no statutory authority but private schools, no less than Government schools, accepted these 29 text books because non-acceptance would have involved stoppage of grant-in-aid from the State Government. In the meantime a Society called the Madhya Pradesh Pathya Pustak Rachna Avam Shaikshinik Anusandhan Nigam (hereinafter referred to as the Text Books Corporation) was formed by the State Government for the purpose of carrying on the work of printing, publishing and distributing text books for use in the Primary and Middle school classes in the State of Madhya Pradesh. The Minister incharge of the portfolio of education was an ex-officio Chairman of the text Books Corporation, while some officers of the Government connected with the Education Department were ex-officio members along with certain other non-official members nominated by the State Government. The Text Books Corporation was registered under the Madhya Pradesh Societies Act, 1959 and according to the provisions of that Act, it was to function on a no profit-no loss basis. The initial resources of the Text Books Corporation were provided by the State Government by giving a loan of Rs.15 lacs for the purpose of enabling it to commence its operations. The Text Books Corporation was by its very constitution controlled by the State Government and it was intended to function as an agency of the State Government. The work of printing and publishing of text books was, however, not commenced immediately by the Text Books Corporation and until the end of the academic year 1970-71, the aforesaid 29 text books printed and published by the State Government continued to be prescribed and used in the Primary and Middle school classes.

There was, however, a change in the course of instruction and syllabi in some of the subjects from the academic year 1971-72. The State Government by a notification dated 18th May, 1971 prescribed improved courses of instruction and syllabi in certain subjects to be followed from the academic year 1971-72 and directed that so far as courses of instruction and syllabi in the other subjects were concerned, they should continue to be the same as in the previous academic year 1970-71. The aforesaid 29 text books printed and published by the State Government, not being in accordance with the new courses of instruction and syllabi so prescribed, were rendered useless and in their place, new text books had to be brought out which would be in conformity with such new courses of instruction and syllabi. The Text Books Corporation accordingly printed and published 28 text books in accordance with the new courses of instruction and syllabi and these

- A 28 text books were prescribed by the State Government by a notification dated 21st May, 1971 for use in the Primary and Middle school classes for the academic year 1971-72. The number of text books printed and published by the Text Books Corporation was reduced from 29 to 28 because one text book, namely, Bal Bharati Praveshika, which was printed and published by the State Government as a separate book, was amalgamated by the Text Books Corporation with Bal Bharati Part I. These 28 text books brought out by the Text Books Corporation were referred to by the State Government as 'nationalised text books' as the Text Books Corporation was merely an agency set up by the State Government for carrying out the work of printing, publishing and distribution of text books. The State Government made it clear in the notification dated 21st May, 1971 that so far as the other subjects were concerned for which such 'nationalised' text books were not available, the schools were free to use according to their convenience such books of private publishers as they liked, provided they were written in accordance with the courses of instruction and syllabi for the academic year 1970-71. The result was that in the Primary and Middle school classes for the academic year 1971-72, the above mentioned 28 text books, printed and published by the Text Books Corporation, were used exclusively as text books for the subjects dealt with by them, while for the other subjects text books printed and published by private publishers were used according to the convenience of the schools. The courses of instruction and syllabi for the next academic year 1972-73 were prescribed by the State Government by a notification dated 10th May, 1972 and by this notification the State Government introduced new courses of instruction and syllabi in certain subjects and with regard to the rest, directed that the same courses of instruction and syllabi as also the same text books shall continue to be in use as in the academic year 1971-72. The same 28 text books, printed and published by the Text Books Corporation, revised in accordance with the new courses of instruction and syllabi where necessary continued to be prescribed as text books for the academic year 1972-73. The Text Books Corporation thereafter brought out eight further text books making in the aggregate 36 text books printed and published by then and as appears from the circular dated 30th August 1973 issued by the Director of Public Instruction, an order dated 23rd March 1973 was issued by the State Government prescribing these 36 text books for use in the Primary and Middle school classes. This order had not been challenged in the present petition or in the voluminous affidavits filed on behalf of the parties and it need not therefore engage our attention. The learned counsel appearing on behalf of the petitioner did make an attempt in the course of the argument to challenge the validity of this order but when we pointed out to him that there was no challenge against it in the petition and it was, therefore, not open to him to assail its validity on the petition as it stood he rightly withdrew his attack. This, of-course, does not mean that the petitioner cannot challenge the validity of this order in any other appropriate proceeding which he may take for that purpose, provided he has valid grounds for doing so.
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So far as Higher Secondary education is concerned, it was regulated by the Madhya Pradesh Education Act, 1951 in the Mahakoshal region

and by the Madhya Bharat Secondary Education Act, Samvat 2007 in the Madhya Bharat region. It is not necessary to refer to the provisions of these two statutes, for both of them were repealed by the Act of 1959 which was enacted by the Legislature of the new State of Madhya Pradesh after the reorganisation of that State. Section 3 of that Act provided for the incorporation of the Board of Secondary Education and s. 4 laid down its composition. The powers of the Board were set out in s. 8, which provided *inter alia* that the Board shall have the power to prescribe courses of instruction in such branches of Secondary Education as it may think fit. Sections 18 and 19 constituted a salient and distinguishing feature of this Act. They were based on the recommendations made by the Secondary Education Commission, 1952-53 set up by the Government of India. The Secondary Education Commission suggested in its report that it was necessary that "all political and other extraneous influence must be eschewed in the selection of text books" for use in Higher Secondary classes and this was possible only if a high power committee was entrusted with this task. What should be the constitution of this high power committee and what functions must be assigned to it also formed the subject matter of recommendations made by the Secondary Education Commission. These recommendations formed the basis for the enactment of ss. 18 and 19. Section 18 provided for the constitution of a committee called the Text Books Committee which was to consist of distinguished independent persons who would be free from political and other extraneous influences and they included *inter alia* a sitting or retired Judge of the High Court or a District Judge, a member of the State Public Service Commission, a Vice-Chancellor of a university in the State and two leading educationists. The functions of the Text Books Committee were defined by s. 19 to be as follows :

"(1) to select text books for prescribed courses of instructions and syllabi for Secondary Education;

(2) to prepare a panel of expert reviewers for each of the subjects included in the secondary school education curriculum;

(3) to appoint expert committees consisting of not more than three members from amongst the panel of experts to examine and submit a detailed report on the suitability of the books referred to them;

(4) to invite experts to write text books and other books of study, if necessary,——"

Though one of the functions entrusted to the Text Books Committee was to select text books for prescribed courses of instruction and syllabi, no power was given to the Board to *prescribe* the text books selected by the Text Books Committee. The Board, however, claimed to have the power to prescribe text books in languages on the ground that the power to prescribe courses of instruction and syllabi in languages carried with it by necessary implication the power to prescribe text books and on that view, the Board, on the basis of the selections made by the Text Books Committee, prescribed text books in English, Hindi, Marathi and Sanskrit.

A The Madhya Pradesh Madhyamik Shiksha Adhiniyam 1965 (hereinafter referred to as the Act of 1965) was enacted by the Madhya Pradesh Legislature on 29th September 1965 and by s. 30, it repealed the Act of 1959. Section 3 of that Act provided for the incorporation of the Board of Secondary Education and its constitution was laid down in s. 4. Section 8 defined the powers of the Board which included *inter alia* the power:

B “(a) to prescribe courses of instruction in such branches of Secondary Education as it may think fit;

C (m) to advise the State Government as to the courses of instruction and syllabi of Middle School Education with a view to secure co-ordination between Middle School and Secondary Education;

D The last quoted cl.(m) of s. 8 clearly postulated that the State Government has the power to prescribe courses of instruction and syllabi for Middle School classes. Section 24 empowered the Board to constitute various committees which included *inter alia* Committees of Courses and their constitution, powers and duties were to be provided by regulations made by the Board under s. 28. The Board in exercise of the power conferred under s. 28 made the Board of Secondary Education, Madhya Pradesh Regulations, 1965 (hereinafter referred to as the Regulations). Regulation 30 provided that the Board shall appoint Committees of Courses in the subject enumerated in that regulation and each Committee of Courses was enjoined by regulation 32 to “lay down a syllabus in the subject or subjects with which it is concerned, and recommend suitable text books when called upon to do so”. It was not stated in the Regulations as to who could call upon the appropriate Committee of Courses to recommend suitable text books but obviously what was contemplated was that the Board would require the appropriate Committee of Courses to make recommendations in regard to text books. Now, the Board was not given the power to prescribe text books, and therefore, the recommendation of suitable text books invited from the appropriate Committee of Courses could only be for the purpose of enabling the Board in its turn to recommend such text books for use by schools in the Higher Secondary classes. In fact, the Board did not claim to exercise the power to prescribe text books on any subjects other than languages.

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G The Board prescribed text books only on languages and so far as the other subjects were concerned, the Board merely recommended text books on some of those subjects.

H The procedure followed by the Board for prescribing or recommending text books under the Act of 1965 and the Regulations was as follows: The Board invited publishers desiring to get their text books selected to register themselves with the Board and several publishers accordingly got themselves registered and the petitioner was one of them. The detailed instructions and specifications in regard to the text books

on matters such as quality of paper, number of pages, price etc. were laid down by the Board and the registered publishers were invited to submit text books prepared in accordance with such instructions and specifications for selection by the Board. The registered publishers then got the text books written by authors of their choice in conformity with the prescribed courses of instruction and syllabi and printed in accordance with the instructions and specifications given by the Board and submitted such text books to the Board for selection. The text books which were received from the registered publishers were then sent to three reviewers appointed by the Board for the relevant subject for evaluation after removing the title page, the names of the author and the publisher and every other matter that might indicate the identity of the author or the publisher. On receipt of the report of the reviewers such of the text books as were rated high by the reviewers were sent to the appropriate Committee of Courses together with the report of the reviewers for the purpose of making its recommendations. The appropriate Committee of Courses after scrutinising the text books and considering the evaluation made by the reviewers made its recommendation to the Board as regards the merits of the text books submitted for its consideration. The Chairman of the Board then, by virtue of the authority conferred upon him by the Resolution of the Board dated 12th October, 1971, selected the text books after considering the report of the reviewers and the recommendation of the appropriate Committee of Courses and the text books so selected were prescribed or recommended, as the case may be, by the Board. This procedure gave opportunity to all the registered publishers to submit their text books for selection by the Board and provided a machinery for selection of the best text books to be recommended or prescribed by the Board.

The record before us does not show precisely what were the language on which text books were prescribed by the Board, but it does appear from the affidavits and the notification dated 28th March, 1973 issued by the Board, that text books were prescribed by the Board for most of the languages taught in the primary and middle schools, barring General English and Tamil for classes IX and X. So far as the text books recommended by the Board were concerned, there were four notifications issued by the Board from time to time recommending text books on different subjects for classes IX and X for the period commencing from the academic year 1972-73 for the Higher Secondary School Leaving Certificate Examination, 1975. The first was a notification dated 5th April, 1972 by which the Board recommended six textbooks on Civics, the second was a notification dated 25th April, 1972 by which the Board recommended five text books on Economics, the third was a notification dated 26th April, 1972 by which the Board recommended eight text books on Physics and the fourth was a notification dated 17th May, 1972 by which the Board recommended eight text books on Chemistry. There were thus four subjects on which text books were recommended by the Board. It was not seriously disputed on behalf of the petitioner that the procedure set out above

- A** for selection of text books was substantially followed by the Board in prescribing text books on languages and recommending text books on these four subjects. None of the text books prescribed or recommended by the Board was a text book printed and published by the petitioner. The petitioner had submitted text books on Civics, Physics and Chemistry for selection by the Board but they were rejected by the reviewers as they were found to be below standard and were printed on poor quality paper and were also costlier than the text books submitted by other registered publishers.

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- C** This was the position which obtained when the Madhya Pradesh Prathamik, Middle School Tatha Madhyamik Shiksha (Pathya Pustakon Sambandhi Vyavastha) Adhiniyam, 1973 (hereinafter referred to as the Act of 1973) was enacted by the Madhya Pradesh Legislature. This Act came into force on 23rd March, 1973 being the date appointed under sub-s. (3) of s. 1. The provisions of this Act are material and we may refer to them. Section 2, cl. (e) defines 'text book' in the widest possible terms and according to this definition, it means any book approved by the State Government in accordance with the syllabi prescribed under the Act for use for any examination conducted under the authority of the State Government or by the Board or held in an approved school or a school recognized by the Board and includes other books of study or instructional material such as maps, designs and other material of like nature approved by the State Government for any standard of primary education, middle school education or secondary education in accordance with the syllabi laid down under the Act. Section 3, sub-s. (1) provides that the State Government may from time to time in relation to primary education and middle school education and the Board may from time to time in relation to Secondary education, lay down syllabi and publish the same in such manner as may be prescribed and sub-s. (2) of s. 3 says that the syllabi laid down under the authority of the State Government in the case of primary education and middle school education and by the Board in the case of secondary education and in force immediately before the appointed day, i.e., 23rd March, 1973 shall be the syllabi laid down and published for the purpose of sub-s. (1) of s. 3. Then comes section 4 which deals with the prescription of text books according to syllabi laid down under s. 3. Since that is the section which is impugned in the present petition, we may reproduce it :

- G** "4(1) The State Government may, by order, prescribe the text books according to syllabi laid down under section 3; Provided that text books for secondary education shall not be prescribed without prior consultation with the Board.

- H** (2) The text books prescribed by the State Government or the Board according to the syllabi referred to in sub-section (2) of section 3 and in force immediately before the appointed day shall, till they are changed in accordance with the provisions of this Act, be the text books prescribed for the purpose of sub-section (1).

(3) As from the appointed day, no books other than the text books prescribed under sub-section (1) or referred to in sub-section (2) shall be used in any approved school or recognized school for imparting instructions in accordance with syllabi in primary education, middle school education or secondary education."

The State Government is also given power under s. 5 to undertake the preparation, printing or distribution of text books itself or to cause the text books to be prepared, printed or distributed through such agency as it thinks fit on such terms and conditions as may be prescribed. Section 6 provides that the text books prescribed by the State Government for any standard of secondary education shall be text books prescribed for such standard of secondary education in accordance with the syllabi and the Board shall be bound to accept the same when so prescribed by the State Government. Then follows section 7 which deals with delegation of power and the last is section 8 which confers power on the State Government to make rules for carrying out all or any of the purposes of the Act. It was common ground between the parties that no rules have so far been made by the State Government under this section.

Soon after the coming into force of the Act of 1973, the Board issued a notification dated 28th March, 1973 which contained *inter alia* the following directions :

1. The syllabus and scheme of examination for the Higher Secondary School Certificate Examination 1976 shall continue as per the Higher Secondary School Certificate Examination, 1975.
2. Leaving aside General English and Tamil for classes IX and X, so far as the rest of the subjects are concerned, the text books recommended or prescribed by the Board for the Higher Secondary School Certificate Examination 1975 shall be the recommended or prescribed text books for the Higher Secondary School Certificate Examination, 1976.

The State Government thereafter in exercise of the power conferred under s. 4, sub-s. (1) of the Act of 1973 issued a notification dated 24th May, 1973 according its approval to certain text books on Botany, Zoology, History, Element of Commerce and English for the Higher Secondary School Certificate Examination, 1976. It was recited in the notification that the approval to these text books was given by the State Government in consultation with the Board.

The petitioner thereupon filed the present petition claiming various reliefs under Art. 32 of the Constitution. Several contentions were raised in the petition which has the great demerit of being a highly prolix and confused document, not easily yielding to analysis, but it is not necessary to delve into the petition to find out all the contentions taken there, since at the hearing the learned counsel for the petitioner confined his arguments only to the following contentions :

- A** A. Prior to the enactment of the Act of 1973 the State Government had no statutory authority to prescribe any text books for the primary and middle school classes and the notifications dated 21st May, 1971 and 10th May, 1972 issued by the State Government prescribing 28 text books printed and published by the Text books Corporation for use in some of the primary and middle school classes were, therefore, without the authority of law and these 28 text books could not be said to be validly prescribed by the State Government nor could they be said to be 'in force' immediately before the appointed day, and if that be so, they could not be regarded as text books prescribed under sub-s. (2) of s. 4.
- B** B. Though text books on languages were prescribed by the Board, there was no statutory provision empowering the Board to do so and the prescription of these text books by the Board was, therefore, without the authority of law and these text books could not be said to be validly prescribed by the Board or to be 'in force' immediately before the appointed day so as to qualify for being regarded as text books prescribed under s. 4, sub-s. (2). The Notification dated 28th March, 1973 undoubtedly provided that these text books shall be prescribed text books for the period commencing from the academic year 1973-74, but that Notification was ineffective to prescribe any text books under s. 4, sub-s. (1) because it was issued by the Board and not by the State Government which alone could prescribe text books under s. 4, sub-s. (1).
- C** C. The Board by issuing the notifications dated 5th April, 1972, 25th April, 1972, 26th April, 1972 and 17th May, 1972 merely recommended certain text books on Civics, Economics, Physics and Chemistry. These text books were not prescribed by the Board and they were not 'in force' immediately before the appointed day. They could not, therefore, be regarded as text books prescribed under s. 4, sub-s. (2). Though the notification dated 28th March, 1973 was issued after the appointed day, it did not have the effect of prescribing any of these text books under s. 4, sub-s. (1), firstly, because it was issued by the Board and not by the State Government, and secondly, because it did not more than merely direct that these text books shall be recommended text books for the period commencing from the academic year 1973-74.
- D** D. Though the notification dated 24th May, 1973 recited that the approval to the text books mentioned in the notification was accorded by the State Government in consultation with the Board, there was in fact no prior consultation with the Board as required by the proviso to s. 4, sub-s. (1) and the notification prescribing these text books, was therefore, null and void.
- E** E. Section 4 imposed unreasonable restrictions on the right of the petitioner to carry on his business of printing publishing and
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distributing text books for use in Primary, Middle School and Higher Secondary Classes, inasmuch as it did not provide a proper and adequate machinery for selection of the best available text books and left it to the unguided and unfettered discretion of the State Government to prescribe at its own sweet will such text books as it liked without providing any standard or guidance which would regulate the exercise of such discretion and it was, therefore, void as being violative of Art. 19(1)(g) of the Constitution. This section was also violative of the equality clause contained in Art. 14 of the Constitution inasmuch as it enabled the State Government to discriminate between one publisher and another by leaving it to the unrestrained will of the State Government to prescribe such text books as it liked without laying down any machinery which would ensure selection of the best available text books by giving equal opportunity to all publishers.

These were the only contentions urged on behalf of the petitioner which need to be considered and we shall now proceed to examine them.

Re : A.

This contention relates to 28 text books printed and published by the Text Books Corporation. The State Government prescribed these 28 text books for use in the primary and middle school classes at the time when the Act of 1973 had not been enacted and the question is whether the State Government was entitled to do so. There was, ofcourse, then no statutory provision, like s. 4, sub-s. (1) of the Act of 1973, which empowered the State Government to prescribe any text books and the prescription of these 28 text books had, therefore, no legal force. But that does not mean that the State Government was not entitled to prescribe these 28 text books in exercise of its executive power under Art. 162 of the Constitution. The executive power of the State Government under Art. 162 extends to all matters with respect to which the State Legislature has power to make laws and since education is a subject which falls within entry 11 of List II of the Seventh Schedule to the Constitution, the State Government could apparently in exercise of its executive power prescribe these 23 text books, provided that in doing so it did not trench on the rights of any person. It is now well settled by the decision of this Court in *Rai Sahib Ram Jawaya Kapur v. State of Punjab*(1) that the State Government can act in exercise of executive power in relation to any matter with respect to which the State Legislature has power to make laws, even if there is no legislation to support such executive action, but such executive action must not infringe the rights of any person. If the executive action taken by the State Government encroaches on any private rights, it would have to be supported by legislative authority, for under the rule of law which prevails in our country every executive action which operates to the prejudice of any person must have the authority of law to support it. Vide paragraph 27 of the judgment of this Court in *Bennett Coleman & Co. v. Union of India*.(2) The executive action of the State Government in entering upon the business

(1) [1955] 2 S.C.R. 225.

(2) [1972] 2 S.C.C. 788.

- A of printing, publishing and selling text books in *Rai Sahib Ram Jawaya's* case (1), though not supported by legislation, was upheld because it did not operate to the prejudice of any person. This Court took care to point out that if it were "necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed".
- B The same view was reiterated by this Court in *State of Madhya Pradesh v. Thakur Bharat Singh*(2) where referring to the decision in *Rai Sahib Ram Jawaya's* case(1) this Court pointed out that in that case it specifically held that "by the action of the Government no rights of the petitioners were infringed, since a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen : the State had merely entered upon a trading venture. By entering into competition with the citizens, it did not infringe their rights". It would, therefore, seem that the State Government could prescribe these 28 text books in exercise of its executive power provided that such action did not infringe the rights of anyone.
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- D Now, so far as Government schools are concerned, the State Government could always, as the authority owning and conducting those schools, prescribe the text books to be used by the students in those schools. The prescription of such text books by the State Government would not infringe the rights of any publisher, because, as pointed out by this Court in *Rai Sahib Ram Jawaya's* case,(1) there is no right in a publisher that "any of the books printed and published by him should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future". With regard to the private schools also the position is the same. All private schools have to seek recognition by the State Government for two reasons. Firstly, by reason of Regulation 61, cl. (b), it is a condition of recognition of a school by the Board that its primary and middle sections should be recognized by the State Government
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- F and secondly, it is only recognized schools which are eligible for grant-in-aid from the State Government. Both these are highly compelling reasons. There are hardly any schools which have no Higher Secondary section and that means they must have recognition by the Board, but this they cannot have unless they are recognized by the State Government in respect of their primary and middle sections. Besides, having regard to the high costs of maintenance in running a school, it is not possible for any school to function without grant-in-aid from the State Government and in order to qualify for grant-in-aid, the school must be recognized by the State Government. Now, one of the main conditions on which recognition is granted by the State Government is that the school authorities must use as text books only those which are prescribed or authorised by the State Government. Thus, even though there is no law which confers power on the State Government
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- H to prescribe text books, the State Government can by virtue of the need of the private schools for recognition, prescribe text books for them

(1) [1955] 2 S.C.R. 225.

(2) [1967] 2 S.C.R. 454

and oblige them to use such text books. So far, therefore, as the private schools are concerned, the choice of text books rests entirely with the State Government. No publisher has any right to insist that any of his books shall be accepted as text books by the State Government. He has merely a chance or prospect of any or some of his books being approved as textbooks by the State Government. "Such chances are", to use the words of Mukherjee, C.J., in *Rai Sahib Ram Jawaya's case*,⁽¹⁾ "incidental to all trade and business" and there can be no infringement of any right, if by an action of the State Government such chances are taken away. The action of the State Government in prescribing 28 text books printed and published by the Text Books Corporation, to the exclusion of other text books on the subject did not therefore infringe any right of the petitioner and other publishers and it was within the executive power of the State Government. This view is completely supported by the decision in *Rai Sahib Ram Jawaya's case*. (1)

It must, therefore follow that 28 text books printed and published by the Text Books Corporation were validly and lawfully prescribed by the State Government in exercise of its executive power and they were 'in force immediately before the appointed day. These text books accordingly fall within the category of prescribed text books under sub-s. (2) of s. 4. and under s. 4. subs. (3) the approved and recognized schools were under an obligation to use these text books and no others so far as they related to the subjects for which they were prescribed.

RJ: B.

It is elementary that the Board is a creature of the statute and unless the statute creating it invests it with power to prescribe text books so as to make it obligatory on the schools to adopt such text books and no others for study and teaching, it cannot claim to exercise such power. The Board also cannot, in the absence of power expressly or by necessary implication conferred on it by the Statute, make it a condition of recognition of the schools that they shall follow only the text books prescribed by it and no other text books shall be used by them for study and teaching. The Act of 1965 under which the Board is created does not in express terms give power to the Board to prescribe text books, nor does it provide anywhere that the Board shall be entitled to make it a condition of recognition that the schools shall use the text books prescribed by it and no others. Even the Regulations made by the Board under s. 28 of the Act of 1965 do not make it a requirement of recognition that only the text books prescribed by the Board shall be used by the schools. Vide Regulation 61. The only question is whether there is anything in the Act of 1965 which by necessary implication confers power on the Board to prescribe text books. It was not seriously disputed by the learned Advocate General appearing on behalf of the respondents that the Board has no power to prescribe text books generally but his contention was that, so far as languages are concerned, the power to prescribe courses of instruction, which is admittedly vested in the Board, carries with it by necessary implication the power to prescribe text books, because

(1) [1955] 2 S.C.R. 225.

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courses of instruction in languages cannot be prescribed otherwise than by reference to particular text books selected for the purpose. It was urged by the learned Advocate General that it is only through particular selected text books that courses of instruction in languages can be prescribed, and therefore, the Board has, as necessarily incidental to its power of prescribing courses of instruction, the power

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to prescribe text books on languages. This contention is not well founded and cannot be sustained. The Board has undoubtedly the power to prescribe courses of instruction in languages, but it does not include, as necessarily incidental to it, the power to prescribe text books on languages. It is not correct to say that the course of instruction in language cannot be laid down except by reference to text books prescribed for the purpose. The course of instruction in language would cover topics such as grammar, composition, prose and poetry. So far as grammar and composition are concerned, there can be no doubt that course of instruction can be laid down without prescribing any text books and in fact we find from the prospectus issued by the Board from time to time that no text books were prescribed by the Board and yet the course of instruction could be laid down with sufficient clarity and precision by reference to various topics such as nouns, verbs, adverbs, adjectives, tenses, complex sentences and so on and so forth. The course of instruction in prose and poetry can be easily prescribed by reference to prose passages, short stories, articles, essays and poems of different authors and for this purpose it is not necessary to prescribe any particular text books containing such prose passages, short stories, articles, essays and poems. In fact, once these prose passages, short stories, articles, essays and poems are prescribed as part of the course of instruction, different publishers would come out with different text books compiling these materials and presenting them in intelligible, instructive and useful form. These different text books may vary one from the other, in presentation, style, annotations, comments, elucidations, explanatory notes, quality of printing, price etc. Some may be more intelligible and useful than the others. The chief merit of a text book on prose and poetry would really lie not in mechanical reproduction of the prose passages, short stories, articles, essays and poem prescribed by the Board, which can be done by any publisher, but in the annotations, comments, elucidations and explanatory notes given by the author with a view to inculcating in the students greater understanding and keener appreciation of the literary and other qualities of such prose passages, short stories, articles, essays and poems. Any one of these text books may be prescribed by the Board and that would be wholly different from prescribing the course of instruction. We may illustrate our point by an example. Take a case where a play of Shakespeare is to be prescribed. There are several editions of Shakespearian plays. There is the Cambridge edition; there is the Arden edition; there is the Warwick edition and there are a host of other editions. The play of Shakespeare can be prescribed by referring to its title, as for example, Hamlet or King Lear. It is not necessary, in order to prescribe such play as a part of the course of instruction, that a particular edition of such play should

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also be prescribed as a text book. The two are entirely distinct propositions. The power to prescribe courses of instruction in languages does not require for its effectual exercise prescription of text books and the power to prescribe text books cannot be read by necessary implication in the power to prescribe courses of instruction.

It is, therefore, clear, and this conclusion can hardly be disputed, that the prescription of text books on languages was outside the power of the Board and hence it was *ultra vires* and had no binding effect which would oblige the schools to use only these text books and no others. These text books could not in the circumstances be said to be prescribed by the Board, nor could they be said to be in force, immediately before the appointed day so as to attract the applicability of s. 4, sub-s. (2), and they could not claim the status of prescribed text books under s. 4, sub-s. (2). These text books could not also be regarded as text books prescribed under s. 4, sub-s. (1) on the basis of the notification dated 28th March, 1973. It is only the State Government and not the Board, which is given power under s. 4, sub-s. (1) to prescribe text books, and therefore, the notification dated 28th March, 1973, which was issued by the Board and not by the State Government, was futile and ineffectual and did not have the effect of prescribing these text books under s. 4, sub-s. (1). These text books could not, therefore, be regarded as text books prescribed under sub-s. (1) or referred to in sub-s. (2) of s. 4 and in the circumstances there was no obligation on the approved and recognised schools to use only these text books and no others under sub-s. (3) of s. 4.

Re: C.

This contention is self-evident and does not need any elaborate argument. It may be noted that there is a basic distinction between recommendation and prescription of a text book. When a text book is prescribed by an appropriate authority having legal power to do so, it has to be followed by the schools. Prescription of a text book carries with it a binding obligation to follow the text book. There is no such obligation when a text book is merely recommended. Recommendation has merely a persuasive effect, it being open to the schools to accept the recommendation or to reject it as they think fit. The schools may use the recommended text book or they may not according as the principals choose. That is why no conferment of statutory power is needed to enable the Board to recommend text books and no question of *ultra vires* can arise in such a case. Now the text books which formed the subject matter of the notifications dated 5th April, 1972, 25th April, 1972, 26th April, 1972 and 17th May, 1972 were merely recommended and not prescribed by the Board and being only recommended text books as distinguished from prescribed text books, they obviously could not be said to be 'in force' immediately before the appointed day. Section, 4, sub-s. (2) did not, therefore, apply in respect of these text books and they could not be regarded as text books prescribed under s. 4, sub-s. (2). The respondents placed strong reliance on the notification dated 28th March, 1973 but it is difficult to see how this notification can be of any help to the respondents. This notification was admittedly

- A** issued by the Board and not by the State Government and moreover it did not even purport to prescribe these text books but merely directed that these text books shall be recommended text books for the period commencing from the academic year 1973-74. It is, therefore, not possible to read this notification as representing exercise of power under s. 4, sub-s. (1) and the status of prescribed text books could not be accorded to these text books on the strength of this notification.
- B** These text books could not accordingly be regarded as prescribed text books either under sub-s. (1) or under sub-s. (2) of s. 4, and section 4, sub-s. (3) could not be invoked for contending that these text books alone should be used in the approved and recognised schools to the exclusion of text books of other publishers.

Re: D.

- C** The validity of the notification dated 24th May, 1973 was challenged under this head of contention on the ground that the State Government by this notification prescribed certain text books for the Higher Secondary classes without prior consultation with the Board and the notification was, therefore, invalid as being in contravention of the proviso to s. 4, sub-s. (1). Now, it is clear on a plain reading of s. 4, sub-s. (1) that though power is conferred on the State Government to prescribe text books for Higher Secondary classes, this power cannot by reason of the proviso, be exercised by the State Government without prior consultation with the Board. The proviso clearly lays down a condition for the exercise of the power and unless this condition is satisfied the power cannot be exercised by the State Government. Any attempted exercise of the power without complying with this condition would be null and void. The question which, therefore, requires to be considered is whether the State Government issued the notification dated 24th May, 1973 after prior consultation with the Board. Now there is a recital in the notification that the approval to the text books mentioned in the notification was given by the State Government in consultation with the Board. This recital throws the burden of proving that there was no prior consultation with the Board on the petitioner. It is settled law that where the validity of an order depends on the fulfilment of a condition precedent and there is a recital in the order that the condition precedent is satisfied, the presumption arises in favour of the satisfaction of the condition precedent—the burden is on the person challenging the satisfaction of the condition precedent to prove that in fact the condition precedent was not satisfied. See *Swadeshi Cotton Mills v. The State of U. P.* (1). The petitioner would, therefore, have to show by producing proper and adequate material that though the notification recited that the State Government had consulted the Board prior to the issue of the notification, there was in fact no such prior consultation with the Board. If the petitioner can establish this, the notification would have to be held to be invalid as being in contravention of the proviso to s. 4, sub-s. (1).
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- H** Now it is clear from paragraph 134 of the affidavit filed by Chaturvedi, Deputy Secretary to the Government of Madhya Pradesh,

(1) [1962] 1 S.C.R. 422.

Education Department in reply to the petition that text books on Botany, Zoology, English, Elements of Commerce, History and Geography were invited by the Board from the registered publishers and various registered publishers submitted their text books on one or more of these subjects for selection and approval by the Board. The petitioner also availed of this opportunity and submitted text books on History and Geography. The text books received from the various registered publishers were then sent to the reviewers for evaluation, there being a different set of expert reviewers for each subject, and on receipt of the report of the reviewers, these text books, at any rate most of them chosen in the order of merit given by the reviewers, were placed before the appropriate Committee of Courses along with the report of the reviewers. The appropriate Committee of Courses after scrutinising the text books placed before it and considering the evaluation made by the reviewers, submitted its recommendations to the Board and the Chairman of the Board, agreeing with the recommendations made by the appropriate Committee of Courses, forwarded them to the State Government as recommendations of the Board. It appears that no recommendations in regard to text books on Geography were forwarded by the Chairman of the Board to the State Government as all the text books on Geography submitted for selection and approval were found to be below the requisite standard. The State Government then issued the notification dated 24th May, 1973 prescribing text books on Botany, Zoology, English, Elements of Commerce and History in accordance with the recommendations forwarded by the Chairman of the Board. It will be seen from these facts that the question as to what text books should be recommended to the State Government for prescription was not placed before the general meeting of the Board, nor was any resolution passed by general meeting of the Board recommending any particular text books. The recommendations in regard to the text books were made by the Chairman of the Board. This was indeed not disputed by the learned Advocate General but his contention was that the Chairman was entitled to act on behalf of the Board in making recommendations and the recommendations made by him in regard to text books were in the eye of the law recommendations of the Board. Now, there can be no doubt that if the recommendations made by the Chairman could be regarded as recommendations of the Board, the requirement of the proviso to s. 4, sub-s. (1) would be satisfied. But we do not think it is possible to take this view. (What the proviso to s. 4, sub-s. (1) requires is that there should be prior consultation with the Board, and therefore, it is the Board which must give its opinion and advice to the State Government in regard to the prescription of text books. Now the Board may act by resolution passed at general meeting but as pointed out above, there was no resolution passed at general meeting of the Board recommending any text books. It was the Chairman who recommended the text books and the question, therefore, is whether the Chairman could exercise the power of the Board to make recommendations to the State Government so that the recommendations made by the Chairman could in law be said to be recommendations of the Board. The powers and duties of the Chairman are to be found in s. 15 of the

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- A Act of 1965. Sub-s. (1) of s. 15 does not help, for it merely says that it shall be the duty of the Chairman to see that the Act and the Regulations are faithfully observed and he shall have all powers necessary for that purpose. Sub-s. (2) of s. 15 has also no relevance in this connection. Then there is sub-s. (3) of s. 15 which provides that in any emergency arising out of the business of the Board, which
- B in the opinion of the Chairman requires that immediate action should be taken, the Chairman shall take such action as he deems necessary and shall thereafter report his action to the Board at its next meeting. This sub-section is clearly inapplicable as it is not the case of the respondents that there was any emergency arising out of the business of the Board which necessitated the taking of immediate action by the Chairman. The recommendation of the text books was not
- C made by the Chairman as an emergency measure—at any rate, that was not the plea taken by the respondents. Sub-s. (4) of s. 15 is a sort of residuary provision which confers power on the Chairman to “exercise such other powers as may be vested in him by Regulations”. But there is nothing in the Regulations which vests in the Chairman the power of the Board to recommend or give advice in relation to text books to be prescribed by the State Government. In fact, no power of the Board is vested in the Chairman by the Regulations. Thus, we do not find anything in the Act or in the Regulations which provides that the power of the Board to recommend or give advice in relation to text books to the State Government—which power is necessarily by implication conferred on the Board under s. 4, sub-s. (1) proviso—shall be exercisable by the Chairman so that consultations with the Chairman would be tantamount to consultation with the Board. Realising this difficulty, the learned
- D Advocate General relied on a decision of the Board dated 12th October, 1971, Ex. 9 to the affidavit in reply filed by Chaturvedi on behalf of the respondents, and contended that by this decision the Board authorised the Chairman to take all necessary steps for the purpose of proceeding further with the work of the text books improvement scheme which consisted of selection and approval of text
- E books for the purpose of prescription or recommendation by the Board, and the Chairman was, therefore, entitled to act on behalf of the Board in recommending or giving advice in relation to text books to the State Government. Now we do not dispute the general proposition that when a power or function is given by the statute to a corporate body and no provision is made in the statute as to how such power or function shall be exercised, the corporate body can by a resolution passed at a general meeting devise its own mode of exercising such power or function, such as authorising one or more of the members to exercise it on behalf of the Board. But here this broad proposition would have no application. There are several provisions in the Act of 1965 which provide for delegation of the powers and functions of the Board to the Chairman and other Committees by means of Regulations. If, therefore, any power or function of the Board is intended to be made exercisable by the Chairman, that can only be done through the mechanism of the Regulations. The Board cannot, by a resolution passed at a general meeting, authorise the
- F Chairman to exercise a particular power or function entrusted to the
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Board. The decision of the Board dated 12th October, 1971 cannot, therefore, help the respondents even if it were construed as authorising the Chairman to exercise the power of the Board to recommend or give advice in relation to text books to be prescribed by the State Government. But in fact we do not think it can be so construed. This decision merely authorises the Chairman to take all necessary steps for the purpose of proceeding further with the implementation of the text books improvement scheme and it does not confer any authority on him to exercise a power of the Board which he otherwise did not possess. In any event the authority conferred by this decision cannot include the exercise of a statutory function which came to be vested in the Board for the first time on 23rd March, 1973 when s. 4, sub-s. (1) was enacted. We are, therefore, compelled to reach the conclusion that the only consultation which the State Government had before issuing the notification dated 24th May, 1973 was consultation with the Chairman and not with the Board. The recommendation of text books by the appropriate Committee of Courses also could not be regarded as consultation with the Board, because the power or function to give opinion or advice in relation to text books to be prescribed by the State Government came to be conferred on the Board for the first time on the enactment of s. 4, sub-s. (1) and there is no Regulation which delegates this power or function to the appropriate Committee of Courses. It is, therefore, clear beyond doubt that there was no prior consultation with the Board before the State Government issued the notification dated 24th May, 1973 and this notification must accordingly be held to be invalid as being in breach of the mandatory requirement of the proviso to s. 4, sub-s. (1).

Re : E.

The argument of the petitioner under this head of challenge was that s. 4, sub-s. (1) vested power in the State Government to prescribe text books for use in schools at primary, middle and secondary education levels and by reason of s. 4, sub-s. (3) it became obligatory on the schools to use only the text books so prescribed and no others for imparting instruction to the students. The effect of the combined reading of sub-ss. (1) and (3) of s. 4 was that once the text books were prescribed by the State Government under s. 4, sub-s. (1), the schools were precluded from using any other text books for the purpose of imparting instruction to the students. This directly interfered with the business of the petitioner for, if the text books printed and published by the petitioner were not selected and approved by the State Government, the petitioner would not have any market for the sale of his text books and that would prejudicially affect his business. The petitioner did not seriously contend that it was not open to the legislature to provide by legislation for standardisation of the courses of instruction and syllabi and prescription of text books but his grievance was that the machinery provided by the legislature for this purpose was unconstitutional. The petitioner pointed out that he could have no grievance if the Legislature provided an independent body of experts like the Text Book Committee constituted under the

- A Act of 1959, for prescribing text books. The provision for such independent body would ensure fair and equal treatment to all printers and Publishers of text books and eliminate arbitrariness in the matter of selection of text books for prescription. But here the State Government was constituted the authority for selection and prescription of text books and unfettered and uncanalised power was vested in the
- B State Government without any guidelines to control and regulate the exercise of such power and without there being anything which would ensure proper execution of the power or operate as a check on the injustice that might result from improper execution of the same. The State Government could in exercise of its absolute and uncontrolled discretion select and prescribe any text books it liked without consulting any experts on the subject and this might not only result in wrong, and improper evaluation of the merits of the text books submitted for
- C the consideration of the State Government but also lead to arbitrariness and personal as well as political nepotism. The conferment of such unguided and uncontrolled power on the State Government in the matter of selection and prescription of text books contravened the fundamental right to carry on business guaranteed under Art. 19(1) (g) and was also violative of equality clause contained in Art. 14 and sub-
- D ss. (1) and (3) of s. 4 were, therefore, liable to be struck down as invalid. We do not think this contention of the petitioner is well founded. It must fail for reasons which we immediately proceed to give.

- One thing is clear that in order to achieve a uniform standard of excellence in education in all the schools within the State, it is necessary that there should be uniform courses of instruction which are properly thought out and devised by experts on the subject and for giving proper and adequate training in such courses, there should be standardised text books. That would not only ensure uniformity in standard but also achieve efficiency in instruction. Moreover, it would prevent us of poor quality text books which frequently find way in the schools on account of certain dubious financial arrangements between the management and the printers and publishers of those text
- E books. It is, therefore, in the interest of proper and healthy education of children that scientifically planned courses of instruction should be laid down and text books of high merit and excellence should be prescribed. That can never be regarded as unreasonable. Now when the Legislature decides to adopt this course, the Legislature must necessarily entrust the task of laying down courses of instruction and prescribing text books to some authority fitted and equipped for this purpose.
- F We are concerned here only with prescription of text books and we will, therefore, confine our attention to that subject. The Legislature, when it enacted the Act of 1959, left the task of selecting and prescribing text books to be performed by the Text Books Committee but under s. 4, sub-s. (1) of the Act of 1973 the Legislature has provided that this task shall be performed by the State Government. Now it can hardly be disputed that for the purpose of selection and prescription of text books, the machinery of Text Books Committee would be more efficient and objective, and inspiring of greater confidence as to its fairness and impartiality of than that of the State Government.
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but on that account alone the entrustment of the power of selection and prescription of text books to the State Government cannot be regarded as bad. The Legislature may choose one of several methods available to it for achieving its legislative and the Court cannot interfere simply because it thinks that another method is better and should have been adopted by the Legislature. for ultimately it is for the Legislature in exercise of its legislative judgment to determine which of many possible methods it should in the circumstances adopt. It is a matter of policy for the Legislature to decide to which authority it would entrust the power to select and prescribe text books and so long as the authority chosen by the Legislature is not inappropriate or inadequate for the task, no complaint of unconstitutionality in the law can be made on the ground that some other authority which appears to be better could have been chosen by the Legislature. The question which has, therefore, to be considered in adjudging the constitutionality of s. 4, sub-ss. (1) and (3) is not whether a better machinery could have been chosen by the Legislature for selecting and prescribing text books but whether the machinery which is in fact provided by the Legislature is violative of any of the fundamental rights of the petitioner.

So far as the claim of the petitioner based on infraction of the fundamental right under Art. 19(1) (g) is concerned, that stands completely negated by the decision in *Rai Saheb Ram Jawaya's case*.⁽¹⁾ We have already referred to this decision earlier but in order to appreciate how it applies in the context of the present claim, it is necessary to notice the facts of that case in some detail. The procedure which was framed by the State of Punjab prior to May 1950 for selection and approval of text books for use in schools was that the State Government used to invite publishers and authors to submit their books for examination and approval by the Education Department and the State Government, after scrutiny, selected out of them a certain number of text books, any one of them could be used by the schools. This procedure was slightly altered in May 1950 and under the altered procedure, the State Government took upon itself the monopoly of publishing text books in some of the subjects and with regard to the rest, the State Government selected and approved text books—not several as before but only one on each subject—out of those submitted by the publishers and authors and reserved for itself a certain royalty on the sale proceeds of such approved text books. In 1952, however, changes of a far more drastic character were introduced by a notification dated 9th August, 1952 issued by the State Government. By this notification the State Government took over the publishing, printing and selling of text books exclusively in its own hands and the private publishers were altogether ousted from this business. The petitioners who were a firm carrying on the business of preparing, printing, publishing and selling text books there-upon moved this Court under Art. 32 of the Constitution praying for writs of mandamus directing the State Government to withdraw the notifications of 1950 and 1952 on the ground that they contravened the fundamental right of the petitioners under Art. 19(1) (g). This Court, however, took the view that no fundamental right of the petitioners to carry on their

(1) [1955] 2 S. C. R. 225

A business of preparing, printing, publishing and selling text books was infringed by the notifications issued by the State Government in furtherance of their policy of nationalisation of text books for students and the petitioners were, therefore, not entitled to any relief under Art. 32 of the Constitution. Mukherjea, C. J., speaking on behalf of a unanimous Court, pointed out:

B "The procedure hitherto followed was that the Government used to invite publishers and authors to submit their books for examination and approval by the Education Department and after selection was made by the Government, the size, contents as well as the prices of the books were fixed and it was left to the publishers or authors to print and publish them and offer them for sale to the pupils. So long as this system was in vogue the only right which publishers, like the petitioners had, was to offer their books for inspection and approval by the Government. They had no right to insist on any of their books being accepted as text books. So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but if he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever. On the one hand, therefore, there was nothing but a chance or prospect which the publishers had of having their books approved by the Government, on the other hand the Government had the undisputed right to adopt any method of selection they liked and if they ultimately decided that after approving the text books they would purchase the copyright in them from the authors and others provided the latter were willing to transfer the same to the Government on certain terms, we fail to see what right of the publishers to carry on their trade or business is affected by it. Nobody is taking away the publishers' right to print and publish any books they like and to offer them for sale but if they have no right that their books should be approved as text books by the Government it is immaterial so far as they are concerned whether the Government approves of text books submitted by other persons who are willing to sell their copyrights in the books to them, or choose to engage authors for the purpose of preparing the text books which they take up on themselves to print and publish.—The action of the Government—does not amount to an infraction of the fundamental right guaranteed by Article 19(1) (g) of the Constitution."

H These observations are equally applicable where the State Government instead of prescribing text books in exercise of its executive power does so in exercise of statutory power such as that conferred

under s.4, sub-s.(1). No fundamental right guaranteed to the petitioners under Art. 19(1)(g) is infringed if the State Government in exercise of the statutory power conferred under s. 4, sub-s. (1) does not prescribe text books printed and published by him. The challenges based on Art. 19(1) (g) must, therefore, fail.

That takes us to the challenge based on Art. 14 of the Constitution. This Article ensures equality before law and strikes at arbitrary and discriminatory State action. Where State Government exercises any power, statutory or otherwise, it must not discriminate unfairly between one person and another. Every State action must be guided by certain norms and standards which are in themselves not objectionable as being discriminatory in character. If power conferred by statute on any authority of the State is vagrant and unconfined and no standards or principles are laid down by the statute to guide and control the exercise of such power, the statute would be violative of the equality clause, because it would permit arbitrary and capricious exercise of power, which is the anti-thesis of equality before law. Such a case would fall within the second proposition laid down by this Court in *Jyoti Pershad v. Administrator for the Union Territory of Delhi*.

"The enactment of the rule might not in terms enact a discriminatory rule of law but might enable an unequal or discriminatory treatment to be accorded to persons or things similarly situated. This would happen when the legislature vests a discretion in an authority, be it the Government or an administrative official acting either as an executive officer or even in a quasi-judicial capacity by a legislation which does not lay down any policy or disclose any tangible or intelligible purpose thus clothing the authority with unguided and arbitrary powers enabling it to discriminate."

It can, therefore, hardly be disputed that if s. 4, sub-s. (1). were found to confer a naked and arbitrary power on the State Government to select and prescribe such text books as it pleases in exercise of its absolute and uncontrolled discretion without any guiding principle or policy to control and regulate the exercise of such discretion, it would be in violation of the constitutional mandate of equality before law. The State Government would then be able to choose the text book of any publisher it likes and prescribe it as a text book even though it is inferior in quality than the text book of another publisher. That would enable the State Government to exercise its power arbitrarily and capriciously and discriminate at its sweet will between one publisher and another. But we do not think s. 4, sub-s. (1) suffers from this lethal infirmity. It does not vest an arbitrary uncontrolled discretion in the State Government to select and prescribe such text books as it likes irrespective of their merit and quality. The object or purpose for which the power to select and prescribe text books is conferred on the State Government is to ensure uniformity of standard

- A and excellence in instruction which can be achieved only if standardised text books of high quality and merit are used in the schools. This object or purpose furnishes guidance to the State Government in exercising its power of selecting and prescribing text books. The power to select and prescribe text books is thus not an unguided and unfettered power which leaves it free to the State Government to select and prescribe such text books as it may want only or capriciously please,
- B but it is a power which is confined and embanked within limits by the object and purpose for which it is conferred. The State Government cannot, therefore, act arbitrarily or capriciously in selecting or prescribing text books but it has to exercise this power in the light of the policy or principle that the best possible text books, possessing the highest degree of merit and quality, should be made available to the students. This standard or criterion, gatherable from the object and purpose of the Statute, controls and regulates the exercise of the power by the State Government and it is by reference to this yard-stick that the exercise of the power by the State Government is canalised and kept within bounds. If the State Government in selecting and prescribing text books does not follow this standard or criterion, the prescription of text books made by the State Government, and not s. 4, sub-s. (1)
- C would be liable to be condemned as invalid. It is not possible to say that arbitrary and uncontrolled power has been vested in the State Government and on that account s. 4, sub s. (1) is bad.
- D

- It was however, contended on behalf of the petitioner that even if there is any guidance provided by the Legislature, it is futile because the power conferred on the State Government is a very wide discretionary power and it can easily lend itself to misuse or abuse in the hands of the executive without any one being able to pinpoint or demonstratably show such misuse or abuse of power. The apprehension which was voiced was that since there is no machinery provided by the Legislature which would ensure just and proper execution of the power by the State Government according to the guidelines laid down by the Legislature, the State Government may with impunity act arbitrarily or capriciously and the selection and prescription of text books by it may not only be vitiated by wrong evaluation of the merit and quality of text books but may also conceivably be actuated by personal or political corruption or nepotism on the part of those exercising the power on behalf of the State Government. Now, it is true, and there, can be no doubt about it, that the power conferred on the State Government is a large discretionary power and no machinery is laid down by the Legislature which would ensure just and proper execution of the power by the State Government but on that account alone the conferment of the power cannot be held to be invalid. Whenever a discretionary power is conferred on any authority, there is always a potential danger of its misuse or abuse, however much the Legislature may try to hedge it with safeguards. But the mere possibility that the power may be misused or abused cannot *per se* induce
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- H the Court to deny the existence of the power. It cannot be overlooked that the Legislature has confided this power not to any petty official but to the State Government and that itself is a guarantee that the power

would be exercised in conformity with the policy or principle laid down in the Statute. As said by this Court in *Matajob Dobey v. H. C. Bhari*(1) "A discretionary power is not necessarily a discriminatory power and abuse of power is not easily to be assumed where the discretion is vested in the Government and not in a minor official." We have no doubt that if the law is administered by the State Government "with an evil eye and an unequal hand" or there is misuse or abuse of power by the State Government, the arms of this Court would be long enough to reach it and to strike down such misuse or abuse with a heavy hand. We may point out that State Government has not yet made rules under s. 8 of the Act of 1973 prescribing the machinery which it would adopt in selecting and prescribing text books. It is quite possible that when such machinery is prescribed by the State Government it will allay any apprehension of possible misuse or abuse of power by the State Government. If, on the other hand, it is found that such machinery operates so as to deny equality of treatment to private publishers similarly circumstanced, it may become vulnerable to attack under Art. 14 of the Constitution.

We are not unmindful of the fact—and that is a matter which has caused us great anxiety—that the power to select and prescribe text books for obligatory use by students in schools can be a potent and powerful weapon in the hands of the executive to inculcate its social, economic or political philosophy and ideology in young impressionable minds which have not yet developed the capacity to think independently for themselves and which are easily amenable to the thoughts, ideas and influences to which they are continually exposed. The State Government, controlled by a political party having a particular social, economic and political philosophy or ideology, may use the power of selecting and prescribing text books for indoctrinating the highly receptive and sensitive minds of young boys and girls and stifling the growth and development of free thought which is so essential for maintenance of democratic way of life. It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. As pointed out by Mr. Justice Holmes in *Abramson v. United States* (2) "the ultimate good desired is better reached by free trade in ideas—the best test of truth is the power of the thought to get itself accepted in the competition of the market". There must be freedom of thought and the mind must be ready to receive new ideas, to critically analyse and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest. That is why our *Vedic* prayer says : "Let noble thoughts come to us from all sides". The text books which are selected and prescribed or use in schools must not, therefore, be such as project only a particular social, economic or political philosophy or ideology. The mind of the young students must not be 'cribbed, cabined and confined' by thoughts and ideas which form the social, economic or political philosophy or ideology of the political party which is for the time being

(1) [1955] 2 S.C.R. 925

(2) 250 U.S. 616

- A** controlling the State Government. It is, therefore, necessary that in the selection and prescription of text books all political and other extraneous influences should be eliminated. The only objective must be to give to the students the best possible text books possessing the highest degree of merit and quality from a purely objective and academic point of view so as to lead to a healthy development of the
- B** personality of the students and make them truly nationalist, patriotic, service-minded and useful members of the society. That is the reason why the Secondary Education Commission recommended the constitution of a high power committee which would be in charge of the function of selecting and prescribing text books. It is true that under the Act of 1973 there is no provision for constituting such a high
- C** power committee and instead, the power to select and prescribe text books is vested in the State Government. But there is nothing to prevent the State Government from setting up an independent high power committee on the lines indicated by the Secondary Education Commission for the purpose of assisting it in the task of selecting and prescribing text books. This can be done by the State Government by making appropriate rules under s. 8 of the Act of 1973 and there is no reason to suppose that the State Government will not do so.
- D** Be that as it may, it is clear from the aforesaid discussion that the power to select and prescribe text books conferred on the State Government under s. 4, sub-s. (1) is not an unguided and unfettered power and s. 4, sub-s. (1) is not liable to be struck down as invalid on the ground of contravention of Art. 14, and if that be so, s. 4 sub-s. (3) also does not incur the condemnation of that article.
- E** We, therefore, allow the petition and make the rule absolute to a limited extent. We declare that the text books on languages prescribed by the Board as also the text books which formed the subject matter of the notifications dated 5th April, 1972, 25th April, 1972, 26th April, 1972 and 17th May, 1972 issued by the Board—both of which categories of text books were purported to be continued by the notification dated 28th March, 1973—are not prescribed text books
- F** within the meaning of sub-s. (1) or sub-s. (2) of s. 4. We also issue a writ quashing and setting aside the notification dated 24th May, 1973 issued by the State Government. So far as the other reliefs claimed by the petitioner are concerned, the petition is rejected and the rule will stand discharged. There will be no order as to costs.