
(1989) 01 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition No. 2561 of 1988 (Original Side)

Ashok Keshoram Agarwal

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 21-01-1989

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 227

Citation : (1989) 91 BOMLR 150

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.A. Jahagirdar, J.—This petition under Article 226 of the Constitution of India has been filed by the father of a girl, who was at the relevant time studying in the school of the fourth respondent. She appeared for the 9th standard examination in March 1988 and the fourth respondent declared her as having failed. It was the case of the petitioner that despite having been declared as failed, his daughter was entitled to the benefit of a rule to be found in appendix seven of the Secondary Schools Code. This rule provides for certain grace marks to be given in the case of students who failed. The maximum of the grace marks is also specified in the said rule. According to the petitioner, if this rule is followed, his daughter would have to be declared as having passed the 9th standard examination and would have been entitled to be promoted to the 10th standard.

2. There is certain correspondence between the petitioner and the education officer on the one hand and the petitioner and the fourth respondent on the other. After considering the representation made by the petitioner to the education officer, the latter sent a letter dated June 23, 1988 pointing out to the fourth respondent that the petitioner's daughter was entitled to be promoted to the 10th standard in the light of the rule referred to above. The education officer asked the fourth respondent to revise the result of the petitioner's daughter and

promote her to the 10th standard. The fourth respondent was also asked to explain the reasons as to why the petitioner's daughter was detained in the 9th standard for the year 1988-89 inspite of the rule, to which the attention of the fourth respondent was drawn by the education officer.

3. There was no compliance with this requirement on the part of the fourth respondent which led the petitioner to file this petition. It has been prayed in the petition that this Court should issue a writ setting aside the order which has failed the petitioner's daughter and requiring the fourth respondent to promote the petitioner's daughter to the 10th standard after allowing to her the grace marks as required by the rule in appendix seven to the Secondary Schools Code. Ad-interim relief was also prayed for.

4. When the petition came up for admission before Daud J. on August 26, 1988, Daud J. passed a speaking order tentatively agreeing with the petitioner's contention and directing the fourth respondent to give a passing certificate which would enable the petitioner's daughter to seek admission to the 10th standard in another school. It was brought to the notice of Daud J. that another school, on what can be regarded as a proper interpretation of the aforesaid rule, thought that the petitioner's daughter was entitled to be declared as passed in the 9th standard examination and on that account the other school was prepared to admit the petitioner's daughter in the 10th standard. It has been mentioned that in compliance with this order of Daud J. the fourth respondent has already given a passing certificate, which has been availed of by the petitioner's daughter who has joined another school in 10th standard. Nevertheless, the question has been raised by the petitioner as to whether the fourth respondent, which is a private unaided school, can be compelled by a writ to be issued by this Court under Article 226 of the Constitution to follow a rule which finds its place in the Secondary Schools Code. In this question there are two more questions involved, in the first place, whether the fourth respondent is a State or an authority within the meaning of Article 12 of the Constitution and therefore is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution. Secondly, whether the rules constituting the Secondary Schools Code are statutory rules which can be enforced by a student against a school or for that matter against any other person.

5. Mr. Vasudev, the learned advocate appearing in support of the petition, has contended that the recent development in case law suggests that even a private school could be an authority within the meaning of Article 12 of the Constitution and therefore could be reached by this Court in exercise of its jurisdiction under Article 226. In this regard he placed reliance upon a judgment of the Supreme Court in *Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others*, . In particular he referred to paragraph 8 of the said judgment wherein it has been stated that a school is an authority and therefore could be subjected to the jurisdiction of the High Court under Article 226 of the Constitution. I have, with his assistance, gone through the said judgment and in

particular what has been stated in paragraph 8 thereof, but find myself unable to agree with him that the said judgment lays down that every private school, which is recognised by the State for the purpose of education, could be an authority under Article 12 of the Constitution. It is clear from what has been stated in paragraph 8 of the judgment that because the school involved in Manmohan Singh's case was receiving grant from the public exchequer, the said school could be subject to the writ jurisdiction of the High Court. It was also noticed that the employees of the said school had received the statutory protection under the Punjab Aided Schools (Security of Service) Act, 1969. It is in these circumstances that it was held that the school in Manmohan Singh's case could be subject to the jurisdiction of the High Court under Article 226 of the Constitution.

6. The question as to whether a school could be reached by this Court under Article 226 of the Constitution has been, as far as this Court is concerned, conclusively decided by a Full Bench of this Court in *Sheela Sachidananda v. Deputy Director of Education* [1982] Mh. L.J. 116 . It may be mentioned that in Manmohan Singh's case the Supreme Court referred to its own judgment in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and finding that the provision of finance to a large extent was a factor which could indicate whether a school could be an authority held accordingly. In paragraph 21 of its judgment in *Sheela Sachidananda's* case, the Full Bench has also considered *Ajay Hasia* and by applying the tests indicated in that judgment has held that a school or a management of the Society running the school cannot be said to be an instrumentality or agency of the state as indicated in the judgement of the Supreme Court in *Ajay Hasia's* case. The Full Bench decision being binding upon me, I must necessarily hold that the fourth respondent, which is a non-aided school, cannot be a State or instrumentality of the State or any other authority as mentioned in Article 12 of the Constitution.

7. The next question is whether this Court could issue a writ based upon the alleged right of the petitioner under the provisions of the Secondary Schools Code. On this question there is a long line of decisions to which my attention has been invited by Dr. Chandrachud, the learned Advocate appearing on behalf of the fourth respondent. An early decision on this point is in *State of Assam and Another Vs. Ajit Kumar Sharma and Others*, . In that case the Supreme Court was examining the provisions of the Assam Aided College Employees Rules, 1960. It was held that the said rules were in the nature of administrative instructions without any statutory force. Dealing with the rules, the Supreme Court said as follows:

The Assam Aided College Employees Rules (1960) regarding Conduct and Discipline of Employees of Aided Educational Institutions admittedly have no statutory force and are framed in order to give revised grants to private colleges to enable them to give higher scales of pay etc. to their teachers in accordance with the recommendations of University Grants Commission. Where such

conditions of grants-in-aid are laid down by mere executive instructions it is open to a private college to accept those conditions or not to accept them.

It was specifically pointed out that such instructions, which were not even based upon any rules or an Act or a statute, had no statutory force.

8. In a later decision, namely in *Kumari Regina Vs. St. Aloysius Higher Elementary School and Another*, the same view was repeated, though there was no specific reference to the judgment of the Supreme Court in *Ajit Kumar's* case. In *Regina's* case, the rules, which were called Part II Rules, apparently framed under the provisions of the Madras Elementary Education Act, fell for interpretation. It was noted that Part II Rules as reframed in 1939, though framed under an Act of 1920, were not rules "to carry out all or any of the purposes of this Act". It was therefore held that such Rules were not statutory rules as to control the relations between the management of the school and its teachers. Elaborating, it was further held as follows [at p. 1924 para 12]:

The result is that the relations between the management and the teachers even in a recognised elementary school have to be regarded as being governed by the contracts of employment and the terms and conditions contained therein. Part II Rules, which cannot be regarded as having the status of statutory rules made u/s 56, cannot be said to have the effect of controlling the relations between the management of a school and its teachers or the terms and conditions of employment of such teachers or abrogating the law of master and servant which ordinarily would govern those relations.

Dr. Chandrachud rightly points out that in the present case there is not even an Act under which the Secondary Schools Code has been framed.

9. One must necessarily make a reference to the judgment of the Supreme Court in *The State of Maharashtra and Another Vs. Lok Shikshan Sansatha and Others*, which has been examined in great details by the Full Bench in *Sheela Sachidananda's* case. Indeed it could be suggested that the judgment of the Full Bench is practically based upon what has been mentioned by the Supreme Court in the case of *Lok Shikshan Sanstha*.

10. The status of the rules framed for the purpose of regulating the relationship between educational institutions and the Government has been more elaborately discussed in *Vaish Degree College v. Lakshmi Narain* AIR [1976] S.C. 888. This case also decided that an educational institution is not amenable to the writ jurisdiction of a High Court under Article 226 of the Constitution on the ground that it is governed by the provisions of certain rules made by the State. It was pointed out in paragraph 9 of the said judgment as follows:

It seems to us that before an institution can be a statutory body it must be created by or under the statute and owe its existence to a statute. This must be the primary thing which has got to be established. Here a distinction must be made between an institution which is not created by or under a statute but is

governed by certain statutory provisions for the proper maintenance and administration of the institution....

Vaish Degree College's case, therefore, necessarily decided that an educational institution, even if it is governed by the provisions of a statute such as the Registration of Co-operative Societies Act, cannot be regarded as an authority amenable to the jurisdiction of the High Court under Article 226 of the Constitution.

11. It is not necessary to refer to any more decisions because, as I have already mentioned earlier, this question is conclusively decided by the Full Bench of this Court in Sheela Sachidananda's case (supra). It has been specifically held that writ petitions under Articles 226 and 227 are not maintainable at the behest of the teachers for enforcement of their entitlements under Clause 77.4 and other connected clauses of the Secondary Schools Code. The clauses under the Code do not amount to statutory rules. In my opinion, what is true of the teachers must necessarily be held to be true of the students who are also claiming a right under the same provisions. This petition, therefore, will have to be dismissed on this ground.

12. Before I part with this judgment it must be recorded that Dr. Chandrachud has stated that the passing certificate, which has been issued by the fourth respondent in favour of the petitioner's daughter pursuant to the interim order passed by this Court, will not be recalled irrespective of the decision of this petition. This necessarily means that the petitioner's daughter, who has already been promoted to 10th standard in another school, will continue to be in that standard.

13. It must also be recorded that Dr. Chandrachud wanted to argue that the direction which has been issued in the instant case by the education officer in purported exercise of the authority under the Secondary Schools Code could not be issued against the fourth respondent, the fourth respondent being a minority institution. Several arguments based upon the minority character of the fourth respondent were pressed into service for resisting the claim of the petitioner in this petition as well as the exercise of the authority by the education officer under the Secondary Schools Code. In view of the fact that I am holding that the petition must fail on the ground which I have already indicated above, it is not necessary to decide the questions arising out of these submissions.

14. In the result, the petition fails. Rule is accordingly discharged with no order as to costs.