

(2019) 06 UK CK 0085

In the Uttarakhand High Court

Case No : Writ Petition No. 883, 884, 885, 886 Of 2019 (M/S)

Aviral Badoni & Others

APPELLANT

Vs

Council For The Indian School Certificate Examination And
Anr

RESPONDENT

Date of Decision : 20-06-2019

Acts Referred:

Delhi School Education Act, 1973 — Section 8(2)
Constitution Of India, 1950 — Article 12, 32, 226

Citation : (2019) 06 UK CK 0085

Hon'ble Judges : Lok Pal Singh, J

Bench : Single Bench

Advocate : Aditya Singh, G.S. Negi, Kanwaljit Singh, Piyush Garg

Final Decision : Dismissed

Judgement

Lok Pal Singh, J

1. Since, common question of law and facts are involved in the aforementioned writ petitions, therefore same are taken up together and are being decided by a common judgment for the sake of brevity and convenience.

2. For proper adjudication of the case, facts of WPMS No. 883 of 2019 are being taken into consideration.

3. Petitioner is the student of St. Joseph's Academy Rajpur Road, Dehradun/respondent no. 2. After successfully completing their class 10th examination, petitioners were promoted to class 11th. School has conducted the internal examination for class 11th students as per Chapter II of the Regulations of the ICSE, wherein it is provided that for promotions, a candidate is required to have obtained at least 40% marks in four subjects including English on the cumulative average and minimum 75% attendance of working days would be considered for being promoted to 12th standard. The petitioners could not secure the minimum marks and have been detained in class 11th on account of having not secured

the eligibility criteria, as per the regulation of respondent no. 1/ Council for the Indian School Certificate Examinations (hereinafter referred as CISCE). Request has been made on behalf of the father of the petitioner before respondent no. 2 i.e. Principal that petitioner is ready to give compartment examination for the subjects for which he has been detained by the school for being promoted to class 12th, but to no avail. Feeling aggrieved, the petitioner has filed bunch of writ petitions invoking this Court's extraordinary jurisdiction under Article 226 of the Constitution of India.

4. In the prayer part of the writ petitions, the following reliefs have been claimed:

(i) Issue a writ order or direction in the nature of mandamus commanding the respondent no. 2/ School to take compartment examination of the petitioner for the subjects for which he has been detained in class 11th.

(ii) Issue a writ order or direction in the nature of mandamus commanding the respondents to issue results subscribing to the Regulation of ICSE as contained in chapter II Part II Clause 'E'.

(iii) Issue a writ order or direction in the nature of certiorari quashing the result i.e. progress report of the petitioner (contained as Annexure No. 3 to the writ petition) issued by respondent no. 2 school being against the regulations issued by respondent no. 1 'ICSE Board'.

5. It is the contention of the learned counsel for the petitioner that as per the regulation of ICSE, though petitioner has not been awarded Pass Certificate, but he is entitled to be admitted to Class 12th by 31st August of the Academic Year, as the petitioner fulfils all other conditions as per the Regulations.

6. A counter affidavit has been filed by respondent no. 2 wherein preliminary objection has been raised in regard to the maintainability of the writ petition against respondent no. 2. It is contended that respondent no. 2 is neither "State" nor "Instrumentality of State" nor "any person or authority" within the meaning of Article 12 of the Constitution of India, and is a private institution, not receiving any grant or grant-in-aid from either the Central Government or the State Government, therefore, no mandamus can be issued against respondent no. 2.

7. Learned counsel for respondent no. 2 in support of his submission has placed reliance upon the judgment of Division Bench of this Court rendered in Special Appeal No. 38 of 2018, *Master Gurvijay vs. Union of India*, decided on 29.04.2008 wherein judgment of learned Single Judge was put to challenge, and the same was affirmed by the Division Bench, holding that the writ petition against the private institution is not maintainable. It is further contended that for promotion to Class 12th, the School follows the Regulations laid down by the ICSE, New Delhi, i.e. a minimum of 35% in 4 subjects and pass marks in English is compulsory and if any students fails in any one of the subject except English, he/she is eligible for compartment examination, otherwise not. In the present case, petitioners do not fall under this category as they have failed in more than

one subject and detained in class 11th as per the ICSE norms. In the counter affidavit following facts have been placed on records which are extracted hereunder:-

(a) In the School Diary of respondent no. 2 it is clearly mentioned that "promotion to the next class depends on the whole year's work, regular attendance, overall development and ability to cope with the next step in the student's education". The School has divided the whole all XI syllabus into 4 parts i.e. Unit 1, Term 1 and Unit 2, Term 2. This information as incorporated in the School Diary is given to each student so every student is aware of the above. The cumulative marks of these four examinations are taken into consideration for promotion to the next class. In the case of Class XI also, the school follows the same system and the final average is calculated and taken as the criteria for promotion of the student to Class XII. For promotion to Class XII, the school follows the regulation laid down by the CISCE, New Delhi, i.e. minimum of 35% in 4 subjects and pass marks in English is Compulsory. "If any student fails in one ONE subject except English, he/she is eligible for compartmental examination, otherwise not (as per the CISCE Rules and Regulations for promotion). In the petitioner's case, he does not fall under this category because he has failed in more than one subject; therefore he has been detained as per the CISCE norms.

(b) In the final average for the exam petitioner was awarded 28 marks in English, 23 marks in Accounts, 33 in Commerce, 20 in Economics, 7 in Computers and 52 in Moral Science. The final average marks in each subject are out of 100. The Progress Report Cards issued to each student is self-explanatory. However, it is clarified that for Unit Test 1 and Term 1 the maximum marks and marks obtained, as well as for Unit Test 2 and Term 2 the maximum marks and the marks obtained have been shown by the clarificatory Report Card (Annexure No. CA3). The Clarificatory Report Card is not different from the Report Card issued to each student. It is being filled to explain the maximum marks out of which the student obtained the marks. The marks obtained remain the same. The Clarificatory Report Card may not be construed as different from the one issued to the petitioner. It is pertinent to mention that the question paper issued to each student before the examination reveals the maximum marks for each subject. The student is thus well aware about the maximum marks in each paper. It was, therefore, not mentioned separately to each student in their respective Report Cards.

(c) The petitioner failed in English and in all the other Board subjects. It is to be noted that Moral Science is not a Board subject. Moral Science is taught with a view to inculcate moral values to the student.

(d) Vide communication No. CISCE/CIR/2018 dated 10th January 2018, the Council for the Indian School Certificate Examination (for brevity CISCE) New Delhi which reveals the change of pass marks from 35% to 40%. (Annexure No. CA-4). Vide Circular dated 04.12.2018 by CISCE, the respondent no. 2 was

informed about the criteria for appearing in compartmental examination (Annexure No. CA-5). Another Circular dated 29th March 2019 is being filed as Annexure CA-6. The eligibility criteria for promotion to Class 12 are mentioned in these circulars. In addition to the above, Regulation of CISCE are relevant. As per the aforementioned Regulation condition no. 5, the relevant part thereof is extracted hereinbelow:-

"Candidates who were not awarded pass certificates may appear for the compartmental examinations to be held in July in one ONE subject in which they have not secured the Pass Mark i.e. 35%. To be eligible to appear for the Compartmental Examinations the candidate should have secured the pass Mark in English and two other subjects. Copy of the regulations and syllabuses as prescribed by CISCE is being placed as Annexure CA-7. The respondent no. 2 has strictly adhered to the afore mentioned circular (Annexure CA-3)

(e) That the petitioner herein did not fulfill the criteria set forth in the manner stated in para d above, therefore he is not entitled to take Compartmental Examination. He was therefore not eligible to be promoted to a Higher Class i.e. Class 12th. The Circular dated 29th March 2019 as mentioned above was incorporated in the Rules and Regulations of the CISCE for the year 2021.

8. I have heard the learned counsel for the parties at length and perused the entire materials available on record.

9. Since, question of maintainability of the writ petition has been raised by respondent no. 2, thus, this Court has to deal with this issue firstly.

10. Their Lordships of the Hon'ble Apex Court having considered catena of judgment in the case of Marvari Balika Vidyalaya vs. Asha Srivastava & ors., decided on 17.02.2019 has held that the writ petition against the private unaided educational institutions is maintainable. The relevant paragraphs of the judgment are extracted hereunder:-

13. In Raj Kumar v. Director of Education & Ors.(supra) this Court held that Section 8(2) of the Delhi School Education Act, 1973 is a procedural safeguard in favour of employee to ensure that order of termination or dismissal is not passed without prior approval of Director of Education to avoid arbitrary or unreasonable termination/dismissal of employee of even recognised private school. Moreover, this Court also considered the Objects and Reasons of the Delhi School Education Act, 1973 and came to the conclusion that the termination of service of the driver of a private school without obtaining prior approval of Director of Education was bad in law. This Court observed:

"45. We are unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent School. Section 8(2) of the DSE Act is a procedural safeguard in favour of an employee to ensure that order of termination or dismissal is not passed without the prior approval of the Director of Education. This is to avoid arbitrary or unreasonable termination or dismissal

of an employee of a recognised private school."

14. This Court has laid down in *Raj Kumar v. Director of Education & Ors.* (supra) that the intent of the legislature while enacting the Delhi School Education Act, 1973 (in short, 'the DSE') was to provide security of tenure to the employees of the school and to regulate the terms and conditions of their employment. While the functioning of both aided and unaided educational institutions must be free from unnecessary Governmental interference, the same needs to be reconciled with the conditions of employment of the employees of these institutions and provision of adequate precautions to safeguard their interests. Section 8(2) of the DSE Act is one such precautionary safeguard which needs to be followed to ensure that employees of educational institutions do not suffer unfair treatment at the hands of the management.

15. Writ application was clearly maintainable in view of aforesaid discussion and more so in view of the decision of this Court in *Ramesh Ahluwalia v. State of Punjab & Ors.* (supra) in which this court has considered the issue at length and has thus observed:

"13. in the aforesaid case, this Court was also considering a situation where the services of a Lecturer had been terminated who was working in the college run by the Andi Mukti Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust. In those circumstances, this Court has clearly observed as under:(V.R. Rudani case, SCC PP.700-701, paras 20 & 22)

"20. The term 'authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

22. Here again, we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the Statute. Commenting on the development of this law, Professor de Smith states:'To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract. We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which

must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellant on the maintainability of the writ petition.

The aforesaid observations have been repeated and reiterated in numerous judgments of this Court including the judgments in Unni Krishnan and Zee Telefilms Ltd. brought to our notice by the learned counsel for the appellant Mr. Parikh.

14. In view of the law laid down in the aforementioned judgment of this Court, the judgment of the learned Single Judge as also the Division Bench of the High Court cannot be sustained on the proposition that the writ petition would not maintainable merely because the respondent institution is a purely unaided private educational institution. The appellant had specifically taken the plea that the respondents perform public functions i.e. providing education to children in their institutions throughout India." (emphasis supplied)

16. It is apparent from the aforesaid decisions that the Writ Application is maintainable in such a matter even as against the private unaided educational institutions.

11. Admittedly, respondent no. 2 is recognized by the Regulations of ICSE Board. It is true that respondent no. 2 is not receiving any grant from the Central or State Government, but is discharging public function by way of imparting education to students. Though, respondent no. 2, may not come within the definition of State or its instrumentalities, but covered under the definition of 'authority', in view of the definition of Article 226 of the Constitution of India wherein words 'any person or authority' is used, thus writ jurisdiction under Article 226 is not amenable to statutory authorities and instrumentalities of the State but also cover any other person or body discharging public duty. Thus, it is held that since respondent no. 2 is discharging public function by way of imparting education, the writ petition against respondent no. 2 is maintainable.

12. Now, the second issue for consideration is that whether this Court can issue mandamus against respondent no. 2, permitting the petitioner to participate in compartment examination.

13. It is the submission of the learned counsel for the petitioner that as per the Regulation of ICSE, respondent no. 2 is bound to admit the petitioner to Class 12th by 31st August of the Academic Year as the petitioner fulfils the other conditions as per the Regulations but respondent no. 2 did not consider the petitioner for being promoted to Class 12th. It is further contended that there is also a provision of compartmental examination but respondent no. 2 has not conducted the compartmental examination of the petitioner in the subjects he failed. Learned counsel for the petitioner drew attention of this Court to Chapter II of the Regulations, which is as under:

Part II- Internal Examination

(i) It will be the responsibility of the Head of the School to ensure that promotion from Class XI is done on the basis of cumulative achievement level of the student throughout the year, in the subjects he/she has been registered for. For promotions, a candidate is required to have obtained at least 40% marks in four subjects including English on the cumulative average and a minimum attendance of 75% of the working days.

14. On the other hand, learned counsel for respondent no. 2 would submit that vide circular no. CISCE/CIR/2018 dated 01.01.2018, the minimum passing marks would be 35% instead of 40% for being considered to Class 12th. As per the Progress Report of the petitioners, they failed to secure the required marks for promotion to class 12th as per the norms of ICSE. It is further contended that petitioner did not fulfill the criteria for being permitted to appear in compartmental examination, as such, they were not permitted to appear in the said examination.

15. There is no dispute in regard to the criteria of securing 75% attendance, this is must for every student. Here the petitioner has secured 86.99% attendance. The main facet is that the petitioner did not fulfill the criteria for being considered to be promoted to Class 12th , as he has not secured pass mark i.e. 35% in four subjects and pass marks in English, which is compulsory, as per Regulations of ICSE. Further, to appear in the compartmental examinations, a student has to pass in English and other two registered subjects but, the petitioner herein has failed in all the subjects. In exercise of its powers under Article 226 of the Constitution of India in an appropriate cases, this Court can issue direction, order or writ, including the writ of mandamus or any of them, for the enforcement of any of the rights conferred by Part III & IV or any other purpose. The jurisdiction under Article 226 only can be exercised by this Court when any State or Authority failed to discharge its legal obligation. Since, the petitioners could not make out a case of dereliction of duties on the part of the respondent no. 2 and this Court is further of the opinion that no fundamental right of the petitioners has been breached by not permitting the petitioners to appear in compartmental examination, in such circumstances, mandamus cannot be issued to respondent no. 2 to conduct compartment examination of the petitioner for all the subjects.

15. In view of the foregoing discussions, the aforementioned writ petitions fail and are dismissed.

16. No order as to costs.