
(2014) 10 GAU CK 0010
In the Gauhati High Court
Case No : PIL No. 94/2013

Children Welfare Association

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 31-10-2014

Acts Referred:

Constitution of India, 1950 — Article 21, 21A, 226, 37, 45
Right of Children to Free and Compulsory Education Act, 2009 — Section 12, 12(1), 13, 2(c), 38

Citation : (2014) 10 GAU CK 0010

Hon'ble Judges : K. Sreedhar Rao, Acting C.J.;Ujjal Bhuyan, J

Bench : Division Bench

Judgement

Ujjal Bhuyan, J.—Heard Mr. D. Chakraborty, learned Counsel for the petitioner, Mr. A.C. Buragohain, learned Advocate General, Assam assisted by Mr. B.J. Ghosh, learned Government Advocate, Assam and Ms. J. Huda, learned Central Government Counsel.

2. This petition under Article 226 of the Constitution of India has been filed in the form of a Public Interest Litigation (PIL) by a non-Government organization (NGO) called Children Welfare Association highlighting various issues confronting pre-elementary or pre-primary education in the State of Assam, more particularly the issue relating to admission. Petitioner seeks a direction to the respondents, more particularly the State of Assam in the Elementary Education Department, to lay down guidelines for un-aided private schools imparting education at pre-elementary education stage i.e. at the stage of Nursery and Kinder-garden (KG).

3. Petitioner NGO is a registered body under the Societies Registration Act, 1860 and is concerned with the state of affairs in matters relating to admission in Nursery and KG classes in the private schools of the State. It is alleged that such schools have mushroomed all over the State without adhering to any objective norms with the primary purpose of making Nursery and KG education a totally

commercial proposition. Parents are not informed about the admission criteria and disproportionately high fees are charged. No well defined admission criteria is notified and followed. In other words there is complete lack of transparency. Children seeking admission or their parents are often subjected to profiling and screening procedure which is discriminatory and illegal. Moreover, such procedure may impact adversely such children who are not given admission. Petitioner has therefore sought for a direction to the respondents to lay down guidelines requiring private schools and educational institutions to formulate their admission criterion and to disclose the same to the guardians to ensure transparency and to eliminate discrimination.

4. An affidavit has been filed by the Ministry of Human Resource Development, Government of India. Reference has been made to the provisions of Article 21A of the Constitution of India which mandates the State to provide free and compulsory education to all children in the age group of 6 to 14 years. Further reference has been made to the provisions of Right of Children to Free and Compulsory Education Act, 2009 ("2009 Act" hereafter). It is however stated that it is for the Education Department, Government of Assam to formulate guidelines and policies to be followed by the private schools in terms of the 2009 Act.

5. However, on behalf of the State though no affidavit has been filed, it is submitted at the hearing that pre-primary education i.e. at the stage of Nursery/ KG class level are not covered under the elementary education scheme as per the 2009 Act. Intervention in pre-primary section in elementary education would require Government policy decision but at present there is no proposal for State intervention at pre-primary stage for consideration of the Government of Assam.

6. The issue raised in this PIL is of considerable public interest. This is an issue which affects one way or the other guardians and their wards. Pre-primary education is considered to be the most important phase in the growth of a child. It is the first stage where the child is first exposed to the outside world beyond the confines of home. It is the stage which moulds the future of the child.

7. Therefore, it is not at all surprising that the issue relating to admission to pre-primary education has drawn the attention of various stake-holders in different parts of the country. But before we advert to the same, it is considered appropriate to briefly refer to some of the legal and constitutional provisions which may have a bearing on the subject.

8. In the case of Society for Un-aided Private Schools of Rajasthan Vs. Union of India (UOI) and Another, , the Supreme Court very aptly stated as follows:--

"5. Education is a process which engages many different actors: the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education."

9. In other words, the three primary stake holders in education is the educational institution comprising the owner and the teacher, the pupil i.e. the child and the guardian. The State also cannot shirk its responsibility as we shall see from the succeeding paragraphs. They play a pivotal role more particularly in the field of pre-primary education where there is nil to minimal governmental intervention.

10. In *Miss. Mohini Jain Vs. State of Karnataka and others*, , the Supreme Court held the right to education to be a fundamental right guaranteed under Article 21 of the Constitution of India. The ratio laid down in *MOHINI JAIN* was affirmed in *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, .

11. Thereafter, by the Constitution (Eighty-Sixth Amendment) Act, 2002, Article 21A was inserted in the Constitution of India as a fundamental right which says that the State shall provide free and compulsory education to all children of the age group of 6 to 14 years in such manner as the State may by law determine. Article 45 was also introduced in the part on Directive Principles of State Policy in the Constitution. It provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6 years. Article 51A which deals with fundamental duties of the citizens was also amended by addition of clause (k) which says that it shall be the duty of every citizen who is a parent or guardian to provide opportunities for education to his child or ward between the age of 6 and 14 years.

12. Thus the right to education in so far children in the age group of 6 to 14 years is concerned has been expressly declared as a fundamental right under Article 21A of the Constitution. On the other hand, childhood care and education of children in their early childhood stage until they complete the age of 6 years has been made a directive principle which thus assumes fundamental importance in the governance of the country. Article 37 of the Constitution enjoins the State to apply such principles while making laws.

13. After wide ranging consultations and deliberations, Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 (2009 Act) to provide for free and compulsory education to all children in the age group of 6 to 14 years. Child has been defined under section 2(c) to mean a male or female child of the age of 6 to 14 years. Capitation fee has been defined to mean any kind of donation or contribution or payment other than the fee notified by the school. Elementary education has been defined to mean education from class I to class VIII. In the definition of school is included an unaided school not receiving any kind of aid or grants to meet its expenses from the Government or local authority. Screening procedure has been defined to mean method of selection for admission of a child other than a random method while preferring one child over another child.

14. Under section 12 of the 2009 Act even un-aided schools imparting elementary education are required to admit in class-I at least 25% of the strength of their class, children belonging to weaker sections or disadvantaged

groups in the neighbourhood and provide them free and compulsory elementary education. Weaker section has been defined to mean a parent or guardian whose annual income is lower than the minimum limit notified by the appropriate Government. Similarly, dis-advantaged group means Scheduled Caste, Scheduled Tribe or such other backward class as may be notified by the appropriate Government. As per the proviso to Section 12(1), in a school which also imparts pre-school education, the aforesaid provision will apply in admission to such pre-school education. Of course, the expenditure incurred in providing free education to children of such groups is reimbursable.

15. Section 13 bars schools imparting elementary education from realizing capitation fee while admitting a child. It also prohibits application of any screening procedure of the child or the guardian.

16. In exercise of the powers conferred by Section 38 of the 2009 Act, State of Assam has framed the Assam Right of Children to Free and Compulsory Education Rules, 2011.

17. Constitutional validity of the 2009 Act was put to challenge in *Society for Un-Aided Private Schools of Rajasthan* (supra). The Apex Court held the 2009 Act to be constitutionally valid but declared that it would not apply to un-aided minority schools. It was observed by the Apex Court that the 2009 Act has made right of children to free and compulsory education justiciable. It envisages that each child must have access to a neighbourhood school. The 2009 Act, which is child centric, has been enacted to give effect to Article 21A of the Constitution. Its primary objective is to remove financial and social barriers which impede access to education.

18. As already stated above, in this PIL we are concerned with pre-primary education i.e. education prior to class-I, more specifically with the aspect relating to admission. After carefully analyzing the scheme of the 2009 Act and keeping in mind the provision of Article 45 of the Constitution, we are of the considered opinion that the spirit of the 2009 Act should also cover the stage of pre-primary education including the process of admission, in the absence of any statutory norms or even administrative guidelines.

19. At this stage we may refer to the notification dated 23-11-2010 of the Government of India, Ministry of Human Resource Development (Department of School Education and Literacy). It appears that the Ministry of Human Resource Development had received representations from several un-aided and aided schools seeking clarification on the procedure to be followed for admission in the context of the 2009 Act. Following a meeting held with various stake-holders, the Ministry in the notification dated 23-11-2010 observed that the admission procedure to be adopted by the schools should be non-discriminatory, rational and transparent. Schools should not subject children and their parents to admission tests and interviews in order to decide whether they will admit a child or not. Accordingly, guidelines were issued declaring that the schools should

follow a system of random selection for admission. There should be no profiling of the child based on parental educational qualifications. Admission policy should be placed by the school in the public domain.

20. As discussed above, in this PIL we are primarily concerned with education at the Nursery and KG stage, more particularly the aspect of admission, which may also be referred to as pre-elementary stage or pre-primary stage education. This stage of education covers children below 6 years of age, mostly in the age group of 4 to 6 years. Schools imparting such education are also referred to as Montessori schools. We have already noticed the salient features of the 2009 Act. On due consideration we are of the opinion that such provisions as finding place in the 2009 Act should also be made applicable to the stage of pre-primary education with equal force, if not more. At this stage, we may observe that the process of interview, which has been prohibited under the 2009 Act, subjects the tiny child to tension and anxiety. If a child is not selected after going through an interview, the child may experience a sense of rejection which may have an adverse impact on the child's psychology which is contrary to sound educational principles.

21. Department of Public Instruction, Government of Karnataka had issued a circular on March 12, 2013 providing that school seats would have to be filled up by draw of lots when schools receive applications in excess of the available number of seats. The schools were asked to come out with their own rules and regulations for admitting students and that the schools should not collect donations or capitation fee. The circular which was put to challenge has been upheld by the Karnataka High Court.

22. The Delhi Government has also framed statutory rules in respect of admission procedure for pre-primary classes called the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 (2007 Order). Under the 2007 Order, each school imparting pre-primary education shall have to display relevant information on its notice board, prospectus etc., such as total number of seats available, fee structure, details of faculty etc. Conducting of interview either with the child or with the parent/guardian has been prohibited. Schools are required to adopt well defined and non-discriminatory parameters while adopting admission criteria.

23. We have noted the stand of the Government of Assam that at present it has no policy to deal with the above aspect of the matter. However, it has said that it is open to formulation of necessary guidelines and put it in place to regulate pre-school education. But at present there is neither a statutory frame work in place nor any administrative guideline holding the field. We feel that given the importance of the matter, it requires the consideration of the Government which should respond to the situation by enacting suitable legislation keeping in mind the mandate of Article 45 of the Constitution or at least frame administrative guidelines in the interregnum. In Vishaka and others Vs. State of Rajasthan and Others, the Hon'ble Supreme Court was confronted with the issue of sexual

harassment of working women in work place and for prevention of such harassment through the judicial process to fill up the vacuum in existing legislation. The Hon'ble Supreme Court formulated guidelines in this regard in the absence of enacted law. It was declared that the guidelines and the norms laid down in VISHAKA (supra) would be binding and enforceable in law till enactment of suitable legislation. The guidelines so framed held good till enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 by the Parliament.

24. Having regard to the importance of the subject and in the absence of statutory rules or administrative guidelines, we deem it appropriate to issue the following directions for compliance effective from the calendar year 2015 :

"(1) There shall be a transparent and non-discriminatory admission procedure which shall be notified by the respective schools and shall be made known to the parents/guardians seeking admission of their children well in advance. It should be displayed prominently in the school notice board or in any prominent place within the school premises or in the prospectus or in the form of printed rules/norms of the school concerned or by way of advertisement.

(2) The admission procedure alongwith the admission schedule starting from obtaining forms to the date of admission should be disclosed and displayed prominently by the school concerned. Further, the list of documents to be produced by the parent/guardian at the time of admission should be clearly spelt out.

(3) The number of seats available for admission should be clearly indicated.

(4) In case of the number of applicants being more than the number of notified seats, a transparent and non-discriminatory admission procedure should be adopted and applied which should be notified well in advance in terms of direction No. 1 above.

(5) The admission procedure can be based on various criteria, such as, first-come-first basis, giving more weightage to children residing in the neighbourhood of the school, more the nearer more the preference; sibling of an existing student may be given preference; a girl child or a child of a single parent may be given additional weightage. Similarly, specially abled children may also be given additional weightage. However, the admission criteria should be placed in the public domain in terms of direction Nos. 1 and 4 above.

(6) There shall be no admission test or interview of the child. Likewise, there shall be no interview of the parent/guardian to assess the suitability of the child. In other words, there shall be no screening or profiling of the child as well as of the parent/guardian.

(7) Schools should maintain a healthy teacher-pupil ratio. Classrooms should not be cramped. School should have adequate and proper toilet facilities and also adequate space for sporting activities. In other words, the school should have a

child friendly ambience.

(8) The fees to be paid by the parent/guardian including admission fee, tuition fee etc. should be disclosed at the time of displaying the admission schedule.

(9) State Government in the Education (Elementary) Department in consultation with the Assam State Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act, 2005 shall constitute district level grievance redressal committees, to look into any grievance of a parent/guardian relating to admission of their child in a pre-primary school."

25. The above directions shall be applicable to all schools in the State imparting pre-primary education. It shall be the responsibility of the Commissioner and Secretary to the Government of Assam, Education (Elementary) Department to ensure its compliance and implementation.

26. Accordingly, this PIL is disposed of in the above terms.

27. A Copy of this order may be furnished to Mr. B.J. Ghosh, learned Govt. Advocate for doing the needful.