

(2000) 02 CAL CK 0029
In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction A.P.O.T. No. 460 of 1999 G.A. No. 1387 of 1999

Ballygunge Siksha Samity and Others APPELLANT

Vs

Ms. Susmita Basu and Others RESPONDENT

Date of Decision : 29-02-2000

Acts Referred:

Constitution of India, 1950 — Article 12, 18, 226, 30, 30(1)
Management of Recognized Non Government Institutions (Aided and Unaided) Rules, 1969 — Rule 2, 6, 6
West Bengal Board of Secondary Education Act, 1963 — Section 18

Citation : (2000) 2 CALLT 484 : (2000) 1 CHN 635

Hon'ble Judges : Ranjan Kumar Mazumdar, J; Altamas Kabir, J

Bench : Division Bench

Advocate : Mr. M.C. Das and Mr. Subrata Banerjee, Mr. Samaraditya Pal, Mr. Partha Sarathi Sengupta, Ms. Indira Banerji, Ms. Lapita Ray and Ms. Vineeta Meharia, Mr. Tapan Dutta, for the Appellant; Mr. Bikash Ranjan Bhattacharjee, Mr. Pradip Tarafdar and Mr. Indrajit Dasgupta, for the Respondent

Judgement

A. Kabir, J.—The respondents Nos. 1 to 5 in this appeal were among 21 members of the leaching staff of an educational Institution known as Ballygunge Siksha Sadan" run by the appellant No.1 Society at 81A, Garlahat Road, Calcutta-700017, who had filed a writ petition, being W.P.No.4139 of 1992, Inter alia, praying for Issuance of a writ in the nature of Mandamus upon the authorities of the school to properly fix the salaries of the teaching and non-teaching staff of the school and to remove all anomalies in the scales of pay as recommended by the Third Pay Commission and as extended to other Government aided D.A. getting schools. Out of the 31 writ petitioners some retired from service during the pendency of the writ petition and some chose to withdraw from the writ petition leaving the respondents Nos. 1 to 5 herein to continue with the same.

2. The case as made out in the writ petition is that Ballygunge Siksha Sadan was

established in 1950 as a High School and was granted recognition in 1952 provisionally for two years by the West Bengal Board of Secondary Education. Subsequently, the school was granted a Special Constitution and came to be administered by a Managing Committee constituted thereunder. In 1978, the school was granted recognition as a Higher Secondary School by the West Bengal Council of Higher Secondary Education. The school has been receiving aid from the State Government in the form of Dearness Allowance for its approved teachers, but a good many of the teaching staff had not been approved and were thus denied the benefit of Government Dearness Allowance.

3. The writ petitioners alleged that though they had been given the benefits as recommended by the First and Second Pay Commission in West Bengal and as extended to other aided educational institutions in West Bengal, their pay was not refixed as per the recommendations of the Third Pay Commission of West Bengal.

4. The further case of the writ petitioners is that after protracted negotiation, the management of the school agreed to extend to the petitioners the benefits of the recommendations made by the Third Pay Commission, but, in fact, the scales of pay offered to them were not in strict conformity with the entire recommendations of the Third Pay Commission. According to the writ petitioners, they have not been paid their arrears of salary as and from 1st January, 1988, as recommended by the Third Pay Commission.

5. Despite the aforesaid agreement, a writ petition was filed on behalf of the school, inter alia, praying for a declaration that the school was entitled to the protection of Article 30 of the Constitution, having been established and managed by a linguistic minority, and that the respondents therein had no power or authority to interfere with its management and for a further declaration that the Rules for Management of Recognised, non-Government Institution (Aided and Unaided) 1969, have no application to the school and that the recommendations of the Third Pay Commission were not applicable to the school.

6. The writ petitioners claim to have got themselves added as parties in the said writ petition filed on behalf of the school, but the matter is yet to be finally decided.

7. In the meantime, the writ petition filed by the respondents Nos.1 to 5 herein came up for consideration before the learned single Judge who upon holding that the institution is a Non-Government sponsored institution under the administrative control of the Education Department, to which the Rules for the Management of Recognised Non-Government Institutions (Aided and Unaided), 1969, hereinafter referred to as the "1969 Rules", had application, disposed of the same by his Judgment and order dated 17th May, 1999, with the following directions :

"(i) The Director of School Education, respondent No.2 herein, shall enforce the parity in payment to the petitioners in pay scales and D.A. on par with the

Government aided institution and for that purpose the Director shall issue appropriate directions to the respondents fixing the pay scales and D.A. payable to the teachers and also the date from which the said pay scales shall be applicable. Consequently, if there are any arrears due and payable to the teachers based upon the fixation made by the Director, the respondent management shall pay the same.

(ii) The Director shall also consider whether there has been any discrimination or anomalies in the fixation of pay scales of the teachers by the respondent management with respect to the teaching staff in the said institution and if in the opinion of the Director any such anomalies required to be rectified, appropriate directions shall be issued by the Director in that behalf or to the respondent management.

It need only be clarified that the above exercise shall be completed by the Director within a period of 6(six) months from the date of communication of a copy of this order. It is further clarified that it shall be open to the Director to cause an enquiry to be made in this behalf by any of its Gazetted staff and based thereon, it shall be open to the Director to pass orders fixing the basic pay, scales and D.A. in respect of the teaching staff of the respondent institution as also the date from which the same is liable to be implemented. The scales of pay and D.A. shall, however, be on par with the Government aided institutions. If any such enquiry to be conducted, the management of the respondent institution, the teachers of the said institution, and such other person/authority as to the Director shall seem appropriate, shall be afforded an opportunity of being heard in the matter with liberty to place such evidence on record upon which they rely."

8. This appeal has been preferred by the School and its authorities against the said judgment and order of the learned single Judge.

9. Appearing on behalf of the appellants, Mr. Samaraditya Pal firstly urged that the writ petition was not maintainable against the school and its authorities as they were not "State" within the meaning of Article 12 of the Constitution.

10. Mr. Pal submitted that the school, which is a private institution, is run by a Society entirely out of its own resources and does not receive any aid from the Government except for Dearness Allowance for the approved members of the teaching and non-teaching staff of the school. According to Mr. Pal, out of almost 100 members of the teaching and non-teaching staff, only 18 members comprising 8 teachers and 7 non-teaching employees of the secondary section and 3 teachers of the primary section received Dearness Allowance from the Government. Percentage wise the total Dearness Allowance received from the Government is less than 7.3 per cent of the total expenditure incurred by the school each month on the salary and emoluments of the members of the staff.

11. Mr. Pal also submitted that schools receiving only Dearness Allowance from the Government for its teaching and non-teaching staff are not "Government-aided institutions" and have been separately categorised as "D.A. Getting"

Schools. Mr. Pal urged that the same would be clear from the list of recognised secondary schools and Madrasahs in the district of Calcutta published by the office of the District Inspector of Schools (S.E.) Calcutta, Government of West Bengal, wherein "Non-Government aided" institutions have been separately categories from "D.A. Getting" Schools. Mr. Pal pointed out that in the list as published "D.A. Getting" Schools have been shown separately from "Non-Government aided" schools and Ballygunge Siksha Sadan has been listed under the category of "D.A. Getting" schools.

12. Mr. Pal urged that "D.A. Getting" schools could not be bracketted in the same category as "non-Government-aided" institutions and any attempt to do so would be contrary to the accepted policy of the State Government in its Education Department.

13. Mr. Pal then submitted that there are no statutory Rules and Regulations governing the fixation of the salaries and emoluments of the teaching and non-teaching staff of private schools, including "D.A. Getting" schools, which are entitled to fix their own scale of pay for the members of their staff. Mr. Pal submitted that, in any event, the teachers of the school have at all times been well paid and their salaries and allowances have compared favourably with that of their counter-parts in Government and Government-aided schools.

14. In support of his submissions, Mr. Pal firstly referred to the decision of the Hon'ble Supreme Court in the case of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, wherein the Hon'ble Supreme Court had occasion to consider the scope of Article 12 of the Constitution in relation to a Society registered under the Societies Registration Act. In the process, the Hon'ble Supreme Court indicated certain tests to determine as to whether an "authority" came within the definition of "State" for the purpose of Article 12 of the Constitution.

15. Mr. Pal urged that the most important test was whether the authority is an instrumentality or agency of the Government and not as to how it was created. Mr. Pal submitted that the Hon'ble Supreme Court had observed that the inquiry to be made was not to determine as to how the juristic person was born but why it was brought into existence. It could be a statutory corporation created by a statute or it may be a Government company or a company formed under the Companies Act or it may be a society registered under the Societies Registration Act--whatever be its genetical origin it would be an "authority" within the meaning of Article 12 if it was an instrumentality or agency of the Government with the Government exercising deep and pervasive control over its affairs.

16. Mr. Pal urged that in the instant case there was no material to even suggest that the school was an instrumentality or agency of the State, so as to make it an "authority" within the meaning of Article 12 of the Constitution and hence amenable to writ Jurisdiction, or that the State Government exercised deep and pervasive control over its affairs.

17. Mr. Pal then referred to the Bench decision of this Court in the case of Sri Anupam Ghosh v. Union of India & Ors. [1991 (2) CHN 451] wherein it was held that even if M/s. Andrew Yuls & Co. Ltd., being a Government Company, was held to be "State" within the meaning of Article 12 of the Constitution, the impugned action of termination of the service of an employee was not amenable to writ jurisdiction. In other words, the act complained of was the outcome of a private arrangement notwithstanding the status of the contracting parties.

18. Reference was then made to the Full Bench decision of Bombay High Court in the case of The Shamrao Vithal Co-operative Bank Limited and another Vs. Padubidri Pattabhiram Baht and another, wherein the Multi-State Co-operative Bank registered under the Maharashtra Co-operative Societies Act, 1960, was held not to be a "State" within the meaning of Article 12 of the Constitution, though it was governed by the Banking Regulation Act, 1949, and performed public functions. Mr. Pal submitted that the said judgment was rendered on the finding that the Central Government does not have any all-pervasive control over a Multi-State Co-operative Bank nor because of performance of public functions did it automatically become "State" under Article 12 of the Constitution.

19. Mr. Pal then referred to the decision of the Hon"ble Supreme Court in the case of Som Prakash Rekhi v. Union of India (AIR SC Page 212) wherein relying upon its earlier decision in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, the Hon"ble Supreme Court held that Bharat Petroleum Corporation is "State" within the enlarged meaning of Article 12. Mr. Pal submitted that while arriving at such conclusion, the Hon"ble Supreme Court observed that the preponderant considerations for pronouncing an entity as State agency or instrumentality are:--

- (i) financial resources of the State being the chief funding source,
- (ii) functional character being Governmental in essence.
- (iii) plenary control residing in Government,
- (iv) prior history of the same activity having been carried on by Government and
- (v) some element of authority or command.

20. Mr. Pal submitted that none of the said criteria were present in this case so as to make the school a "State" within the meaning of Article 12 of the Constitution.

21. The next case referred to by Mr. Pal is the decision of the Hon"ble Supreme Court in the case of Shri Vidya Ram Misra Vs. Managing Committee, Shri Jai Narain College, , wherein it was observed that a lecturer appointed by the Managing Committee of a College affiliated to Lucknow University which was not a statutory body, does not hold a public office or status which was capable of being protected and his remedy was only by way of a suit for damages and not under Article 226 of the Constitution.

22. Mr. Pal also referred to the decision of the Hon"ble Supreme Court in the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , wherein upon considering the earlier decisions on the point and applying the tests indicated therein, the Hon"ble Supreme Court held that NCERT did not fall within the definition of "State" under Article 12 of the Constitution since its activities were not wholly related to Government functions and the control of the Government was confined only to proper utilisation of the grants made to it.

23. It was also submitted that the Government has from time to time constituted Pay Commissions to examine the structure of pay and conditions of service of its employees, having regard to the financial resources of the Government and to make appropriate recommendations thereupon. Mr. Pal urged that such recommendations cannot and do not have any application to private institutions such as the Ballygunge Siksha Sadan where the burden of payment of salary of the teaching and non-teaching staff are borne not by the Government but by the schools themselves.

24. In January, 1987, the State, Government constituted a Pay Commission, commonly referred to as the "Third Pay Commission", inter alia, to examine the structure and conditions of Service of :

(a) Teaching and non-teaching staff of Government sponsored or aided--

(i) Schools upto Class XII standard,

(ii) Training institutions of Primary Teachers,

(iii) Libraries,

(iv) Polytechnics and Junior Technical schools,

(b) Non-teaching employees of non-Government Colleges (sponsored and aided).

(c) Employees of District School Boards, with due regard to the financial resources of the State Government.

25. Mr. Pal contended that the terms of reference of the Third Pay Commission did not cover "D.A. Getting" schools which were neither Government sponsored nor Government-aided schools. He also contended that in Government sponsored or non-Government-aided schools the entire salary burden of the teaching and non-teaching staff is borne by the State Government while in "D.A. Getting" schools the Government only paid Dearness Allowance to the approved teaching and non-teaching staff of the school. Mr. Pal submitted that a conscious distinction had been made by the State Government in its Education Department between "non-Government aided" schools and "D.A. Getting" schools for the said reason.

26. Mr. Pal urged that, in any event, having regard to the definition of "sponsored institution" in Rule 2(g) of the 1959 Rules, the learned single Judge had

misdirected himself in holding that Ballygunge Siksha Sadan was a sponsored institution since it had neither been established by the State Government nor had it been taken over by the State Government with the consent of the majority of persons for the time being in charge of its management.

27. Moreover, the expression "sponsored schools" had also been defined in The West Bengal School Service Commission Act, 1997, to mean a school which had been declared as a "sponsored school" by the State Government by notification, but such a declaration had not been made as far as the Ballygunge Siksha Sadan was concerned.

28. Referring to the provisions of the 1960 Rules, Mr. Pal submitted that specific provisions had been made in Rules 6 and 6A regarding the manner in which the Managing Committees of institutions, other than those sponsored by the State Government, were to be formed. Mr. Pal also referred to Rule 8 of the said Rules which empowers the Executive Committee constituted under clause (a) of section 18 of the West Bengal Board of Secondary education Act, 1963 to approve and/or supersede a Managing Committee of a school and to appoint an Administrator or an Ad-hoc Committee to exercise the powers and perform the functions of the Managing Committee.

29. Reference was also made to Rules 14 and 28 which provide for audit of the accounts of an institution by an Auditor to be appointed by the Director of School Education, West Bengal, and the powers of the Managing Committee of aided educational institutions.

30. Mr. Pal urged that none of the said provisions could in any manner be indicate that the State Government exercised deep and pervasive control of institutions, other than those sponsored by the State Government, so as to make such educational institutions amenable to writ Jurisdiction.

31. Mr. Pal then submitted that the Notification dated 7th March. 1990, issued by the Education Department, Government of West Bengal, which formed the basis of the writ petition filed by the respondents Nos. 1 to 5 and others and which had been relied upon by the learned single Judge in directing that parity be enforced in payment to the writ petitioners in pay scales and D.A. on par with Government-aided institutions, had no application to Ballygunge Siksha Sadan which was neither a Government sponsored nor an aided school. Mr. Pal submitted that the notification made it quite clear that the Pay Commission would examine the structure of emoluments and conditions of service of the teaching and non-teaching staff of Government sponsored or aided institutions as indicated in the notification.

32. Mr. Pal urged that the expression "aided" had not been defined in the notification, but had been defined in The West Bengal School Service Commission Act, 1997, as follows :--

"Aided" with its grammatical variations, used with reference to a school, shall

mean aided by the State Government in the shape of financial assistance towards the basic pay of the teachers of that school."

33. Mr. Pal urged that since the school was not receiving any financial assistance towards the basic pay of its teachers, it was not an aided institution within the meaning of the aforesaid Act.

34. Mr. Pal, however, pointed out that in the note appended to sub-rule (9) of Rule 28 of the 1969 Rules it had been stated as follows :--

"An Institution receiving recurring financial assistance in any shape or form from the State Government either for maintenance or for payment of salary and/or allowances of teachers and/or other employees thereof shall be treated as an aided Institution for the purposes of these rules."

35. Mr. Pal submitted that as had been indicated in the note itself, any institution coming within the scope of the note would be treated as an aided Institution for the purposes of the 1969 Rules only and the same would not have general application in relation to the notification dated 7th March, 1990.

36. Reference was then made to the various Circulars issued by the Education Department, Government of West Bengal, with regard to payment of Grants-in-aid to recognised Non-Government High and Higher Secondary schools to cover the net deficit on the salary account of approved teachers and non-teaching employees. Mr. Pal urged that the school was not also covered by the Grants-in-aid scheme since the entire salaries of the teaching and non-teaching staff of the school were being paid by the school and only some of the said staff, whose appointments had been approved, were being paid Dearness Allowance by the State Government

37. Mr. Pal submitted that the aforesaid distinction would become even more clear from the list of Recognised Secondary Schools and Madrassahs in the District of Calcutta, published by the office of the District Inspector of Schools (S.E.) Calcutta wherein "D.A. Getting" Non-Government schools were categorised separately in relation to "Aided" schools and Ballygunge Siksha Sadan was shown in the category of "D.A. Getting" schools.

38. It was urged by Mr. Pal that It is a well-recognised principle of construction that subsequent legislation may be looked at in order to give a proper interpretation to an earlier Act where there were certain ambiguities or there were provisions which were capable of more than one interpretation. Mr. Pal submitted that since in the notification of 7th March, 1990, there was not definition of the expression "aided", the Court was competent to look into subsequent enactments and notifications where such expression had been used in order to come to a conclusion as to whether the notification of 7th March, 1990, had any application to the school.

39. In support of his submissions Mr. Pal relied on two decisions of the Hon'ble Supreme Court in the case of (i) State of Bihar Vs. S.K. Roy, and (ii) M/s. Pappu

Sweets and Biscuits Vs. Commissioner of Trade Tax U.P Lucknow, . to which reference will be made, if required.

40. At this Juncture it may be noted that appearing for the West Bengal Board of Secondary Education and for the State, Mr. Manick Das and Mr. Tapan Kr. Dutt also submitted that the Ballygunge SikshaSadan was not an aided-school but a "D.A. Getting" school as indicated in the above-mentioned list of recognised secondary schools and madrassahs in the district of Calcutta.

41. Mr. Pal also pointed out that in the reference to the Third Pay Commission it was made quite clear that examination of the structure of emoluments and conditions of service of the teaching and non-teaching staff of Government sponsored or aided institutions as indicated in the notification, would have to be made with due regard to the financial resources of the State Government. Mr. Pal urged that taking recourse to its taxing powers the State Government could arrange to pay arrears from an earlier date, while privately run schools could raise funds only with prospective effect by enhancing the tuition fees and could not, therefore, bear the burden of arrears.

42. Mr. Pal reiterated his submission that the notification of 7th March, 1990, had no application to the school in question and the directions given by the learned single Judge on the basis thereof could not be sustained and were liable to be quashed.

43. No argument was advanced on behalf of the appellants on the questions as to whether the school as a linguistic minority enjoyed the protection of Article 30 of the Constitution. In fact, a separate writ petition filed on behalf of the school praying for a declaration that the school was entitled to such protection is pending and is yet to be finally decided.

44. Appearing on behalf of the respondents Nos. 1 to 5 who, as indicated hereinbefore, continued with the writ proceedings out of the total number 31 writ petitioners who had initially filed the writ petition, Mr. Bikash Ranjan Bhattacharjee submitted that from the very beginning when the school was granted provisional recognition as a High School, it was required to fulfil certain conditions spelt out in the Circular of the Board of Secondary Education, West Bengal, dated 25th May, 1953. One of the conditions was that the salaries of the teachers should be according to the scale as laid down by the Board from time to time.

45. Mr. Bhattacharjee then referred to the Memorandum dated 4th February, 1958, from the Education department, Government of West Bengal, to the Director of Public Instruction, West Bengal, in connection with centrally sponsored schemes for improvement of scales of pay of teachers of Secondary Schools, wherein it was stated that pursuant to the decision of the Central Government, the State Government had decided that there would be uniform scales of pay according to the qualifications and responsibility of teachers and Headmasters in all recognised Secondary Schools.

46. Mr. Bhattacharjee also referred to Regulation 20 of the Code of Regulations for Angle-Indian and Other Listed Schools, 1993, which provides that all schools recognised under the Code were required to pay its teaching and non-teaching staff house rent and medical allowances. Gratuity and Contributory Provident Fund in the scales not lower than those approved by the State Government in respect of Government aided schools affiliated to the West Bengal Board of Secondary Education or as prescribed under the relevant Provident Fund Act/ Rules of the Government of India.

47. Mr. Bhattacharjee urged that the appeal was misconceived, inasmuch as, having regard to the note appended to sub-rule (9) of Rule 28 of the 1969 Rules, the school must be deemed to be an "aided school" since it was receiving some form of financial assistance from the State Government in the form of Dearness Allowance for its approved teaching and non-teaching staff, so as to bring it within the ambit of the Notification of 7th March, 1990. Mr. Bhattacharjee added that the said note would have to be confined only to Rule 28 since it deals with the powers of the Committees of aided institutions.

48. Mr. Bhattacharjee then referred to an unreported decision of this Court in Matter No. 2276 of 1997 (Sri Rupnarayan Chaubey v. The State of West Bengal & Ors.) where one of the questions which fell for determination was whether the rules framed for extension of service of a teacher apply to teachers employed by a private and unaided school. In the said matter it was noted that although the school was described as an "unaided school" it received considerable sums of money from the Government for payment of Dearness Allowance to its teachers. In the course of arguments the note to sub-rule(9) of Rule 28 was referred to and it was held by the learned Judge that the school having enjoyed the benefit of affiliation and considerable financial assistance for payment of clearness allowance to its teachers is bound to follow Rule 28 of the Management Rules and that the direction in the matter of extension of service given by the Board are binding upon the school.

49. Mr. Bhattacharjee next referred to a single Bench decision of this Court in Brojo Bhusan Mishra Vs. State of West Bengal and Others, in which similar questions arose and where following the views expressed by the Hon'ble Supreme Court in 1) Francis John Vs. Director of Education and Others, Frank Anthony Public School Employees" Association Vs. Union of India (UOI) and Others, and 3) Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., and by this Court in Rupnarayan Choubey's case (supra), the learned Judge held that the Government Circular, which provides that a Secondary School Teacher who had improved his/her qualification subsequent to his appointment in a subject nor relevant to his teaching would be allowed the higher scale on qualification basis, would also be applicable to the school which was established by a linguistic minority and was privately managed.

50. Mr. Bhattacharjee submitted that the Hon'ble Supreme Court also had occasion to consider the scope and ambit of Article 12 of the Constitution in Air

India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], and the tests laid down earlier to determine as to Whether a body was an instrumentality or agency of the State were reiterated. It was reiterated that one of the tests was that the instrumentality, agency or persons renders an element of public service and every action of the public authority agency or instrument or the person acting in public interest or any act that gives rise to public element should be guided by public interest in exercise of public power or action hedged with public element and is open to challenge. It must meet the test of reasonableness, fairness and justness. If the exercise of the power is arbitrary, unjust and unfair, the public authority, instrumentality, agency or the person acting in public interest, though in the field of private law, is not free to prescribe any unconstitutional conditions or limitations in their actions.

51. The next decision referred to by Mr. Bhattacharjee is a Bench decision of this Court in M/s. Overland Investment Ltd. and Vs. State of West Bengal and others, wherein Residuary non-statutory companies dealing with public money under the control of the Reserve Bank, were held to be discharging public duties as public authorities and therefore amenable to writ jurisdiction.

52. Mr. Bhattacharjee then submitted that teaching and non-teaching staff of educational institutions must be treated as one indivisible unit and that irrespective of whether such an institution was under private or public management, all benefits available to teaching and non-teaching staff in Government-controlled institutions must also be available to teaching and non-teaching staff of privately managed educational institutions, since all such institutions were discharging functions of a public nature, that is, imparting education.

53. In support of his aforesaid submission, Mr. Bhattacharjee referred to the decision of the Hon'ble Supreme Court in the case of Hindustan Antibiotics Ltd. Vs. The Workmen and Others, wherein the question of fixation of wage structure of a Government undertaking in the public sector fell for consideration and it was observed that the character of the employer or destination of profits has no relevance in fixation of wages and that acceptance of the principle of region-cum-Industries would be more conducive to industrial relation than that of Government wage-structure framed on an all-India basis. It was observed further that who ever may be the employer, he has to pay a reasonable wage to the employees. If it was to be accepted that Government companies born in the public sector are necessarily different from that of companies born in the private sector, the pattern of wage-structure between similar industries in the same region would also differ. On the other hand, if the doctrine of region-cum-Industry was to be accepted, all the employees of industries of similar nature, irrespective of the character of the employers, would get a fair deal without any discrimination which will certainly be conducive to the industrial development of the country. In fact, the constitutional directive in Articles 39(d) and 43 would be violated if an attempt was made by the State to make a distinction between the

same class of labourers on the ground that some of them were employed by a company financed by its and the others by companies floated by private enterprise.

54. Referring to the decision of the Hon''ble Supreme Court in the case of Frank Anthony Public School Employees'' Association Vs. Union of India (UOI) and Others, where the provisions of sections 10 and 12 of the Delhi School Education Act, 1973, were taken up for consideration. Mr. Bhattacharjee submitted that section 10 of the said Act, inter alia, requires that scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a recognised private school shall not be less than those of the employees of corresponding status in schools run by the appropriate authority. Section 12, however, made the provisions of section 10 inapplicable to unaided minority institutions. Holding that the conditions imposed u/s 10 was a permissible regulation which in no way detracted from the fundamental right guaranteed to minority institutions under Article 30(1) of the Constitution to administer their educational institution, the Hon''ble Supreme Court was of the view that to the extent that section 12 made section 10 inapplicable to unaided minority institutions, it was clearly discriminatory and void.

55. The Hon''ble Supreme Court went on to observe that the excellence of 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 be said to be violative of the fundamental right guaranteed by Article 30(1). The management of a minority educational institution cannot be permitted under the guise of the fundamental right guaranteed by Article 30(1) to oppress or exploit its employees any more than any other private employee.

56. The next decision referred to by Mr. Bhattacharjee is that of the Hon''ble Supreme Court in Haryana State Adhyapak Sangh and Others Vs. State of Haryana and others, where the Hon''ble Supreme Court while considering its earlier direction to remove disparity in emoluments of teachers employed in various Government aided private schools and teachers in Government schools, issued further directions to implement the same. Referring to the recommendations of the Kothari Commission appointed by the Government of India to examine the conditions of service of teachers with the object of improving the standards of education in the country and its earlier decision in between the same parties, the Hon''ble Supreme Court, inter alia, directed that the pay scales of the teachers of Government aided schools should be revised so as to bring them at par with the pay scales of teachers of Government schools and that teachers employed in aided schools should be paid the same salary and

dearness allowance as was being paid to teachers employed in Government schools.

57. Similar views were expressed by the Hon''ble Supreme Court in State of Haryana and others Vs. Rajpal Sharma and others, and by the Allahabad High Court in the case of Smt. Sushila Srivastava v. State of U.P. & Ors. (1999 Lab. IC 2843) wherein it was held that Rule 10(2)(c) of The U.P. Recognised Basic Schools (Recruitment and Conditions of Service of Teachers and other conditions) Rules, 1975, providing for pay parity to teachers and employees of recognised schools with those of schools run by Basic Shtksha Parishad applied to private schools also.

58. Mr. Bhattacharjee also referred to the decision of the Hon''ble Supreme Court in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, wherein while considering a similar question the Hon''ble Supreme Court, inter alia, observed that whatever may be the form of the body concerned, what is relevant is the nature of duty imposed. If the duty imposed upon such authority is of a public nature, a writ in the nature of Mandamus would lie for the purpose of fulfilling of such public duties and/or responsibilities.

59. Reference was lastly made to the decision of the Hon''ble Supreme Court in the case of K. Krishnamacharyulu & Ors. v. Sri Venkateswara Hindu College of Engineering & Anr. (AIR 1998 S.C. 295) in which it was reiterated by the Hon''ble Supreme Court that private institutions cater to needs of educational opportunities which have an element of public interest and that teachers could, therefore, avail of remedy under Article 226 of the Constitution.

60. Appearing for the West Bengal Board of Secondary Education, Mr. Manick Chandra Das submitted that though the school was recognised it was not an aided school and if it was neither an aided school nor a Government-sponsored school, the notification dated 7th March, 1990, issued by the Educational Department, Government of West Bengal, would have no application to it

61. Replying to Mr. Bhattacharjee's submissions, Mr. Pal urged that if Mr. Bhattacharjee's contention that the writ petitioners were entitled to pay scales as given by similar schools (aided or unaided) was to be accepted, it would result in unequals being treated as equals, which was too idealistic a concept.

62. Mr. Pal urged that the conditions contained in the Circular dated 25th May, 1953, were no longer relevant in the present context since no scales of pay had been laid down by the West Bengal Board of Secondary Education as far as this school is concerned. At best, recognition given to the school could be withdrawn in case of default of any of the said terms and conditions. Mr. Pal urged that the same argument had been advanced before the learned single Judge who had not accepted the same.

63. As to the Memorandum dated 4th February, 1958, Mr. Pal urged that the

same contemplated bringing about uniformity in aided Secondary schools from 1st March, 1957, and that all subsequent circulars in this regard were also restricted to aided schools. Mr. Pal urged that Ballygunge Siksha Sadan not being an aided school, the said Circulars and Memorandums would have no application to it and the same would be quite clear from Memo No. 1404(18)GA dated 15th May, 1990, wherein it has been stated that the Government was aware of the fact that the implementation of G.O.No. 33-Eden(B) dated 7th March, 1990, in respect of teaching and non-teaching employees of recognised aided Secondary Institutions would be a long drawn process as well as a laborious one. Mr. Pal submitted that in such background a model procedure was prepared in respect of such schools involving exercise of options by the teaching and non-teaching staff of the school in respect of G.O. No. 33-Eden(B) dated 7th March, 1990, but such procedure was not applicable to unaided schools such as Ballygunge Shiksha Sadan.

64. Regarding paragraph 20 of the Code of Regulations for Anglo Indian and other listed Schools, 1993, which came into operation on 1st February, 1994, Mr. Pal submitted that the Code provides for Government grant so as to make these schools analogous to aided schools. Of course, the Code indicates that the Government plans to bring about an uniform education system aimed at achieving uniform salaries, but the Code does not have general application, not even to Anglo Indian schools.

65. Mr. Pal submitted that the 1969 Management Rules create an obligation in respect to aided non-Government schools, but the Note appended to Rule 29(9) of the said Rules does not provide for D.A. Getting Schools to pay a specified salary to its teaching and non-teaching staff. The Judgment in Sri Rupnarayan Chaubey's case (supra) was dealing with sub-rule(4) of Rule 29 regarding extension of the service of a teacher and did not have any relevance to the facts of his case since Rule 28 did not relate to fixation of pay scales. Mr. Pal submitted that the aforesaid Note seeks to treat unaided schools as aided schools only for the purposes of Rule 98.

66. Referring to the decision in Brojo Bhusan Mishra's case (supra), cited by Mr. Bhattacharjee, Mr. Pal contended that the Circular in question did not contain any directions issued by the Director of School Education, West Bengal, with regard to fixation of pay scales and the said decision was, therefore, inapplicable to the facts of this case.

67. Mr. Pal submitted that the decision of the Hon''ble Supreme Court in the Air India Statutory Corporation case (supra) and of this Court in Ms. Overland Investment Ltd. case (supra) have no real bearing as far as this case is concerned, since it was not the case of the writ petitioners/ respondents that the school was an agency or instrumentality of the State. Mr. Pal submitted that admittedly the affairs of companies dealing with public money under supervision and control of the Reserve Bank of India which exercised deep and pervasive control, are amenable to writ jurisdiction, but it could not be said that the

services of employees of such companies have any statutory under pinning which could be considered in the writ Jurisdiction.

68. With regard to the decision of the Hon''ble Supreme Court in the Hindustan Antibiotics case (supra) relied upon by Mr. Bhattacharjee in support of his submission regarding the intention of the Government to bring about uniformity of pay scales of different recognised aided Secondary schools, Mr. Pal urged that "teachers" could not be equated with "Workmen". While the Industrial Disputes Act did not make any distinction between Government industries and non-Government industries, the same could not be said of teachers who had been held not to be "workmen" in the case of Miss A. Sundarambal Vs. Government of Goa, Daman and Diu and Others, .

69. Mr. Pal lastly urged that the decision of the Hon''ble Supreme Court in the Haryana State Adhyapak Sangh case (supra) and that of the Allahabad High Court in Smt. Sushila Srtvastava's case (supra), relied upon by Mr. Bhattacharjee, related to aided schools and schools brought under Grant-in-Aid scheme and could not, therefore, have application to unaided schools.

70. Mr. Pal concluded on the note that since Ballygunge Shiksha Sadan was not an aided school, the notification dated 7th March. 1990, issued by the Education Department, would not apply to it and to its teaching and non-teaching staff.

71. Having regard to the nature of the issues involved, we have given considerable thought to the questions raised in the writ petition and this appeal.

72. Since the maintainability of the writ petition has been questioned, we shall first of all consider the said question before going into the merits of the appeal.

73. There is no dispute that Ballygunge Siksha Sadan is a privately managed educational institution which was granted recognition as a Higher Secondary school by the West Bengal Council of Higher Secondary Education in 1978. Having regard to the tests laid down in AJoy Hasia's case (supra) and in the other cases cited by Mr. Pal, the school cannot be said to be an agency or instrumentality of the State. The financial assistance given by the State in the form of Dearness Allowance for some of the teaching and non-teaching staff of the school is so meagre in relation to the expenses met by the management of the school towards pay and other emoluments of the teaching and non-teaching staff of the school, that it cannot be said that the school is impregnated with Government character, nor does the school enjoy monopoly status. There is also no existence of deep and pervasive Slate control over the school and its management so as to make it an "authority" within the meaning of Article 18 of the Constitution and hence amenable to writ Jurisdiction.

74. There is, however, another aspect which is required to be considered In order to arrive at a decision on the question of maintainability of the writ petition against the school under Article 226 of the Constitution, it has to be seen whether the expression "authority" used in Article 226 of the Constitution would

include the management of the school. This aspect of the matter was gone into by the Hon"ble Supreme Court in V.R. Rudani's case (supra) while considering the question as to Whether a writ in the nature of Mandamus would lie against a private Trust which had been running a Science College affiliated to the Gujarat University at Ahmedabad. The Hon"ble Supreme Court was of the view that the expression "authority" used in Article 226 of the Constitution must be given a liberal meaning unlike its usage in Article 12. While Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32, wide powers are conferred on the High Courts under Article 226 to issue writs for the enforcement of fundamental rights as well as non-fundamental rights. The Hon"ble Supreme Court was also of the view that the words "Any person or authority" used in Article 226 are not to be confined only to statutory authorities and instrumentalities of the State, but may cover any other person or body performing public duties. The form of the body concerned is not very relevant. What is relevant is the nature of the duty imposed on the body which 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.

75. The Hon"ble Supreme Court observed that if the rights are purely of a private character and if the management of the College is purely a private body with no public duty, mandamus would not lie. But, in the event, the said two elements were absent and the party had no other equally convenient remedy, mandamus cannot be denied. It was also observed that it had to be appreciated that the appellant Trust was managing the affiliated College to which public money was paid as Government aid which played a major role in the control, maintenance and working of educational institutions and that aided institutions like Government institutions discharge public functions by way of imparting education to students. They are subject to the rules and regulations of the affiliating University and their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character and Mandamus could not be denied to the aggrieved party. In the said context, the Hon"ble Supreme Court went on to state that Mandamus is a very wide remedy, which must be easily available to reach injustice wherever it is found and technicalities should not come in the way of granting that relief under Article 226 of the Constitution.

76. The aforesaid view was partly reiterated by the Hon"ble Supreme Court in the case of K. Krishnamacharyu In & Ors. v. Sri Venkateswara Hindu College of Engineering & Anr. (supra) where, despite the fact that the institution was a private educational institution which did not receive any grant-in-aid from the Government, it was observed as follows :--

"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 leach the education gets an element of public interest in the performance of their duties. As a consequence, the element of public interest requires to regulate the conditions of service of those employees on part with Government employees."

77. The Hon"ble Supreme Court went on to consider the question as to whether a teacher appointed to a post in a private institution could seek enforcement of orders passed by the Government in the writ Jurisdiction, in view of the High Court's decision that such remedy was available under the Industrial Disputes Act. Holding that the jurisdiction under Article 226 was very wide, the Hon"ble Supreme Court further observed :--

"When an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedy provided under Article 226."

78. The decision in K. Krishnamacharyulu"s case would have been conclusive in the facts of this case, had it not been for the fact that the terms of reference to the Third Pay Commission did not include "unaided" schools so as to make the recommendations contained in Notification No. 35-EDN(B) dated 7th March, 1990, applicable to such "unaided" schools. In others words, though the writ petition would be maintainable, the writ petitioners would not be entitled to the reliefs prayed for.

79. The learned single Judge proceeded on the basis that Ballygunge Siksha Sadan is a sponsored institution and the notification of 7th March. 1990, was, therefore, applicable to it. Consequential directions were accordingly given to the Director of School Education to enforce parity in pay scales and Dearness Allowance between the petitioners and teaching and non-teaching staff of Government aided institutions.

80. Having regard to the definition of "sponsored institution" in Rule 2(g) of the 1969 Rules the learned single Judge appears to have erred in holding that Ballygunge Siksha Sadan is a "sponsored institution". The said point was conceded by the respondents at the time of hearing of the appeal. The school is admittedly a "D.A. Getting" school, though the quantum of D.A. received is very little in comparison to the number of teaching and non-teaching staff in the school. The decision in V.R. Rudani"s case (supra) was to some extent dependent on the fact that the public money paid as Government aid played a major role in the control, maintenance and working of aided educational institutions, which is not so in the instant case, since Ballygunge Siksha Sadan is not an aided school.

81. There is no ambiguity in the terms of reference made by the State Government to the Third Pay Commission with regard to the examination of the structure and conditions of service of teaching and non-teaching staff of Government sponsored or aided Institutions, including schools upto Class III

standard. It is very clear that the structure and conditions of service of teaching and non-teaching staff of only Government sponsored or aided Institutions described in the notification of 7th March, 1990, were to be examined by the Third Pay Commission, despite Mr. Bhattacharjee's submission that even non-Government institutions were included in the reference in view of the definition of "employee" in the said notification. If it was the intention of the State Government that even recognised non-Government unaided institutions were to be included in the reference, such intention would have manifested itself in the preamble of the notification itself without one having to garner such intention from the definition of an expression made therein. Furthermore, annexure-1 to the notification, referred to in the definition of employee, also refers, inter alia, to State Government sponsored or aided Junior High/High Schools/Higher Secondary Schools upto Class XII standard and also to recognised non-Government sponsored/aided voluntary organisations under the administrative control of the Education Department. The institutions mentioned in annexure-1 do not include recognised non-Government Institutions which are neither sponsored nor aided by the Government.

82. The learned single Judge granted relief to the writ petitioners on the promise that the school is a recognised non-Government sponsored institution and that having regard to the note appended to sub-rule (9) of Rule 28 of the 1969 Management Rules, the school, which must be deemed to be an aided school since it received some financial assistance from the State Government in the form of Dearness Allowance for some of its teaching and non-teaching staff, came within the scope and ambit of Notification No. 33-EDN(B) dated 7th March, 1990, and its teaching and non-teaching staff were entitled to the benefit of the pay scales prescribed therein.

83. We are unable to accept the reasoning of the learned single Judge that since the 1969 Rules are applicable to the school in question it is under the administrative control of the Education Department and the writ petitioners are, therefore, "employees" within the meaning of clause 2(e) of Notification No. 33-EDN(B) dated 7th March, 1990, and are entitled to the pay scales prescribed therein.

84. The 1969 Management Rules, which apply to both aided and unaided recognised non-Government institutions, do not prescribe the mode of fixation of pay-scales and other emoluments of teaching and non-teaching staff of such institutions. Even if in view of the note to sub-rule (9) of Rule 28 of the 1969 Management Rules, Ballygunge Siksha Sadan, which receives some amount of financial assistance from the State Government by way of Dearness Allowance for some of its teaching and non-teaching staff, is to be treated as an aided school for the purposes of the said Rules, it does not help the case of the writ petitioners as far as the notification dated 7th March, 1990, is concerned. Aware of its limitations as far as unaided schools are concerned, the State Government has consciously kept recognised non-Government unaided schools outside the

purview of the reference made to the Third Pay Commission. In our view, in the absence of any nexus between the 1969 Management Rules and the notification dated 7th March, 1990, the recommendations of the Third Pay Commission contained in the said notification cannot be extended to recognised non-Government unaided institutions by virtue of the deeming provision in the note appended to sub-rule (9) of Rule 28 of the 1969 Rules.

85. In Sri Rupnarayan Choubey's case (supra) what was directly in question was the implementation of sub-rule (4) of Rule 23 of the 1969 Management Rules regarding extension of service of a teacher of a privately-managed unaided educational institution. In the said context the note to sub-rule (9) of Rule 28 of the aforesaid Rules became relevant since one of the provisions of Rule 28 were directly in issue. "

86. For the same reason, the decision in the Frank Anthony Public School Employees' Association case (supra) cannot form the basis of the directions given by the learned single Judge to the State respondents to enforce the fixation of pay in respect of Ballygunge Siksha Sadan at par with Government aided institutions. In the aforesaid case, some of the provisions of the Delhi School Education Act, 1973, relating to imposition of penalty and scales of pay of teaching and non-teaching staff of recognised aided schools, had been made inapplicable to unaided minority institutions by virtue of section 12 of the Act. Holding such exclusion to be discriminatory and void the Hon'ble Supreme Court directed the Union of India and the Delhi Administration and, its officers to enforce the said provisions in the case of the Frank Anthony Public School.

87. In this case, the writ petitioners have prayed for implementation of the recommendations of the Third Pay Commission made in respect of Government sponsored or aided institutions, although Ballygunge Siksha Sadan does not come under either of the categories. On the other hand, it has been urged both on behalf of the West Bengal Board of Secondary Education and the State that the school is not an aided-school.

88. The learned single Judge, in our view, was wrong on both Courts.

89. As far as the schools governed by the Code of Regulations for Anglo-Indian and Other Listed Schools, 1993, are concerned, they stand on a different footing to privately-man aged unaided schools such as Ballygunge Siksha Sadan. Regulation 20 of the said Code, in fact, stipulates that all schools recognised under the Code shall pay to their teaching and non-teaching staff house rent, medical allowance, Gratuity and Contributory Provident Fund in the scales not lower than those approved by the State Government in respect of Government-aided schools affiliated to the West Bengal Board of Secondary Education.

90. No similar provision is available in respect of privately-managed recognised non-Government unaided institutions on the basis of which similar reliefs would have been given to the writ petitioners.

91. Mr. Bhattacharjee's submission regarding the Government's decision to bring about uniformity of pay scales of different recognised aided Secondary Schools is inapplicable to the facts of this case having regard to the conscious distinction made between recognised non-Government unaided institutions and institutions either sponsored and/or aided by the Government in the notification of 7th March, 1990. The decision of the Hon'ble Supreme Court in the Hindustan Antibiotic Limited case, cited by Mr. Bhattacharjee, is based on the principle of region-cum-industries in the industrial field where no distinction has been made between Government companies and private companies. The decision of the Hon'ble Supreme Court was rendered on the said basis and cannot help the writ petitioner's case in the absence of such uniformity in respect of recognised non-Government unaided institutions and institutions which are either sponsored or aided by the Government.

92. In the aforesaid context Mr. Pal's submission regarding the financial resources of the Government and those of unaided institutions assumes relevance. In the reference made to the Third Pay Commission it was particularly stipulated that the examination of the structure of emoluments and service conditions of the teaching and non-teaching staff of Government sponsored or aided institutions as indicated in Notification No.33 EDN(B) dated 7th March, 1990, would have to be made with due regard to the financial resources of the Government. Such a stimulation was obviously made since the Government would have to bear the burden of such upward revision of pay scales and other emoluments as might be recommended by the Pay Commission in respect of Government sponsored and aided institutions, including payment of arrears based on such revision.

93. To that such financial commitments an account of arrears the Government can take recourse to its taxing powers, while privately managed unaided institutions are not in a position to do so and can raise funds only with prospective effect by enhancing the tuition fees within reasonable and affordable limit.

In any event, since in our view, the Notification No.33 EDN(B) dated 7th March, 1990, is not applicable to the Ballygunge Siksha Sadan, the decision of the learned single Judge to the contrary cannot be sustained and must be set aside.

The appeal, therefore, succeeds and is allowed. The order passed by the learned single Judge allowing the writ petition is hereby set aside.

There will be no order as to costs.

All parties to act on a signed copy of the operative portion of this judgment on the usual undertakings.

R.K. Mazumdar, J.

94. I agree.

95. Appeal allowed