
(1962) 02 GAU CK 0001
In the Gauhati High Court
Case No : Civil Rule No. 477 of 1961

Bangshidhar Sarma

APPELLANT

Vs

Director of public Instruction and Others

RESPONDENT

Date of Decision : 20-02-1962

Acts Referred:

Assam Aided High and Higher Secondary Employees Rules, 1960 — Rule 2, 4
Constitution of India, 1950 — Article 220, 226, 229(3), 288, 300

Citation : (1962) 02 GAU CK 0001

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : P.K. Goswami and S.R. Khaund, for the Appellant; R.K. Goswami, Sr. Govt. Advocate and J.C. Medhi, for the Respondent

Judgement

S.K. Dutta, J.—This is an application under Article 226 of the Constitution of India directed against the Director of public instruction, Assam, Inspector of Schools Central Assam Circle, Nowgong, Sri R.N. Bardoloi Secretary of the Managing Committee of Haibargaon Government Aided High School and Sri Rupraui Natn, Assistant Teacher, Haibargaon Government Aided High School. Petitioner's case is that he is a graduate of the Calcutta University and was appointed as the Assistant Head Master In the Haibargaon Aided High School in May, 1957. From the 1st June, 1961, he became the Head Master in charge of the said school on the retirement of the permanent Head Master. "The Assam Aided High and Higher Secondary Employees Rules 1960" (hereinafter called the Rules) came into force with effect from the 15th February, 1961 under Government Notification No. ESS 140/59 dated 9th March 1961 which was published in the Assam Gazette of the 29th March, 1961. In Rule 4 of these Rules method of recruitment of Head Masters and Head distresses was laid down. In complete violation of this rule, the Managing Committee of the aforesaid school advertised the post of the Headmaster and decided to appoint opposite party No. 4 to the said post Ignoring the claim of the Petitioner. The opposite party No. 2 namely, the inspector of Schools, Central Assam Circle, referred the

matter to the Director of Public Instruction and at the direction of the latter approved the appointment. The Petitioner contends that the entire proceedings commencing from the advertisement of the post to the orders of the Director of Public Instruction) and consequent order of the Inspector of Schools are void and illegal being against the Rules (2) It is not disputed that the proceedings in question in this case are neither judicial nor quasi judicial and as such a writ of certiorari will not issue. It is also not disputed that a writ of mandamus will not also be available unless the Rules which are said to have been violated are statutory. Mr. Go-swami appearing on behalf of the Petitioner sub most that although the notification under which the Rules were issued does not mention any provision of law under which they were issued, it must be presumed that they were made under Article 301 of the Constitution of India. This Article runs as follows:

Subject to the provisions of this Constitution Acts of the appropriate Legislature may regulate in the recruitment, and conditions of service of persons appointed, to public services and posts In connection with the affairs of the Union or of any State:

2. Provided that it shall be competent for the President or such persons as he may direct in the case of services and posts In connection with the affairs of the Union, and for the Governor of State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

3. Mr. Goswami submits that a welfare State like India the Government is interested in the education of the children and education is an item included in List II of the Seventh Schedule to the Constitution, and as such, it is a subject over which the State has power of legislation. According to Mr. Goswami as soon as the Government puts its fingers into any educational institution by making a financial grant to it, be it recurring or non-recurring, the affairs of that institution becomes an affair of the State and any post in that institution will consequently be a post in connection with the affairs of the State. In this connection reference is made to Clause (1) of Article 310 which runs as follows:

Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India, service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

It is pointed out that this Article thus provides that a person who holds a "civil post under the Union" holds the same at the pleasure of the President and every

person who holds any "civil post under a State" holds it at the pleasure of the Governor. It is further pointed out that when as terminology "posts in connection with the affairs of the Union or of any State" appears in Article 300, the terminology used in Article 310 is civil post "under the Union" or "under a State" it is, therefore, contended that whereas Article 31C refers to Government servants, Article 309 includes not only Government servants, but. also a person who holds a post in connection with any affair in which a State or the Union acquires an interest by making a financial grant.

4. We do not think that there is any sub-stance in the above contention. A person may hold a post under the Union and yet he may be posted to a State and employed In connection with the affairs of the State. In such a case, that person will continue to hold the office at the pleasure of the President. Similarly, if a person who is under the State is posted in connection with some affair of the union, he will continue to hold his office at the pleasure of the Governor. That is why different terminologies have been used in Article 309 and 310. On the other hand, the distinction implied by the expressions "public services" and "post in connection with the affairs of the Union or of any State", as they appear in Article 309, is explained by the fact that all civilian employees of the Union or of a State are not in the established services, such as, Indian Administration Service, Indian Police Service, Assam Civil Service, Assam Police service or Assam Education Service etc. Many of them hold appointments outside these established services. The terms "affairs of the State" In its plain or ordinary meaning will mean exclusive Government affair. There is nothing to show that the Constitution-makers intended that a wider sense should be attached to this terminology and that it should include affairs of any private institution to which Government makes a financial grant.

5. Dr. Medhi, appearing on behalf of the opposite parties, submits that Mr. Goswami's inter predation of the term in question will lead to an absurd situation as it will even mean that if a library run by a private organization or a Sports Association once gets a financial grant from the Government, the right to make rules for the conditions of service of persons appointed In that library or association will accrue to the Governor. Such a consequence was apparently not intended by the Constitution-makers. To say that affairs of a private educational institution become affairs of the State as soon as it receives a block grant or maintenance grant from the Government is to give an unusual meaning to the term "the affairs of a State."

6. The Government In a welfare State is undoubtedly interested in the education of its people.

But in India, education is not exclusively an affair of the State. This affair is shared by the Government as well as, by private organizations. Similarly in the field of finance there are State Banks as well as private banks in this country. The affairs of a private bank are not the affairs of the State and it will not become such affairs even if the bank happens to receive some financial aid from

the Government. In the case before us the Rules are therefore mere administrative rules which the Government has made as a condition for granting aid to the maintenance of private schools.

7. The views of the Supreme Court expressed in *In re Kerala Education Bill, 1957* have been cited. by Mr. Goswami at the Bar. The Supreme Court was of the view that reasonable restrictions might be prescribed by the State as a condition for aid and even for recognition. The State might claim that in order to grant aid, it might prescribe what kind of teachers should be appointed to ensure the excellence of the institution to be aided. But the Supreme Court never said that such restrictions must be imposed by law and could not be imposed by administrative rules or regulations. Thus the Supreme Court in *Dwarka Nath Tewari v. State of Bihar* AIR 1950 SC 249 held that Article 82 of the Bihar Education Code which, inter alia, provided that withdrawal or withholding of recognition in case the Managing Committee of a school did not carry out the directions of the Board of Secondary Education, had no greater sanction than an administrative order or rule. As I have said above, in the present case the rules lay down certain conditions which must be accepted if an institution accepts financial aid from the Government and these rules do not have any force of law.

8. Reference is also made to the case of *Bindraban Vs. The State of Himachal Pradesh and Others*, in that case the question arose whether an employee of a company under liquidation who was dismissed by the liquidator could avail of the protection granted by Article 311 of the Constitution. The Himachal Pradesh High Court gave its finding in the following terms.

Now, it appears that the majority of the shares of the Limited Company are held by the State of Himachal Pradesh, so that it may be said at the most that the State controls the affairs of the Limited Company. That does not however mean that the State owns the Company, as contended by the learned Counsel for the Petitioner. It follows therefore, that any employee of the Company can-not be described as a person holding a civil post under the State of Himachal Pradesh, it is of open therefore to the Petitioner to question his dismissal within the provisions of Article 311 of the Constitution.

9. The above finding does not seem to be of any assistance to Mr. Goswami. If the affairs of a school are controlled by the Government a post of a teacher in the said school can be said to be a post in connection with the affairs of the State. In that case the conditions of his service may be prescribed under Article 309 of the Constitution. But when a private institution is there and seeks financial aid from the Government and the Government in its turn lays down certain condition for granting such an aid, it cannot be said that these conditions are prescribed under the aforesaid Article 309.

10. Dr. Medhi further submits that even the Rules are statutory, there has been no violation of the same. But in view of my finding that the Rules are mere administrative rules, I do not consider it necessary to go into the question

whether there has been actually any violation of the same. As I have said above, mandamus will not be issued unless the duty sought to be coerced is imposed by law and in this view of the matter this petition must fail and it is dismissed. In the circumstance of the case, there will be no order as to cost.

G. Mehrotra, C.J.

11. I agree with the order proposed by Dutta, J. The facts are fully set out in his order. The only question which Mr. Goswami for the Petitioner has argued is that the Assam Aided High and Higher Secondary Employee Rules, 1960 have got statutory force and any breach of these rules are enforceable under Article 228 of the Constitution. His contention briefly is that as education is an affair of the State, the Governor is authorised to make rules under Article 309 of the Constitution regulating the recruitment and the conditions of service of persons appointed to posts in connection with the educational affairs. It cannot be said that as the State being a welfare State is interested in the educational development of the people of this State, the management and control of all the educational institutions is an affair of the State and that all employees in such institution hold posts in connection with the affairs of the State it can also not be said that any institution carrying on the activities in respect of which the State can legislate, necessarily becomes the affair of the State and the management of such an institution becomes the affair of the State, so as to make an the posts in the said institution or business concerned posts in connection with the affairs of the State. The management and control and the appointment to the posts in these institutions cannot be regarded as the affair of the State merely because the State makes a grant to these institutions. These rules do not purport to have been made in the exercise of the powers under Article 309 of the Constitution if these rules are contrasted with the rules called the Assam Services (Pay-on promotion) Rules, 1961, it will appear that the latter rules are expressly made under Article 309 of the Constitution, while the rules in question do not purport to have been made under Article 309 of the Constitution.

12. Mr. Goswami's argument is that as the Governor has power to frame rules for recruitments to the posts of the teachers in the aided school the rules which deal with such matters must be one passed in the exercise of powers under Article 309 of the constitution. Prior to the making of these rules the service rules for employees of Government Aided schools were contained in Appendix 1 to the Assam Education Department Rules and Orders, Volume I. The Assam Code has no statutory force. Simply because rules have now been framed by the Governor though contents of case may be similar to the service rules contained in Appendix I attached to the Assam Education Department Rules and Orders, Volume I it cannot be said that these rules are statutory rules. They may still be in the nature of administrative directions issued by the Governor.

13. In the case of Lachmi v. Military Secy. to the Governor of Bihar reported in AIR 1950 Pat 398 the question which came up for consideration was whether the Mails employed in the Raj Bhawan were Government servants or they held civil

posts under the State. It was held that even though they were paid from the Government funds it did not by itself necessarily make them Government servants, for, the controlling authority, in so far as the menials working in the Raj Bhawan are concerned, is the Governor himself. In the matter of appointment and dismissal of the employees of the educational institution the control vests in the managing committee. The affairs of the institution are controlled by the managing committee. The properties of the institution vest in the managing committee it cannot therefore, be said that merely because the Government pays grants to these institutions, all appointments to the posts in such institutions are the affairs of the Government.

14. It is urged that the grants made to the non-government secondary schools are included in the budget and thus the institutions to which grants are made out of the budgeted amount, become the affairs of the State. Merely because some grant is made to the school out of the budgeted amount of grants, the management of the institution cannot be regarded as the affair of the State and the Petitioner cannot be said to have been appointed to a post in connection with the affairs of the State. The salary is not to be paid out of the consolidated fund as in the case of the High Court under Article 229(3) of the Constitution. Under Article 226 of the Constitution the mandamus cannot be issued to interfere with the domestic jurisdiction of any private institution and the authority managing the said institution cannot be regarded as a quasi public authority amenable to the jurisdiction of this Court under Article 220 of the Constitution, in the case of "Joseph Mundassery v. Manager St. Thomas College, Trichur" reported in AIR 1954 Trav Co. 109 it was held that the management of private college entirely managed by private funds mere fact of affiliation to the University does not make it quasi-public authority amenable to the jurisdiction of the High Court under Article 226 of the Constitution. In any view of the matter the Petitioner in my opinion is not entitled to any relief under Article 220 of the Constitution as the rules have no statutory force.

15. Even under the rules the Petitioner did not possess the necessary qualification and therefore, if the Petitioner was not appointed the Head Master but the opposite party who possessed the necessary qualification was appointed as such, it cannot be and that there has been any violation of the rules.