

(2019) 08 CAL CK 0006

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 16345 (W) Of 2004

Ahinsa Prachar Samity & Ors

APPELLANT

Vs

Director Of School Education & Ors

RESPONDENT

Date of Decision : 05-08-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 11, 141
West Bengal Minorities Commission Act, 1996 — Section 2(c)
Delhi School Education Act, 1973 — Section 8(2), 10, 12
West Bengal Schools (Control Of Expenditure) Act, 2005 — Section 2(m)
West Bengal Minorities Commission Act, 1996 — Section 2(c)
Management Of Recognized Non- Government Institutions (Aided And Unaided) Rules, 1969 — Rule 33
Constitution Of India, 1950 — Article 12, 13(2), 13(3), 19, 25, 26, 27, 28, 29, 30, 30(1), 39(d), 45, 143(1), 154(1), 161, 161(1), 162, 226

Citation : (2019) 08 CAL CK 0006

Hon'ble Judges : Shampa Sarkar, J

Bench : Single Bench

Advocate : Shuvro Prokash Lahiri, Shaunak Ghosh, Rajib Mullick, Rakesh Sarkar, Tapan Kumar Mukherjee, Ranjan Saha

Final Decision : Dismissed

Judgement

Shampa Sarkar, J

1. The petitioner No.1 is a society registered under the Societies Registration Act, 1860 and is engaged in establishment management and running of schools and educational institutions in the city of Kolkata. The object being welfare and charity. The petitioner No.1 established a school under the name and style of Shri Digambar Jain Vidyalaya (hereinafter referred to as the said school). The petitioner Nos.2 and 3 are the Honorary Secretaries of the said school. The petitioners claim that the said school was a private unaided minority institution, run for the betterment of the Jain community and thus entitled to rights enshrined under Article 30 of the Constitution of India. According to the petitioners the society was separate in its identity from the said school. The said

school was autonomous in its management and finances and did not get any financial support from the society. Some of the approved teachers of the said school were getting dearness allowance (in short DA) from the State of West Bengal. The said school however retained its identity as a private unaided DA getting minority institution.

2. The petitioners in this writ petition, have, challenged the memorandum dated May 29, 2002 bearing No.641-SE (Law)/5S-577/2001 issued by the special Secretary to the Government of West Bengal, School Education Department, (hereinafter referred to as the said memorandum). The petitioners have prayed for a declaration that the said memorandum was contrary to law, without jurisdiction and ultra vires the Constitution of India and ought to be quashed and set aside.

3. By the said memorandum the Government of West Bengal School Education Department, Law Branch informed the authorities of all DA getting schools recognized by the West Bengal Board of Secondary Education, which received DA for the approved teaching and non-teaching staff, from the Government of West Bengal would have to pay salary in their appropriate scale of pay from their own resources at par with the salary prescribed by the State Government for teaching and non-teaching employees of Government aided schools with immediate effect. The said memorandum is set out below:-

"No. : 641- SE (LAW) Dated: Kolkata, 29.05.2002

5S- 577/2001

To : The Director of School Education, West Bengal

Staff Council, Gyan Bharati Vidyapith & Anr., - vs. - State of West Bengal & Others.

The undersigned is directed to say that pursuant to the order of the Hon'ble High Court dated October 8, 2001 in W.P. No.707 of 2002 in the case of Staff Council Gyan Bharati Vidyapith and Ans. -vs.- State of West Bengal & Ors., the matter regarding payment of salaries to the approved teaching and non-teaching employees of D.A. getting schools recognised by the West Bengal Board of Secondary Education at the rate of at least not less than what the teaching and non-teaching employees of the recognised Govt. Aided Schools are being paid, keeping in view the direction issued to the Anglo-Indian schools has been taken up for consideration.

After due consideration of the matter, it is decided that the authorities of all D.A. getting schools recognised by the West Bengal Board of Secondary Education in the state which receive D.A. component for the approved teaching and non-teaching staff of their schools from the Govt. Of West Bengal will have to pay salary in the appropriate scale of pay from their own resources to the approved teaching and non-teaching employees at the rate prescribed by the State Govt.

For teachers and non-teaching employees of the Govt. Aided Schools with immediate effect.

It is also decided that the approved teaching and non-teaching employees of those D.A. getting schools will get D.A. from the Govt. (on percentage basis) at the rate as is admissible to other employees of State Govt. Aided Education Institutions as is announced from time to time by the state, in supersession of all the previous orders issued from the Govt. To this effect, provided that these posts were duly sanctioned by the Govt. And appointment of teaching and non-teaching staff to these posts were approved by the Govt. It is reiterated in this connexion that no school will claim D.A. for the staff who is/are not approved and is/are not within the sanctioned strength.

The Director of School Education, West Bengal is requested to inform the authorities of all D.A. getting schools to follow the order so that the approved teaching and non-teaching employees of these D.A. getting schools are paid their salaries by them, as per decision. D.A. component will only be released by the D.I. on verification of monthly acquaintance rolls of the approved staff.

This order will take immediate effect.

Sd/- D. Basu

Spl, Secretary to the Govt. Of West Bengal

Kolkata, the 5th June, 2002"

4. The background leading to the issuance of the said memorandum requires discussion. By a judgment and order dated October 8, 2001 a learned Single Judge of this Court in W.P. No.707 of 2000 (In re:- Staff Council, Gyan Bharati Vidyapith vs. State of West Bengal & Anr.) directed that the Secretary Education Department (Secondary Education), Government of West Bengal should take a decision as to why the policy adopted by the State Government in respect of Anglo Indian and listed schools towards payment of salaries to the teaching and non-teaching staff thereof, at the rate not less than that of government aided schools would not be adopted in respect of DA getting schools. On the basis of the said direction, the Special Secretary to the Government of West Bengal School Education Department issued the said memorandum. The relevant portion of the judgment is quoted below:-

"In a recent judgment this Court has held that if an institution is not paying salaries to teachers and non-teaching staff at the minimum rate prescribed by the State, it does not acquire even the right to apply for recognition. While the State has thought about those institutions which have come into being much later, the State has not thought anything about those institutions which were established earlier and has not applied the same policy in relation to those institutions too.

I think the Government must look into this aspect of the matter and I,

accordingly, direct the Secretary, Education Department (Secondary Education), Government of West Bengal to decide and communicate to the petitioners within a period of a months from date as to why a similar policy, as has been adopted by the Government in relation to the Anglo Indian and listed schools, shall not be adopted in relation to those aided school which are being paid Dearness Allowance for the teachers only.

This disposes of the writ petition.

All parties concerned including the Secretary, Education Department (Secondary Education), Government of West Bengal, are to act on a Xeroxed signed copy of this Dictated Order on the usual undertaking."

5. The teachers of Gyan Bharati Vidyapith had filed the above writ petition on the allegation that although the State of West Bengal was granting DA to them and the school was recognized by the West Bengal Board of Secondary Education, they were not being paid salaries at the minimum rate at which salaries were being paid to the teachers of recognized government aided schools. The learned Single Judge was of the view that just like the Government issued directions upon the Anglo Indian schools, which were minority institutions to pay salaries to the teaching and non-teaching staff at the rate not less than what was being paid to the teachers and non-teaching staff of the government aided schools, similarly, the Government should make an endeavour to ensure that a similar policy was adopted for DA getting schools. The writ petition filed by these teachers was disposed of by the judgment and order dated October 8, 2001. The said memorandum was thus issued pursuant to the said judgment and order.

6. Thereafter, nine (9) teachers of the said school filed a writ petition bearing W.P. No.5103 (W) of 2003 (In re: Sri Mahendra Narain Pathak vs. State of West Bengal, through the Secretary, School Education Department, Bikash Bhavan, Salt Lake, Kolkata) before this Court praying for a direction upon the authority of the said school to implement the said memorandum. The said school was impleaded as respondents in the proceeding, through the Secretary of the Managing Committee as the respondent No.6, the Secretary of the said school was the respondent No.7 and the teacher-in-Charge of the said school was the respondent No.8 in the above writ petition. The grievance of the teachers of Shri Digambar Jain Vidyalaya was that despite the issuance of the said memorandum by the Government of West Bengal, the school authority was not paying salary to them at the rate paid to their counterparts in other government aided schools. It was alleged that the school authority had completely disregarded the said memorandum and as a consequence whereof, the State Government had also stopped releasing the DA in respect of the approved teachers. The aforesaid writ petition was disposed of by a judgment and order dated November 17, 2003 with a direction upon the school authority to pay salary in favour the petitioners therein in accordance with the said memorandum. The arrear payments were also directed to be made within a period of three (3) months. The State respondents were also directed to release the DA in favour of the petitioners at

the old rate. The State Government was given liberty to take proper action against the school authority for non-implementation of the said memorandum. It had been recorded in the said judgment, that the specific defence of the school in their affidavit-in-opposition was that the resources generated by the school was not sufficient for payment of the salaries to their employees as directed by the said memorandum. The relevant portion of the judgment is quoted below:-

"After hearing the learned counsel for the parties and after going through the aforesaid materials on record, I am of the view that so long the government notification being annexure P-1 to the instant writ application is not struck down by any competent authority, the management of all D.A. getting schools must comply with such direction, if they want to run any educational institution in the State of West Bengal. Within the narrow scope of this writ application it is beyond the competence of this court to decide whether the school authority has sufficient sources to make payment of salary at the rate given in government aided institutions. If they are unable to pay salary at that rate, in such a case, they should not be permitted to run such institution, but so long they intend to run such institution, they must comply with the mandate of the Government.

Under the aforesaid circumstances, I dispose of this application by directing the school authority to pay salary in favour of the petitioners in accordance with the direction contained in annexure P-1. So far the arrears are concerned, the same should be paid within three months from date.

Similarly, the state respondents are also directed to release D.A. in favour of the petitioners at the old rate within one month from date and thereafter, go on paying the same at the same rate even if the school authority does not comply with the direction of the State Government; in that event, however, the State will be free to take action against the school authority for non-implementation of annexure P-1. The school authority is directed to send requisition to the District Inspector of schools (SE) Kolkata for release of the D.A. within one week from date, if not already sent.

This writ application is disposed of with the above direction."

7. Aggrieved by the aforementioned judgment and order dated November 17, 2003 the said school preferred an appeal before this Court which was registered as F.M.A. No.369 of 2004 (In re: Shree Digambar Jain Vidyalaya & Anr vs. Mahendra Narain Pathak & Ors reported in (2004) 4 CHN 523). An Hon'ble Division Bench of this Court was pleased to dismiss the said appeal dated September 24, 2004. The relevant portion of the judgment of the Hon'ble Division Bench is quoted below:-

"The difference between the partially aided institution and fully aided institution is that whereas partially aided institution gets only the portion of the dearness allowance whereas the fully aided institution gets dearness allowance as well as

the basic salaries by way of aid from the Government. While the portion of the aid received by the school towards dearness allowance is being paid to the teaching and non-teaching staff, the school has not bothered to pay the minimum basic salary prescribed by the Government for fully aided as well as the other school including the Anglo-Indian Schools. The Managing Committee of the school is contending that it is unable to pay the same. The learned Single Judge has observed in the impugned judgment and order that in the event the Managing Committee is unable to pay the same, they should close the institution. The question is whether this observation of the learned Single Judge in the perspective is appropriate or inappropriate. In matters which are governed by Directive Principles of State Policy, the principal consideration of the Court would be not the benefit which a particular person is entitled to get in the matter of implementation of a policy pertaining to such Directive Principles. What the Court is required to see is for whose benefit the policy has been made. The policy relating to recognition of an institution, settling of a curriculum, prescribing the qualifications of teachers, prescribing the standard of education to be imparted and laying down the basic infrastructure by way of policy are all aimed at imparting education to that child who would ultimately become a full-fledged responsible citizen of this country. It has to be seen what he gets. It is not necessary to see what others get for implementation of this policy. A person, who is agreeable to impart education at a price less than the minimum prescribed price, may not be a person competent to impart such education. A future citizen who, by reason of the circumstances, has been compelled to take education from him will thus suffer. In that background the Government has come out with the policy that the minimum what is being paid to a teacher to teach in other institution, at least that must be paid. The Managing Committee of the appellant is not agreeable to discharge even that of obligation on the ground of financial constraint. We feel that when others are capable of doing what Government is seeking the appellant to do, failure on the part of the Managing Committee of the institution show that the members of the Managing Committee have proved themselves to be incapable. They have no interest otherwise in the institution. If they have failed, they should have resigned from the school management so that other competent people can take charge of the Managing Committee of the institution and to give them an opportunity to find the ways and means to improve the financial position of the school.

We, therefore, see no reason to interfere with the judgment and order impugned in this appeal and, accordingly, we dismiss the application for stay and the appeal treating the same as on days' list with the consent of the parties is dismissed.

There shall be no order as to costs."

8. Aggrieved by the aforementioned judgment and order, the school authorities of the said school have preferred an appeal before the Hon'ble Apex Court bearing Civil Appeal No(s).2232 of 2006 which is still pending.

9. Reverting to the facts of this case, this writ petition has been filed by the society and the honorary secretary of the said society, challenging the competence of the State Government to issue the said memorandum and making the same binding on the said school. It was urged that the school was a private, unaided minority DA getting institution and the Government by issuing an executive instruction or executive order could not interfere with the management of the school. The school as a minority institution was entitled to fix the salary structure of its own employees and the same was within the domain of a private contract. According to the writ petitioners, such interference by the state respondents, in matters relating to contract of service between the employer and the employees, was in violation of their fundamental right guaranteed under Article 30 of the Constitution of India.

10. It was urged that in the judgment and order passed in W.P. No.5103 (W) of 2003 dated November 17, 2003 (the writ petition filed by some teachers of the said school), there was an observation of the learned Single Judge, that unless the said memorandum was set aside by a competent authority, the school authorities were bound to abide by the said memorandum. On the basis of such observation the petitioner No.1, society and its honorary secretaries have challenged the constitutionality of the said memorandum qua the said school by way of a separate writ petition. Hence this writ petition.

11. Mr. Shuvro Prokash Lahiri, the learned Advocate appearing on behalf of the petitioners urged that the staff of the said school could never be treated at par with those of government aided schools. By way of an example, he submitted that the death-cum-retirement benefit scheme which was applicable in the case of employees of government aided institutions was not applicable to the employees of the said school and the government itself made a distinction between the two kinds of schools. He has relied on a notifications dated April 19, 2006 in support of this contention. Mr. Lahiri has further relied on notifications dated May 21, 2009, June 17, 2015, September 22, 2017 and lastly June 21, 2018, in order to show that the Government itself by these notifications had prescribed different rates of DA for teachers of different DA getting schools and the DA was higher if the school had adopted R.O.P.A. 2009 and lower if the school had adopted R.O.P.A. 1998. Thus, according to him, the said memorandum was no longer applicable and had lost its force as the Government itself had prescribed different rates of DA for different pay structures adopted by such schools. Mr. Lahiri further referred to the definition of 'school' contained in Section 2(m) of the West Bengal Schools (Control and Expenditure) Act, 2005 in order to substantiate that the government itself did not consider DA as aid but as a grant.

12. According to Mr. Lahiri, the said memorandum was issued pursuant to a direction of this Court passed in a writ petition in W.P. No.707 of 2000 dated October 8, 2001, on a writ petition filed by teachers of the Gyan Bharati Vidyapith which was not a minority institution unlike the petitioner and as such

the operation of the said memorandum, if at all, ought to have been restricted to the teaching and non-teaching staff of the Gyan Bharati Vidyapith alone and not made applicable to all DA getting institutions, especially the minority institutions. It was further argued that Anglo Indian Schools had their own rules prescribed by the State of West Bengal in exercise of power under the West Bengal Board of Secondary Education Act, 1963 and Rules for Management of Recognised Non-Government Institutions (Aided and Unaided) 1969 (hereinafter referred to as the Rules) framed thereunder and the State Government was empowered by legislation to prescribe rules to ensure that Anglo Indian Schools paid salary to their employees at the rate given to employees of government aided schools but, the State Government lacked the competence to issue such an executive instruction in the form of the said memorandum forcing private unaided DA getting minority institutions to pay salary at the same rate as paid to the employees of government aided institutions, in the absence of any statutory provisions. According to him, any policy framed by the Government with regard to the pay structure of employees of a private unaided minority institution would amount to infringement of the fundamental rights of the institution as guaranteed under Article 30 of the Constitution of India. It was further submitted that by the said memorandum, the Government was enforcing payment of the scale of pay as revised under R.O.P.A. 1998 and R.O.P.A. 2009 by the minority institutions although, the said institutions were not listed in those Government Orders namely, 33-Edn.(B) dated March 7, 1990, 25-SE (B)/IM-102/98 dated February 12, 1999 and 46-SE (B)/5B-1/2009 dated February 27, 2009, by which the scales prescribed under R.O.P.A. from time to time had been adopted by the State Government in respect of staff of government aided schools..

13. It was further urged that the State Government lacked the competence to issue the said memorandum and the same was violative of Articles 13 (2), 13 (3), 154 (1) and 161 (1) of the Constitution of India as the same lacked the assent of the Governor. It was next contended that there could not be waiver of the fundamental rights guaranteed under Articles 29 and 30 of the Constitution of India and as such, the writ petition was maintainable at the instance of the petitioners, despite the judgment and order of this Court in W.P. No.5103 (W) of 2003 dated November 17, 2003 which was affirmed by an Hon'ble Division Bench in respect of the said school.

14. According to the petitioners, the principle of equal pay for equal work would not apply as the method of recruitment, qualification, nature of duties of the teaching and non-teaching staff of the said school was different from that of their counter-parts in government aided schools. It had been emphasized by the petitioner that although the other schools namely, Holy Child, Gyan Bharati Vidyapith etc. had implemented the R.O.P.A. Rules, the said school had never implemented the same and as such the judgments delivered by this Court on the writ petitions relating to those schools would not be applicable to the said school.

15. The next argument of the petitioners was that the said school did not have

any financial support from the society and had to generate its own funds from the fees received from the students and as such they did not have the resources to pay the salary at a higher rate. Implementation of the said memorandum would amount to ultimately closing down the school as the resources would dry up. It was lastly emphasized that there was no dispute with regard to the fact that the Jain community was a minority community in West Bengal as declared by the notification No.248-4 dated February 18, 2008 amending Clause (c) of Section 2 of the West Bengal Minorities Commission Act, 1996 and the said school was a minority institution.

16. The petitioner relied on the following judgments, namely *Sushmita Basu and Ors. vs. Ballygunge Siksha Samity and Ors.*, reported in (2006) 7 SCC 680, *Surinder Prasad Tiwari vs. U.P. Rajya Krishi Utpadan Mandi Parishad*, reported in (2006) 7 SCC 684, *Satimbla Sharma and Ors. vs. St. Paul's Senior Secondary School and Ors.*, reported in (2011) 13 SCC 760, *Behram Khurshid Pesikaka vs. State of Bombay*, reported in AIR 1955 SC 123, *Basheshar Nath vs. Commissioner of Income-tax, Delhi and Rajasthan & Anr.*, reported in AIR 1959 SC 149, *Sisters of St. Joseph of Cluny and Ors. vs The State of West Bengal and Ors.*, reported in AIR 2018 SC 2183, *Puran Singh and Ors. vs. State of Punjab and Ors.*, reported in AIR 1996 SC 1092, *Tarun Dutta vs. State of West Bengal and Ors.*, reported in (2005) 3 CAL LT 143 (HC), *Sharif-ud-Din vs. Abdul Gani Lone*, reported in AIR 1980 SC 303, *Narbada Prasad vs. Chhanganlal and Ors.*, reported in AIR 1969 SC 395, *Sonada Degree College & Ors. vs. Deshpad Rai & Ors.*, reported in 1999 (II) CHN 221, *Delhi Development Authority, N.D. and Ors. vs. Joint Action Committee, Allottee of SFS Flats & Ors.*, reported in AIR 2008 SC 1343, *Bal Patil and Ors. vs. Union of India (UOI) and Ors.*, reported in AIR 2005 SC 3172 and an unreported judgment of this Hon'ble High Court in MAT 1800 of 2016 (*In re: Convent of Our Lady of Providence Girls' High School & Ors. vs. Anita Nigam & Ors.*) dated July 6, 2018 in support of his above submissions.

17. Mr. Tapan Kumar Mukherjee, the learned Additional Government Pleader appearing on behalf of the State respondents submitted that this writ petition was barred under the principles of constructive res judicata being hit by Explanation IV to Section 11 of the Code of Civil Procedure. In support of his contention Mr. Mukherjee relied on a Full Bench decision of this Hon'ble Court reported in (2010) 1 CHN (CAL) 72 (*In re:- General Manager (PA), Allahabad Bank & Ors. vs. Shib Sankar Mukherjee*). It was his specific contention that the managing committee of the said school was a party respondent in W.P. No.5103 (W) of 2003 and they failed to challenge the constitutionality/legality/enforceability of the said memorandum qua the said school before the learned Single Judge as also before the Hon'ble Division Bench. According to Mr. Mukherjee, the issue relating to applicability of the said memorandum qua the said school had reached a finality, and the approved teaching staff who were enjoying dearness allowance from the State of West Bengal were entitled to the implementation of the said memorandum. Mr. Mukherjee emphasized that in the judgment of the Hon'ble Division Bench in *Shri Digambar Jain Vidyalaya (supra)*

it had been clearly held that the said school was getting partial aid in the nature of dearness allowance and as such the State had the authority to regulate the basic salary and/or frame a policy with regard to matters relating to impart of education which was the subject matter of Directive Principles of State policy, by prescribing the minimum salary and that the said school ought not to be in the business of imparting education, if it was not agreeable to pay salary at the minimum rate prescribed. When the Government had come out with a policy prescribing a minimum amount to be paid to a teacher, the Hon'ble Division Bench was of the opinion that the said amount should be paid by the said school.

18. The next submission of Mr. Mukherjee was that even if the petitioner was a minority institution, several decisions of the Hon'ble Apex Court had settled the issue and had held that in matters of imparting education, private unaided institution minority educational institutions could not mal-administer and the Government had a role to play in regulating conditions of services and salaries of their employees as a security measure. His last submission was that Article 162 of the Constitution of India empowered the State Government in this case to issue the said memorandum and the same was binding on all DA getting schools.

19. Mr. Mukherjee referred to the decisions of T.M.A. Pai Foundation & Ors. vs. State of Karnataka & Ors., reported in (2002) 8 SCC 481, General Manager (PA), Allahabad Bank & Ors. vs. Shib Sankar Mukherjee, reported in 2010 (1) CHN (CAL) 721 and State of Punjab & Ors. vs. Jagjit Singh & Ors., reported in (2017) 1 SCC 148. He also distinguished the decision of the Hon'ble Apex Court in Satimbla Sharma and Ors. (supra) and submitted that in the facts of the said case, the Hon'ble Apex Court was of the opinion that the appropriate Government could make rules and issue executive instructions in order to regulate the conditions of pay and services of teachers of unaided private institutions.

20. Mr. Shaunak Ghosh learned Advocate appearing for the respondent Nos.6, 10 and 12, that is, the teachers of the said school submitted that the school authorities did not raise the point of non-applicability of the said memorandum to the said school before the learned Single Judge in the proceedings arising out of W.P. No.5103 (W) of 2003. Neither before the learned Single Bench nor before the Hon'ble Division Bench did the petitioners ever raise the question of unconstitutionality of the said memorandum on the ground of the same being violative of Article 25 to 30 of the Constitution of India and as such the said point could not be raised for the first time in this writ petition. As the applicability of the said memorandum had been finally decided by the Hon'ble Division Bench with respect to the said school, the writ petition was hit by the principle of issue estoppel and the writ petition was barred by the principle of Constructive Res Judicata. It was further submitted that the order of the Hon'ble Division Bench was under challenge before the Hon'ble Apex Court and when the special leave was granted by the Hon'ble Apex Court, the operation of the judgment and order of the Hon'ble Division Bench had not been stayed.

21. The next contention of the teachers was that the school was never recognized as a minority institution and the notification of the Government declaring the Jain community as a minority community was issued only in 2008. The school did not obtain any certificate from the appropriate authority, namely, the National Commission for Minority Educational Institutions or from Minorities Affairs and Madrasah Education Department, West Bengal declaring the same to be a minority institution. It was submitted that although, the school had applied before the State Government for prescription of special rules under Rule 33 of the 1969 Rules, the draft rules submitted by the said school were never finalised by the Government. It was contended that as the petitioners were desirous of having special rules framed by the Government just like Anglo Indian School, the definition of "aided school" under the regulations of Anglo Indian and other Listed Schools in West Bengal, 1993 should be accepted by them. The definition is quoted below:-

"(1) "aided school" means a recognised school receiving aid of any kind whatsoever on a recurring basis, whether in the form of Government Grant, or Dearness Allowance or the like;"

22. Mr. Ghosh submitted that the said memorandum was an executive instruction issued by the Government to ensure equal pay for equal work of teachers of all schools, including private minority institutions and the law in this regard had been settled by the Hon'ble Apex Court long time ago. According to Mr. Ghosh, the State Government could regulate either by statutory provisions or by executive orders the terms and conditions of services and minimum pay and qualifications of teachers of minority institutions as well. It was his further contention that the competence of the Government of West Bengal to issue the said memorandum had been finally decided by a learned Single Judge of this Court in W.P. No.20168 (W) of 2002 (In re: Gyan Bharati Vidyapith & Anr. vs. Director of School Education & Ors.). He next submitted that financial hardship could not be a reason for non-implementation of the said memorandum. He contended that Article 161 of the Constitution of India has been declared to be directory and not mandatory and as such the Government could issue executive instruction which did not require the sanction of the Governor.

23. Mr. Ghosh relied on the decisions of Anglo-Indian & Others Listed School, Notification No.878-Edn.(S)/10R-3/85 dated December 24, 1993, Rita Mukherjee & Ors. vs. The State of West Bengal & Ors., (In re: W.P. No.322 of 2013), Frank Anthony Public School Employees' Association vs. Union of India and Ors., reported in (1986) 4 SCC 707, In re the Kerala Education Bill, 1957 reference under Article 143(1) of the Constitution of India reported in AIR 1958 SC 956, All Saints High School, Hyderabad and Ors. vs. Government of Andhra Pradesh and Ors., reported in (1980) 2 SCC 478, T.M.A. Pai Foundation and Ors. vs. State of Karnataka and Ors., reported in (2002) 8 SCC 481, Rajendra Narain Singh and Ors. vs. State of Bihar and Ors., reported in (1980) 3 SCC 217, Sant Ram Sharma vs. State of Rajasthan and Ors., reported in AIR 1967 SC 1910, R.

Chitralkha (In CA No.1056 of 1963) Venkatesubba Reddy (In CA No.1057 of 1963) vs. State of Mysore and Ors., reported in AIR 1964 SC 1823, P.T.R. Exports (Madras) Pvt. Ltd. and Ors. vs. Union of India and Ors. reported in (1996) 5 SCC 268, Sushmita Basu and Ors. vs Ballygunge Siksha Samity and Ors., reported in (2006) 7 SCC 680, F.M.A. No. 369 of 2004, an unreported judgment of this Hon'ble High Court The President (Provincial Superior) Society of Sisters of Charity & Ors. vs. Nandita Mukherjee & Ors. (In re: GA No.2390 of 2018), Sub-Committee of Judicial Accountability vs. Union of India and Ors., reported in (1992) 4 SCC 97 and Shree Digambar Jai Vidyalaya & Anr. vs. Mahendra Narai Pathak & Ors., reported in (2004) 4 CHN 523 in support of his submissions.

24. The respondent Nos.6, 10 and 12 were granted leave by this Court to file a supplementary affidavit enclosing an earlier writ petition bearing W.P. No.16018 (W) of 2005 (In re: Shri Ahinsa Prachar Samity and Ors. vs. State of West Bengal, through the Secretary, Ministry of Education, West Bengal, having its office at Writers' Building, Kolkata and Ors.) filed by the petitioners herein challenging the appointment of an administrator in the said school, by an order dated June 8, 2005 issued by the West Bengal Board of Secondary Education, with further prayers for direction upon the State of West Bengal to prescribe the special rules for the said school as a minority institution. The said writ petition was admitted for hearing by another learned Single Judge of this Court and an interim order was passed staying the operation of the government order by which the administrator was appointed. From the memorandum and articles of association annexed to the said writ petition, it appears that the said society was formed for the welfare of the Jain community and to establish educational institutions for the community as minority institutions. They had also forwarded draft rules to the Government and applied for prescription of a rule by the Government in terms of Rule 33 of the Rules of 1969. Unfortunately, no such rules were ever framed in respect of the said school and the school continued to function on the basis of their own bye-laws. At the relevant point of time when the writ petition was filed, the said school had 19 approved teachers who were getting DA but, most of them have since retired and this writ petition is being contested by the respondent Nos.6, 10 and 12.

25. I have heard the learned Advocates appearing for the parties and considered the documents filed by the respective parties. It appears that the petitioner No.1 is a society registered under the Societies Registration Act, 1860. From the annexures to the writ petition bearing W.P. No.16018 (W) of 2005 filed by the same petitioners, it appears that the petitioner No.2 had himself approached the authorities for recognition of the school, had applied before the Government for framing special rules and had also submitted draft special rules under Rule 33 of the Rules on Management of Recognised Non-government Institution (Aided and Unaided), 1969. It appears from the records that it was the petitioner No.2 himself who had continuously communicated with the authorities for recognition of the said school along with other similar schools founded by the petitioner No.1, Society. From the pleadings in the said writ petition, it appears that the

petitioner No.1 founded and established the said school in 1957 and the school was being run in an accommodation provided by the petitioner No.1. All expenses were being borne by the said Society, petitioner No.1. It appears that as per the draft rules framed by the society a representative of a founder member was to be nominated to the managing committee of the said school and the governing body of the founder body could supersede the Managing Committee of the school. Under such circumstances and on the basis of the above facts which are part of the pleadings in another pending writ petition being W.P. No.16018 (W) of 2005 and matters of record, it could be safely concluded that the management of the school was not completely distinct and separate in its identity and function from the petitioner No.1, Society or the petitioner Nos.2 and 3. The Managing Committee, Secretary and the Teacher-in-Charge of the said school were respondents in W.P. No.5103 (W) of 2003. The school authorities in the said proceeding did not dispute the competence of the State Government to issue the said memorandum and make the same binding on the said school. Their only contention was financial hardship. Similarly in the appeal preferred before the Hon'ble Division Bench against the order of the learned Single Judge in W.P. No.5103 (W) of 2003 also, the school authorities did not contend that the Government lacked the competence to issue the executive order in respect of the said school which was a minority institution. In this writ petition, the point regarding the competence of the Government to issue the said memorandum has been raised for the first time on the ground of the same being violative of Article 30 of the Constitution of India. It is clear from the records pertaining to W.P. No.16018 (W) of 2005 that the society controls the management, finances and other affairs of the school. It was the petitioner No.2 himself who approached the authority for recognition of the school and also for framing of special rules for the said school akin to those framed by the Government under Rule 33 of the 1969 Rules in respect of Anglo Indian Schools and Christian minority schools. Joint representations were also sent by the petitioner No.2 and the school authorities. The same set of petitioners moved the writ petition bearing No. W.P. 16018 (W) of 2005, when an administrator was appointed in the school by the Board. Thus, this writ petition should fail on the principles of *res judicata* and/or constructive *res judicata* being hit by Explanation IV of Section 11 of the Code of Civil Procedure. The Full Bench decision relied upon by Mr. Mukherjee in *General Manager (P.A) Allahabad Bank (supra)* has made it clear that in order to sustain the plea of *res judicata* it was not necessary that all the parties to the litigation must be common. All that was necessary was that the issue should be between the same party or between the party under whom they or any of them claim. Where the cause of action in the later proceeding was identical with the one in the earlier proceeding between the same party or their privies involving the same subject matter, the principles would be attracted. The purpose behind this principle was that there should be a finality to litigation and no man should be vexed for the same cause twice.

26. I am of the view, that the petitioners were not completely separate in their

identity from the managing committee of the school and they had a positive role to play in the affairs of the school. The grounds for challenge in this writ petition could have been raised as a defence by the managing committee of the school in the earlier proceedings in which orders have been passed by the learned Single Bench as also by the Hon'ble Division Bench making the said memorandum binding on the said school qua the approved teaching staff who were enjoying DA from the State Government. The points raised by the petitioners in this writ petition is barred under Explanation IV to Section 11 of the Code of Civil Procedure. For convenience the same is quoted below:-

"Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided such Court.

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.....

.....

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

27. I disagree with the petitioner, that in view of Section 141 of the Code of Civil Procedure the principles of constructive res judicata would not be applicable in the instant proceedings being a proceeding under Article 226 of The Constitution of India. The Hon'ble Apex Court has settled the law that the principles of Constrictive Res Judicata was applicable to writ proceedings. Reference may be made to the decisions of the Hon'ble Apex Court in Shiv Chander More & Ors. vs. Governor & Ors., reported in (2014) 11 SCC 744 and the relevant portion of the above decision is quoted below:-

"23. Reference may also be made to the Constitution Bench decision in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] wherein this Court once again reiterated that the principles of constructive res judicata apply not only to what is actually adjudicated or determined in a case but every other matter which the parties might and ought to have litigated or which was incidental to or essentially connected with the subject-matter of the litigation. This Court observed:

"35. ... an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and

defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Civil Procedure Code was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."

24. It is in the light of the above authoritative decisions of this Court no longer open to the appellants to contend that the principles of constructive res judicata would not debar them from raising the question which, as observed earlier, could and indeed ought to have been raised by them in the previous round of litigation. The High Court was, in that view of the matter, perfectly justified in holding that the plea sought to be raised by the appellants in the purported exercise of liberty given to them by the orders of this Court dated 9-4-2008 in *Lt. Governor v. Shiv Chander More* [*Lt. Governor v. Shiv Chander More*, (2008) 4 SCC 690] was not legally open and should not be allowed to be urged."

28. Reference may also be made to another decision of the Hon'ble Apex Court in *Beerbal Singh vs. State of U.P. & Ors.*, reported in (2018) 13 SCC 675 and the relevant portion of the above decision is quoted below:-

"2. The High Court had dismissed the previous writ petition after fifteen years after hearing the learned counsel for the parties and that too on merits not in limine. Reasons have also been assigned for the dismissal of the writ petition. The only ground raised in the previous writ petition was with respect to Section 17(1) which has been dealt with in the impugned order which was passed by the Division Bench of the High Court on 6-7-2005 [*Birbal v. State of U.P.*, 2005 SCC OnLine All 2300] . Thus filing of the second writ petition was not only misconceived but ill-advised action and the new ground, which was urged for lapse of proceedings was not available to be raised in the second writ petition. Successive writ petition could not be said to be maintainable with respect to the same notification. Hence, it had rightly been dismissed [*Beerbal Singh v. State of U.P.*, Writ-C No. 63625 of 2005, order dated 30-9-2005 (All)] by the High Court.

3. The appeal is dismissed with costs which are quantified at Rs 10,000 (Rupees ten thousand only) to be deposited in the Supreme Court Employees' Welfare Fund within a period of one month."

29. Thus the decision of *Puran Singh and Ors.* (*supra*) which is distinguishable on facts, cited by the petitioner does not come to the aid of the petitioner.

30. The Hon'ble Division Bench in the decision of *Shri Digambar Jain Vidyalaya* (*supra*) while upholding the binding effect of the said memorandum had considered dearness allowance as a partial aid and came to a specific finding that in furtherance of the objectives of the Directive Principles of State Policy enshrined under Article 45 of the Constitution of India, the Government had issued the said memorandum to ensure proper pay scale of the teachers in order to maintain a certain level of education to be imparted by the said school. This judgment of the Hon'ble Division Bench is binding on this Court vis-a-vis the applicability of the said memorandum to the said school insofar as, it relates to

the approved teachers who had received DA component from the State Government. The said memorandum was once again sought to be implemented by way of a writ petition being W.P. No.14982 (W) of 2009 (In re:- Shree Sushil Kumar Pandey & Ors. vs. State of West Bengal & Ors.) filed before this Court by 55 writ petitioners working in Shree Maheshwari Vidyalaya. By a judgment and order dated April 13, 2010 a learned Single Judge upheld the said memorandum:-

"In my opinion, in view of the Executive Order of the Government dated May 29, 2002 the petitioners were entitled to claim salary and allowances at the revised rates specified in the Revision of Pay and Allowance Rules, 2009 and the Institute was under an unqualified obligation to implement the scales specified in the rules. I do not find merit in the argument that if the provisions are implemented, then it will not be possible to keep the Institute running; for implementation of the 2009 Rules will create an additional financial burden of around Rs.1 crore.

Neither increase in financial burden resulting from implementation of provisions of law, nor insufficiency of financial resources to bear the additional financial burden created by implementation of the provisions of law is a valid ground to say that the Institute incurring the obligation to revise the petitioners' pay and allowances in compliance with the Government Order dated May 29, 2002 should not be asked to implement the revised scales specified in the Revision of Pay and Allowance Rules, 2009.

Mr Basu has rightly relied on the decision of the Supreme Court in Frank Anthony Public School Employees' Association v. Union of India & Ors., (1986) 4 SCC 707, holding as follows:

"23. We must refer to the submissions of Mr Frank Anthony regarding the excellence of the institution and the fear that the institution may have to close down if they have to pay higher scales of salary and allowances to the members of the staff.

.....Regarding the fear expressed by Shri Frank Anthony that the institution may have to close down we can only hope that the management will do nothing to the nose to spite the face, merely to 'put the teachers in their proper place'. The fear expressed by the management here has the same ring as the fear expressed invariable by the management of every industry that disastrous results would follow which may even lead to the closing down of the industry if wage scales are revised."

For these reasons, I dispose of this petition ordering as follows. The Institute shall implement the Revision of Pay and Allowance Rules, 2009 with effect from the date they were implemented by the Government aided institutes. Pay and allowances of the petitioners shall be revised and arrears shall be paid within eight weeks from the date of communication of this order. The Government shall pay the balance dearness allowance, if any, within four weeks from the date the requisition for the amount is received from the Institute. No costs. Certified Xerox."

31. The above judgment was carried in appeal by way of M.A.T No.1320 of 2010 (In re:-Secretary, Shree Maheswari Vidyalaya & Ors. vs. Sree Sushil Kumar Pandey & Ors.) and the Hon'ble Division Bench by a judgment and order dated March 8, 2011 dismissed the appeal and upheld the order of the learned Single Judge. The Hon'ble Division Bench held that effect of the said memorandum would not be wilted away for want of Governor's assent. The Hon'ble Division Bench made the following observation:-

"We are also least impressed by the reference made by Shri Sen to the decision of Union of India & Ors. v. Diljeet Singh & Anr. (supra) on the question of the effect the Government Circular dated May 29th 2002 would have, in view of our discussion held hereinabove. Reading the impact of the two consecutive Constitution Bench decisions in P. Joseph John v. State of Travancore, Kochi (supra) and R. Chitralekha v. State of Mysore (supra), we do not feel inclined to hold that the Circular - for want of mention of the Governor's authority, has been wilted in any fashion. More so, we are buttressed in the situation by the Division Bench Order in M.A.T. 130 of 2004. As such, in our opinion, the decision of Union of India & Ors. v. Diljeet Singh & Anr. (supra) which was dealing with an interpretation under the COFEPOSA Act, is quite distinguishable in the factual matrix of the present case.

So far as Shri Sen's submission on the strength of the decision of Bonglgaon Refinery & Petrochemicals Ltd. & Ors. v. Girish Chandra Sarma's (supra) that he can raise points hitherto not canvassed before the learned Single Judge, does not require any discussion. This question is well-settled. We have permitted Shri Sen to raise the question and we have not gone into the same as to whether the same was earlier canvassed or the point has been taken before the learned Single Judge, as felt by the learned Senior Government Advocate.

Before we part, we cannot resist our temptation in resorting to the decision of Frank Anthony Public School Employees' Association v. Union of India & Ors. = (1986) 4 SCC 707, which was quoted by the learned Single Judge, as placed before His Lordship by Shri Basu learned Senior Counsel and are of the opinion that we are required to abide by the fall out of the same. After all, this is an educational institution and not a Profit and Loss making Trading concern. Unless the Teachers are well cared and properly looked after, how we can expect that they will give their best to train young minds, who would become useful citizens of tomorrow?

As we have found that we have to affirm the Order passed by the learned Single Judge, the Appellants are now directed to implement to ROPA Rules w.e.f. the date as directed by the learned Single Judge and the pay and allowances of the Respondents shall be revised and consequential arrears to be paid within four weeks from this date.

Appeal accordingly stands dismissed."

32. The Secretary of Shree Maheswari Vidyalaya & Ors. filed a special leave

petition before the Hon'ble Apex Court against the said judgment and order of the Division Bench and the special leave to appeal was dismissed.

33. The law has been well-settled by a catena of decisions that the State Government was competent to regulate and issue executive orders relating to the conditions of service of teaching and non-teaching staff, the minimum qualification of teachers, disciplinary matters and pay scales of minority institutions, without directly interfering with the management and control of the said institution. Such regulatory measures according to the Hon'ble Apex Court were not violative of Article 30 of the Constitution of India.

34. The rights of minorities to establish and administer educational institutions has been recognized under Article 30 of the Constitution of India. For proper adjudication of the issues involved in this writ application, the above provisions are quoted below:-

"30. Right of minorities to establish and administer educational institutions. - (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law of the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

35. It has been held by the Hon'ble Apex Court that (In re: The Kerala Education Bill, 1957) (supra) that the rights of minorities under Article 30 of the Constitution of India and the duty of the State under Article 45 to endeavour to introduce free and compulsory education, cast an obligation on the Court to reconcile the two provisions and arrive at a synthesis between the two. By the said judgment, the Hon'ble Apex Court upheld the regulations made by the State Government in the said Bill to be permissible, as they were designed to give protection and security to the ill paid teachers who are engaged in rendering service to the nation by imparting education in private minority schools.

36. The Hon'ble Apex Court in Frank Anthony Public School Employees' Association (supra) the following observation was made:-

" 16. The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better

service to the institution and the pupils cannot surely be said to be violative of the fundamental right guaranteed by Article 30(1) of the Constitution. The management of a minority Educational Institution cannot be permitted under the guise of the fundamental right guaranteed by Article 30(1) of the Constitution, to oppress or exploit its employees any more than any other private employee. Oppression or exploitation of the teaching staff of an educational institution is bound to lead, inevitably, to discontent and deterioration of the standard of instruction imparted in the institution affecting adversely the object of making the institution an effective vehicle of education for the minority community or other persons who resort to it. The management of minority institution cannot complain of invasion of the fundamental right to administer the institution when it denies the members of its staff the opportunity to achieve the very object of Article 30(1) which is to make the institution an effective vehicle of education.

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21. The result of our discussion is that Section 12 of the Delhi School Education Act which makes the provisions of Chapter IV inapplicable to unaided minority institutions is discriminatory and void except to the extent that it makes Section 8(2) inapplicable to unaided minority institutions. We, therefore, grant a declaration to that effect and direct the Union of India and the Delhi Administration and its officers, to enforce the provisions of Chapter IV [except Section 8(2)] in the manner provided in the chapter in the case of the Frank Anthony Public School. The management of the school is directed not to give effect to the orders of suspension passed against the members of the staff.

22.

23. We must refer to the submissions of Mr Frank Anthony regarding the excellence of the institution and the fear that the institution may have to close down if they have to pay higher scales of salary and allowances to the members of the staff. As we said earlier the excellence of the institution is largely dependent on the excellence of the teachers and it is no answer to the demand of the teachers for higher salaries to say that in view of the high reputation enjoyed by the institution for its excellence, it is unnecessary to seek to apply provisions like Section 10 of the Delhi School Education Act to the Frank Anthony Public School. On the other hand, we should think that the very contribution made by the teachers to earn for the institution the high reputation that it enjoys should spur the management to adopt at least the same scales of pay as the other institutions to which Section 10 applies. Regarding the fear expressed by Shri Frank Anthony that the institution may have to close down we can only hope that the management will do nothing to the nose to spite the face, merely to "put

the teachers in their proper place". The fear expressed by the management here has the same ring as the fear expressed invariably by the management of every industry that disastrous results would follow which may even lead to the closing down of the industry if wage scales are revised."

37. In *All Saints High School, Hyderabad and Ors.* (supra) the Hon'ble Apex Court had made the following observation:-

63. Thus, on an exhaustive analysis of the authorities of this Court and the views taken by it from time to time during the last two decades on various aspects, shades and colours, built in safeguards, guarantees, scope and ambit of the fundamental right enshrined in Article 30(1), the principles and propositions that emerge may be summarised as follows:

(1) That from the very language of Article 30(1) it is clear that it enshrines a fundamental right of the minority institutions to manage and administer their educational institutions which is completely in consonance with the secular nature of our democracy and the directives contained in the Constitution itself.

(2) That although unlike Article 19 the right conferred on the minorities is absolute, unfettered and unconditional but this does not mean that this right gives a free licence for maladministration so as to defeat the avowed object of the Article, namely, to advance excellence and perfection in the field of education.

(3) While the State or any other statutory authority has no right to interfere with the internal administration or management of the minority institution, the State can certainly take regulatory measures to promote the efficiency and excellence of educational standards and issue guidelines for the purpose of ensuring the security of the services of the teachers or other employees of the institution.

(4).....

(5)

(6)

(7) It is, therefore, open to the government or the university to frame rules and regulations governing the conditions of service of teachers in order to secure their tenure of service and to appoint a high authority armed with sufficient guidance to see that the said rules are not violated or the members of the staff are not arbitrarily treated or innocently victimised. In such a case the purpose is not to interfere with the internal administration or autonomy of the institution but it is merely to improve the excellence and efficiency of the education because a really good education can be received only if the tone and temper of the teachers are so framed as to make them teach the students with devotion and dedication and put them above all controversy. But while setting up such an authority care must be taken to see that the said authority is not given blanket and uncanalised and arbitrary powers so as to act at their own sweet will ignoring the very spirit and objective of the institution. It would be better if the

authority concerned associates the members of the governing body or its nominee in its deliberation so as to instil confidence in the founders of the institution or the committees constituted by them."

38. In T.M.A. Pai Foundation and Ors. (supra) question No.5 (c) has also settled the law on the issue which is quoted below:-

" Q. 5. (c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like appointment of staff, teaching and non-teaching and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. For redressing the grievances of such employees who are subjected to punishment or termination from service, a mechanism will have to be evolved and in our opinion, appropriate tribunals could be constituted, and till then, such tribunal could be presided over by a judicial officer of the rank of District Judge. The State or other controlling authorities, however, can always prescribe the minimum qualifications, salaries, experience and other conditions bearing on the merit of an individual for being appointed as a teacher of an educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with overall administrative control of management over the staff, government/university representative can be associated with the Selection Committee and the guidelines for selection can be laid down. In regard to unaided minority educational institutions such regulations, which will ensure a check over unfair practices and general welfare of teachers could be framed.

There could be appropriate mechanism to ensure that no capitation fee is charged and profiteering is not resorted to.

The extent of regulations will not be the same for aided and unaided institutions."

39. The contention of the petitioner that unlike Gyan Bharati Vidyapith, Shree Maheswari Vidyalaya, the said school was a minority institution and the judgments delivered in respect of those schools making the said memorandum

applicable should not be taken into consideration while deciding the applicability of the said memorandum to the said school which was a minority institution is also not acceptable.

40. While considering the applicability of the said memorandum vis-à-vis some teachers of Holy Child Institute for Girls, Higher Secondary, District-Kolkata, which was a DA getting minority school, a learned Single Judge of this Court by a judgment dated October 8, 2013 in W.P. No.322 of 2013 (In re:-Rita Mukherjee & Ors. vs. The State of West Bengal & Ors.) settled the proposition of law. It was held that for the security of ill paid teachers of recognized minority educational institutions, which were receiving financial support from the Government in the form of DA may be regulated by the State as a condition for granting recognition and/or aid or support. Such support may be in the form of "Grants-in-Aid" or "Dearness Allowance" but the consequence of receiving such grant was the same.

41. The relevant portion of the said judgment is quoted below:-

"Since, the Holy Child Institute Girls' Higher Secondary School, District Kolkata, was recognized by the West Bengal Board of Secondary Education, which was a State within the meaning of Article 12 of the Constitution of India and the aforesaid school was a D.A. Getting school, this discussion will be restricted to the above zone of consideration hereinafter.

It is a settled proposition of law that Article 30(1) of the Constitution of India gives rights to minorities to establish and to administer educational institutions of their choice but right to administer cannot include the right of mal-administer and power of dismissal, removal, reduction in rank or suspension, security to ill paid teachers who are rendering service to the nation and protect the backward classes may be regulated by the State as a condition for granting aid to the educational institution as regulatory measures. Reference may be made to the relevant portions of the above matter of Kerala Educational Bill, 1957, Re v. (supra) as follows:

"31. Power of dismissal, removal, reduction in rank or suspension is an index of the right of management and that is taken away by clause 12(4). These are, no doubt, serious inroads on the right of administration and appear perilously near violating that right. But considering that those provisions are applicable to all educational institutions and that the impugned parts of clauses 9, 11 and 12 are designed to give protection and security to the ill paid teachers who are engaged in rendering service to the nation and protect the backward classes, we are prepared, as at present advised, to treat these clauses 9, 11(2) and 12(4) as permissible regulations which the State may impose on the minorities as a condition for granting aid to their educational institutions."

42. In the decision of K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering, reported in (1997) 3 SCC 571, the Hon'ble Apex Court observed that teachers of private unaided schools could seek implementation of an executive order for payment of salary and other emoluments at par with their

counter-parts is a Government aided school when there was no legislation in place for such teachers. The relevant portion of the above decision is quoted below:-

"4. It is not in dispute that executive instructions issued by the Government have given them the right to claim the pay scales so as to be on a par with the government employees. The question is when there are no statutory rules issued in that behalf, and the institution, at the relevant time, being not in receipt of any grants-in-aid; whether the writ petition under Article 226 of the Constitution is not maintainable? In view of the long line of decisions of this Court holding that when there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart the education get an element of public interest in the performance of their duties. As a consequence, the element of public interest requires regulation of the conditions of service of those employees on a par with government employees. In consequence, are they also not entitled to the parity of the pay scales as per the executive instructions of the Government? It is not also in dispute that all the persons who filed the writ petition along with the appellant had later withdrawn from the writ petition and thereafter the respondent-Management paid the salaries on a par with the government employees. Since the appellants are insisting upon enforcement of their right through the judicial pressure, they need and seek the protection of law. We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education. The private institutions cater to the need of providing educational opportunities. The teacher duly appointed to a post in the private institution also is entitled to seek enforcement of the orders issued by the Government. The question is as to which forum one should approach. The High Court has held that the remedy is available under the Industrial Disputes Act. When an element of public interest is created and the institution is catering to that element, the teacher, being the arm of the institution, is also entitled to avail of the remedy provided under Article 226; the jurisdiction part is very wide. It would be a different position, if the remedy is a private law remedy. So, they cannot be denied the same benefit which is available to others. Accordingly, we hold that the writ petition is maintainable. They are entitled to equal pay so as to be on a par with government employees under Article 39(d) of the Constitution."

43. The competence of the State Government to issue the said memorandum for implementation of the pay structure prevailing in government sponsored and government aided school, in respect of teaching and non-teaching staff of all DA getting schools has once again been considered by another learned Single Judge of this Court in W.P. No.2068 of 2002 (In re:-Gyan Bharati Vidyapith & Anr. vs. The Director of School Education & Ors.). The relevant portion of the above decision is quoted below:-

"25.. . . I do not find any force in the argument of Mr. Sen that the petitioner's institution has the right to accept only the D.A for its approved teachers and non-

teaching staffs but they will not take the liability to implement the pay structure recommended by the 4th pay commission which has already been implemented in case of Government sponsored/aided schools. Nobody can ignore the truth that teachers are the builders of the future citizen of the Nation. Therefore, if they are not benefited and adequately paid for their duties and responsibilities like their counterparts then it is nothing but a clear case of discrimination. All teachers are a section in whole and therefore, their pay structure should be equal. It is not a case that an incumbent who is having higher post is getting higher scale like service matter but in the teaching fraternity all teachers have been discharging the same duties and therefore, they should be paid equally. Therefore, just to avoid any controversy between the teachers working in a D.A receiving schools and the teachers who are working in Government sponsored/aided schools the Government has taken the stand by issuing the notification dated 29th May, 2002 just to maintain a parity in respect of the salaries amongst the teachers who are working in a D.A receiving schools or working in a Government sponsored/aided schools."

44. With regard to the decisions cited by learned Advocate for the petitioners, I find that they do not help the petitioners as they are distinguishable on facts. The judgment in Satimbla Sharma and Ors. (supra) decided that in the absence of any statutory provision or any executive order teachers of private unaided educational institutions could not claim salary and allowance at par with their counter-parts in Government aided institutions. The relevant portion of the above decision is quoted below for clear appreciation of the proposition laid down in the said judgments.

"26. In K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg. [(1997) 3 SCC 571 : 1997 SCC (L&S) 841] , relied upon by the learned counsel for the appellants, executive instructions were issued by the Government that the scales of pay of Laboratory Assistants as non-teaching staff of private colleges shall be on a par with the government employees and this Court held that even though there were no statutory rules, the Laboratory Assistants as non-teaching staff of private college were entitled to the parity of the pay scales as per the executive instructions of the Government and the writ jurisdiction of the High Court under Article 226 of the Constitution is wide enough to issue a writ for payment of pay on a par with government employees. In the present case, there are no executive instructions issued by the Government requiring private schools to pay the same salary and allowances to their teachers as are being paid to teachers of government schools or government-aided schools."

45. In Sushmita Basu & Ors. (supra) the facts were different. The petitioners therein sought implementation of the Third Pay Commission with retrospective effect from 1988. The Hon'ble Apex Court refused the prayer of the petitioners on the ground that the records revealed that the school authorities therein had extended special benefits to their employees which were not extended to their counter-parts in Government schools or Government aided schools and most of

the employees of the said school had entered into an agreement with the authorities thereby expressing their willingness to accept the terms and conditions of pay and allowances. The Hon'ble Apex Court refused to make an exception for one or two teachers.

46. I also do not accept the contention of the petitioners that the State respondents by the said memorandum were seeking indirectly to impose the scale prescribed by R.O.P.A. Rules, although, the school was not one of the listed schools in the government orders issued by the State respondents while prescribing pay scale of employees of aided and unaided schools by adopting the R.O.P.A. Rules. The decision of the Hon'ble Apex Court in Sharif-ud-Din (supra) will have no application.

47. In view of the discussions above, the decisions cited by the petitioners on the proposition that there could not be waiver of fundamental right and the society could maintain this writ petition need not be further answered by this Court. The inevitable conclusion is that the Government could regulate matters relating to service conditions of employees of private unaided minority institutions, even if aid was granted in the form of dearness allowance alone and such regulation did not amount to infringement of the fundamental rights enshrined under Article 30 of the Constitution of India. It is also pertinent to mention here that the concerned school by their communication to some of the teachers which are part of the records, had indicated that the salary had been fixed as per R.O.P.A. 1998. Records also reveal that the State was paying pension to these teachers under a particular pension scheme. This negates the contention of the petitioners that the school had never accepted the pay scale prescribed for teachers of government aided institutions. The decision of Basheshar Nath (supra) does not thus help the petitioners.

48. Moreover, the principle of binding judicial precedent and judicial discipline, compels me to hold that in this writ petition, this Court cannot once again reconsider the question of the applicability or the legality of the said memorandum. The Hon'ble Apex Court in T.P.Thakkar vs. R. M. Patel, reported in (1968) 2SCR 455, had pronounced that precedence which enunciated rules of law, form the foundation of administration of justice under our system. It has been held time and again that a Single Judge of the High Court was ordinarily bound to accept as correct, judgments of Courts of Benches of co-ordinate jurisdiction and of Division Benches. The reason for the rule which makes a precedent binding was to bring about uniformity and certainty in the law. With regard to the validity and binding affect of the said memorandum there has been clear and consistent pronouncements by benches of this Court to the effect that the said memorandum was binding on all schools including minority institutions. There has not been any exceptional instance in this case, like obvious inadvertence, over sight of a judgment or a statutory provision by those courts, which would persuade this Court to take an alternative view. There are no glaring omissions or errors in those judgments which have upheld the validity of the said

memorandum.

49. The various decisions of this Hon'ble Court upholding the validity and enforceability and binding effect of the said memorandum with regard to the teachers of DA getting schools including the said school is a binding precedent on me and I do not find any reason to differ with the views expressed therein as the petitioners have failed to satisfy this Court on the facts and the law, that a contrary view was possible.

50. The said memorandum has repeatedly been upheld by different Co-ordinate Benches and also by two Division Benches and has been made binding on other private minority DA getting schools who have accepted the said memorandum and have adopted the same. The said school also attempted to fix the pay of one or two of the teachers as per R.O.P.A. 1998. The binding nature of the said memorandum has been reiterated over and over again and it has been held to be a valid executive order and has been in operation for more than a decade. I do not find any reason to accept the contention of the petitioners that the said memorandum should be again tested on the point of infringement of Article 30. The said memorandum is also binding on the petitioners just like any other DA getting private unaided institution in respect of approved teachers who were granted DA by the government.

51. This writ petition is thus, dismissed.

52. There will be, however, no order as to costs.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the parties, on priority basis.