
(2011) 06 CAL CK 0043
In the Calcutta High Court
Case No : A.S.T. No. 483 of 2011

Chinmoy Choudhury

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 24-06-2011

Acts Referred:

Constitution of India, 1950 — Article 105(2), 12, 226, 30, 32

Citation : (2011) 4 CHN 384

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Amal Baran Chatterjee and Bhaskar Manna, for the Appellant; Sundarananda Pal and Subir Pal for Opposite Party No. 10, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—Admission in Class XI in St. Xavier's School, Burdwan, was denied to the Petitioner who passed ICSE (Class X) Examination, 2011 conducted by the Council for Indian School Certificate Examination, New Delhi, with Grade A having secured 76.57% of marks in the said examination, though he studied in the very same school from KG Standard up to Class X. The Petitioner sought for admission in the said school in Class XI in the Commerce Stream. It is alleged by the Petitioner that though the admission was given to several students having secured less mark than the Petitioners, in the said institution but such admission was denied to the Petitioner. Accordingly the Petitioner has filed the instant writ petition seeking appropriate relief by complaining the discriminatory treatment of the school authority in selecting candidates for admission in Class XI (Commerce Stream) in the said school. Names of several candidates who were given admission in said school even though they secured less marks than the Petitioner, have also been mentioned in the writ petition with all details about the marks which they obtained in the ICSE Examination. The eligibility criteria which was fixed by the school authority for admitting the students in Class XI in Commerce Stream in the said school are as follows:

Requirements:

65% marks in G.P.

65% marks in Maths

Subject:

English

Bengali/Hindi

Mathematics

Accounts

Economics

Commerce/Computer Science.

2. The Petitioner fulfils the said eligibility criteria. He obtained 76.57% of marks in the said examination. He obtained 86% of marks in Maths. Thus he has fulfilled the eligibility criteria. Still then the admission was denied to him though several students who even could not satisfy the minimum eligibility criteria for such admission, were favoured by the school authority by admitting them in the Class XI in the said school.

3. As such on the materials on record, this Court finds that the selection of candidates for admission in the Commerce Stream in Class XI in the said school, by the school authority was not free and fair. The allegations of discriminatory treatment which were made by the Petitioner against the school authority in the process of selection of candidates for admission in Class XI (Commerce Stream) in the said school have also been established. As such the relief which the Petitioner has claimed in the writ petition could have been given by this Court instantly at the time of entertaining this writ petition, but this Court refrained itself from granting such relief to the Petitioner, as a preliminary objection regarding maintainability of the writ petition was raised by Mr. Sundarananda Pal, learned Senior Counsel, appearing for the school authority.

4. It is contended by Mr. Pal, learned senior Advocate, that since the St. Xavier's School, Burdwan is a private school run by a society registered under the Societies Registration Act and is also enjoying special Rules under Article 30 of the Constitution of India, writ does not lie against such school. He thus, contended that even if there is any irregularity in the process of selection of candidates for admission in the said school still then this Court cannot entertain this writ petition in its constitutional writ jurisdiction. He further contended that in selecting candidates for admission in such a school, the school authority neither performs any public duty nor it acts as a public servant and as such the writ does not lie. To demonstrate, as to who can be regarded as a public servant and which duty can be regarded as public duty to be performed by such public servant, he relied upon a decision of the Hon'ble Supreme Court in the case of

P.V. Narsimha Rao Vs. State (CBI/SPE), . By referring to paragraph 160 of the said decision, he contended that a public servant is a person who holds an office by virtue of which he is authorized or required to perform any public duty. He thus, contended that not only such a person must hold an office but he must be authorized or required by virtue of that office to perform public duty meaning a duty in the discharge of which the public or that community at large has interest. By referring to another decision of the Hon"ble Supreme Court, in the case of Dalco Engineering Private Ltd. Vs. Shree Satish Prabhakar Padhye and Others, , he submitted that since the school was not established by or under an Act, it is neither a statutory body nor an instrumentality of the State and as such even if any illegality is committed by the school authority in the process of selection of candidates for admission in Class XI in the said school, such illegality on the part of the school authority cannot be challenged before this Court in its Constitutional writ jurisdiction.

5. Thus, he invited this Hon"ble Court to dismiss this writ petition on the point of maintainability alone.

6. On merit he contended that admission of a student in Class XI in the said institution who passed ICSE examination from the said school is not automatic as it depends on the students" behavior, academic performance and the discretion of the Principal for the good of the school ethos. He further pointed out from the prospectus of the said school that the Principal's decision is final on all matters of admission and as such the Principal's refusal to admit the Petitioner in Class XI in the said school, according to him, cannot be questioned before any Court of law. By submitting the written instruction given to him by his client before this Court, he tried to justify the reasons for which admission was denied to the Petitioner in Class XI in the said school. The reasons for exclusion of the Petitioner from the zone of consideration for admission in Class XI of the said school which were shown in the said written instructions are set out hereunder:

i) In the instant case, several incidents of gross indiscipline by a group of students of Class X to which Chinmoy Chowdhury belonged, coupled with the noticeable lack of cooperation from his father in respect of the said incidents, were factors which did not appear to be conducive to allow Chinmoy Chowdhury to be admitted to Class XI of the School. This group misbehaved with teachers on a regular basis, put-down their heads/refused to pay attention to the subject being taught in class/bunked classes of some teachers, broke the Class X B notice-board and some desks in the class-room, broke several dividers in the boy"s toilets, window panes were deliberately broken, and on the day of their farewell they twisted the blades of several ceiling fans before leaving the School.

ii) These incidents compelled the School to call the parents of this group. While the remaining parents of the children of this group were apologetic on hearing the report of the Headmaster, the father of Chinmoy Chowdhury refused to accept that his son Chinmoy could be a party to such misbehavior and vandalism, and began to accuse the School of siding against his son. Instead of

appreciating the purpose of being called to the School in its proper perspective, Chinmoy's father threatened to teach proper administration to the School. His manner of speaking was aggressive and insulting and his behavior towards the headmaster was hostile.

iii) In case of admission to the School, the decision of the Headmaster has all along been uniform, just bonafide and without any bias, and the decision to refuse admission to Chinmoy Chowdhury to Class XI has been taken by taking into consideration all the relevant parameters stated above, and to prevent the affairs of the premier institution having the status of "a Minority Institution" being sullied and the high standards of education, morality and discipline being maintained in the School from being jeopardized.

6. By referring to the said written instruction Mr. Pal, learned senior Counsel, contended that even on merit the writ petition cannot be allowed.

7. Mr. Chatterjee, learned Advocate, appearing for the Petitioner, refuted such submission of Mr. Pal, learned Advocate, appearing for the school authority by submitting that since the school receives Government aid towards dearness allowance for its teaching and non-teaching staff, this school cannot be regarded as exclusively a private school and as such it cannot be contended that writ does not lie against such a DA getting school which not only receives grant from the Government but Government has also pervasive control over the fund which it gives to the school on account of DA for the teaching and non-teaching staff of the said institution. Thus, according to him, even though the school is run by a society registered under the Societies Registration Act and is also enjoying special Rules under Article 30 of the Constitution of India, still then writ lies against such an institution firstly for the reason that it receives grant from the Government and Government has also pervasive control over the grant it extends to the said school and more so, the school carries on its activities in imparting education to the people of India which activity can be said to be akin to public duty or State functions as creation of opportunity for imparting education to the citizens of India is an obligation as the State under Article 41 of the Constitution of India. In support of his submission he relied upon a Constitutional Bench judgment of the Hon'ble Supreme Court in Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, wherein it was held that though the pre-requisite for invoking the jurisdiction of the Hon'ble Supreme Court for enforcement of a fundamental right under Article 32 is that the violator of that right should be a State and if that pre-requisite is not fulfilled, then relief cannot be given under Article 32 of the Constitution of India but that does not mean that the violator of such right could go scout free merely because it or he is not a State. It was further held therein that under the Indian jurisprudence there is always a remedy for violation of a right of a citizen who can always seek remedy under ordinary course of law or by way of a writ petition under Article 226 of the Constitution of India which is much wider than Article 32 of the Constitution of India; as such relief can be claimed even against a non-statutory

body which carries on activities akin to public duty or State functions. By referring to the said decision Mr. Chatterjee submitted that since the creation of opportunity for education for its citizen is an obligation of the State and further since the State is unable to discharge its said obligation because of various constraints and further since the school authority is carrying on such activities which are akin to State activities with the aid of the government, it cannot be said that the unfair, unjust and discriminatory decision of this school authority in refusing to admit to the Petitioner in Class XI of the said school cannot be challenged before this Hon"ble Court in this Constitutional writ jurisdiction.

8. Mr. Chatterjee also referred to another decision of the Hon"ble Supreme Court in the case of Smt. Poonam Vs. Sumit Tanwar, wherein it was held that writ lies only against a person if it is a statutory body or performs a public function or discharges a public or statutory duty or a State within the meaning of Article 12 of the Constitution of India. Thus, he contended that since the school authority performs a public function and it discharges a public or statutory duty, it should be regarded as an instrumentality of the State and as such the writ lies against such an institution.

9. On merit he contended that exclusion of the Petitioner from the zone of consideration for admission in the Class XI in Commerce Stream of the said school is unjustified and unfair as the Petitioner not only fulfilled the eligibility criteria for such admission but several other students who secured less marks than the Petitioner and even failed to satisfy the eligibility criteria for such admission, were admitted in Class XI in Commerce Stream in the said school. Mr. Chatterjee, further contended that the reasons which were shown in the written instruction for excluding the Petitioner from the zone of consideration for his admission in Class XI in Commerce Stream in the said school are absolutely unsustainable as the school authority even after bidding farewell to the Petitioner, on completion of his studies in Class X in the said school, granted conduct certificate certifying that the conduct of the Petitioner had been good. A copy of the character certificate granted by the school authority is also annexed to the writ petition. Thus, Mr. Chatterjee submitted that this is a fit case where this Court should intervene to secure admission for the Petitioner in Class XI in Commerce Stream in the said school.

10. Heard the learned Counsel of the parties. Considered the materials on record. Let me now consider the submission of the learned Counsel of the respective parties on the point of maintainability of the writ petition.

11. Admittedly, St. Xavier's School, Burdwan, is run and managed by a society registered under the Societies Registration Act. The said school has been enjoying special Rules under Article 30 of the Constitution of India. The said school is a DA getting school as it receives grant towards payment of dearness allowance of the teaching and non-teaching staff of the said school. Since the school receives State Government grant, it cannot be said that the State does not have pervasive control over the grant which it extends to the school, as the

school authority is accountable to the Government regarding disbursement of such grant of its teaching and non-teaching staff. Thus, though it is true that the school is managed by a society registered under the Societies Registration Act and it has also been enjoying special Rules granted under Article 30 of the Constitution of India but still then since it receives Government grant towards payment of dearness allowance of its teaching and non-teaching staff, this Court cannot hold that the said school being a private school, its action cannot be challenged in writ jurisdiction. That apart since such school was established with the primary object of educating the people of India which is akin to the State function under Article 41 of the Constitution of India, this Court, by relying upon the Constitutional Bench decision of the Hon''ble Supreme Court in *M/s. Zee Tele Films Ltd. v. Union of India* (supra) as well as other decision of the Hon''ble Supreme Court in the case of *Poonam v. Sumit Tanwar* (supra) holds that writ lies against the said educational institution, so far as it relates to discharge and/or performance of its activities towards fulfillment of the basic object for which it was established.

12. The decision which was cited by Mr. Pal, in my view, has no relevance in the facts and circumstances of the instant case. In *P.V. Narsimha Rao v. State*, a question came up for consideration before the Hon''ble Supreme Court as to how far the members accepting bribe and voting are entitled to protection under Article 105(2) of the Constitution of India. In that context the Hon''ble Supreme Court of India considered as to who can be regarded as a public servant and what is actually meant by public duty under Prevention of Corruption Act, 1988. That was completely a different context in which the Hon''ble Supreme Court had to consider as to who is a public servant and what is meant by public duty, to be discharged by such public servant, in order to attract the provision of Prevention of Corruption Act. Since the case in hand before this Court has no semblance of similarity with the case in hand before the Hon''ble Supreme Court, the principle which was laid down by the Hon''ble Supreme Court in the said case has no application in the facts of the instant case. Even other decision which was cited by Mr. Pal in *Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhya* (supra) has no application in the facts of the instant case as that was a case where the Hon''ble Supreme Court considered the distinction between the public and private companies and while doing so the Hon''ble Supreme Court considered the effect of an establishment created by or under an Act and a non-Government company registered under the Companies Act. It was held therein that when an establishment is created by or under an Act, such an establishment should be regarded as a statutory corporation. But when nongovernmental private company is registered under the Companies Act it is not established under the Companies Act and as such it is neither a Government company nor a statutory company.

13. The principle which was laid down by the Hon''ble Supreme Court in the said decision, in my view, has no application in the facts of the instant case as that was not a case where a question cropped up as to whether the writ lies against

an educational institution which is run by a society registered under the Societies Registration Act but is receiving State grant towards dearness allowances of the teaching and non-teaching staff of the said institution nor such an issue was decided by the Hon''ble Supreme Court in the said decision.

14. Mr. Pal, learned senior Advocate, also relied upon another decision of the Hon''ble Supreme Court in the case of Sindhi Education Society and Another Vs. The Chief Secretary, Govt. of NCT of Delhi and Others, to support his stand that even if Minority Institution which is enjoying special Rules under Act 30 of the Constitution of India, receives Government aid towards dearness allowances for its teaching and non-teaching staff, still then writ does not lie against such institution, as such a Government aided institution cannot be construed as a State or instrumentality of the State within the meaning of Article 12 of the Constitution of India inasmuch as the Government does not retain control either financially, functionally or administratively in the working of such minority aided institution, enjoying special Rules under Article 30 of the Constitution of India.

15. Since much stress was given by Mr. Pal on the said judgment, I with all anxieties, have considered the said decision of the Hon''ble Supreme Court very carefully and minutely.

16. Let me now discuss the impact of the said decision in the facts of the instant case. On plain reading of the said decision, I find that maintainability of the writ petition against an aided linguistic minority institution which is run by a society registered under the Societies Registration Act and is enjoying special Rules under Article 30 of the Constitution of India, was neither an issue before the Hon''ble Supreme Court, nor such an issue was decided by the Hon''ble Supreme Court in the said decision.

16. In the said decision applicability of Rule 64(1) (b) of Delhi School Selection Rules, 1973 and/or the orders and instructions issued there under to Sindhi Education Society which was an aided Minority Linguistic Educational Institution enjoying special Rules under Article 30 of the Constitution of India, was under consideration before the Hon''ble Supreme Court. Of course, while considering the said issue, the Hon''ble Supreme Court considered the several earlier decisions of the Hon''ble Supreme Court to ascertain as to whether the said Educational Society can be construed as a State or an instrumentality of the State under Article 12 of the Constitution of India and held that such an institution is not a State and the service in such a linguistic minority school cannot be construed as a service under the State even with the aid of Article 12 of the Constitution of India and thus, it was ultimately held therein that Rule 64(1)(b) of the said Rule cannot be enforced against the linguistic minority school.

17. I feel that some mere elaboration of the said citation is necessary for proper appreciation of the back ground of the said case and the ratio decided therein.

18. Rule 64(1)(b) of the Delhi School Education Rules, hereinafter referred to the

said Rules, was amended vide notification dated 23-02-1990 for introducing some condition for grant of aid by the Government to the minority schools enjoying special Rules under Article 30 of the Constitution of India. As per said amended Rules, the Managing Committee of the said society was required to furnish an undertaking that they would make reservation in the appointment of teachers of scheduled castes and scheduled tribes for receiving grant from the Government.

19. Prior to the introduction of the said Rule by amendment, an identical instruction was issued by the Deputy Director of Education, addressed to the said school authority on 12-03-1985. However, the said instruction was subsequently withdrawn by the Secretary (Education), Government of NCT of Delhi vide his communication dated 21-03-1986 wherein it was clarified that the undertaking, which was required to be given by all the Government aided schools, in the matter of compliance with the provision relating to reservation of scheduled castes and scheduled tribes in the institution, is not applicable to the minority institution. The said clarification was made by following a judgment of Delhi High Court dated 14-07-1982 passed in a writ petition being No. W.P. (C) No. 940 of 1975 filed by the said school authority wherein it was held that the said school being a minority institution was required to comply with only such rule/condition which is in consonance with the provision of Article 30 of the Constitution of India.

20. Even after issuance of the said communication in 1986, the concerned authority in September, 1989 again issued identical instruction demanding undertaking from all aided school including the minority institution for availing of the government grant.

21. The said school felt aggrieved. Accordingly, a writ petition was filed by the said school in Delhi High Court. Though the said school succeeded in the said writ petition, but ultimately lost in the appeal referred by the Government against the judgment of the Writ Court before the Appeal Court. The said matter went up to the Hon'ble Supreme Court as per the leave granted by the Appeal Court while disposing of the said appeal. In this context, the Hon'ble Supreme Court held that the State does not retain deep and pervasive control over such minority institution enjoying special Rules under Article 30 of the Constitution of India even though it receives grant from the Government; as such the school authority cannot be construed as a State with the aid of Article 12 of the Constitution of India.

22. It was observed therein that the right to establish and administer a minority educational institution is the fundamental right of the minority community and as such the school authority has its own freedom to frame its own rules for administration of the school within the sphere of employment or in the sphere of selecting the method of admission of students in the school, but such freedom is not uncontrolled as the state can take regulatory measures whenever it finds that procedure and method of admission is not fair and transparent or mal-

administration of the institution by the school authority is required to be checked.

23. Thus, this Court finds that exercise of such freedom by such institutions is not absolutely uncontrolled by the State. However interference by the State in the administration of the school cannot be made so long as the admission of the students in the said institution is based on fair and transparent method. Though, such school can lay down its own method of selection of students for admission but if such method is not implemented fairly or if right to education which is a fundamental right of a student is infringed by denying admission to an eligible student, then certainly State can step in to protect the fundamental right of the student and if the State Machinery fails to do so, this Court can certainly compel the State machinery to take measure against such institution so that the fundamental right to education of a student is not infringed by the whimsical attitude of the school authority; be it an aided Institution or an unaided Institution. Since the State is a party to this proceeding, this writ petition, in my view, is maintainable as the State machinery may be compelled by issuance of a writ of Mandamus to take regulatory measures against the school authority for protecting the fundamental rights of the eligible students. Be it mentioned here that though such relief has not been claimed by the Petitioner against the State Respondent herein, but still then the Court's power to pass such order by issuing an appropriate writ against the State Respondent in suitable circumstance by moulding the relief's, is not unknown to law.

24. That apart the present problem should also be considered from another angle. In the case of Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, the Hon"ble Supreme Court held as follows:

6 - The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people.

25. But in the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , it was held by the Hon"ble Supreme Court that since there is no governmental interference or control either financially, functionally or administratively in the working of the Council of NCERT, the NCERT is not a State or an authority under Article 12 of the Constitution of India though the NCERT is engaged in promoting education in India, as, according to the said decision, the fact that education is a State function could not make any difference.

26. But the view expressed by the Hon"ble Supreme Court in Chandra Mohan Khanna's case was not approved by the larger Bench of the Hon"ble Supreme Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, wherein the view expressed by the earlier Bench of the Hon"ble Supreme Court in Rajasthan S.E.B."s case was approved with these observations:

46. We are in respectful agreement with this statement of the law. The

observations to the contrary in *Chander Mohan Khanna v. NCERT* relied on by the learned Attorney General in this context, do not represent the correct legal position.

27. Thus, if the said principle which was laid down in *Pradeep Biswas's* case is applied in the instant case, this Court has no hesitate to hold that since *St. Xavier's School, Burdwan*, was not only established to promote education for the citizen of India but the said Institution has also been discharging the State function of promoting educational interest of the people of India, the said institution is an instrumentality of the State under Article 12 of the Constitution of India and as such writ lies against such institution when admission of the Petitioner to the said school was denied even though he satisfied all the criteria laid down by the said institution for admission of the student in Class XI of the said school.

28. Thus, by considering the submission of the learned Counsel for the respective parties, this Court holds that the preliminary objection that writ does not lie against the Respondent school authority, cannot be sustained.

29. Let me now consider the merit of this writ petition in the facts and circumstances of the instant case.

30. I have already indicated above that the Petitioner has fulfilled the eligibility criteria for admission in Class XI in Commerce Steam in the said school. Sufficient materials have been placed before this Court to show that even the ineligible candidates who did not secure the minimum requisite marks for admission in Class XI in Commerce steam in the said school, were admitted in Class XI in Commerce Stream in the said school. Thus, the discrimination made by the school authority in selecting candidates for admission in the Class XI in Commerce Stream in the said school, is apparent on the face of record. As such this Court feels that the interference in the facts of the instant case is necessary.

31. That apart the reasons which were shown by the school authority for excluding the Petitioner from the zone of consideration for his admission in Class XI in Commerce Stream in the said school are not at all justified as this Court finds that even the school authority issued conduct certificate in favour of the Petitioner certifying that the conduct of the Petitioner had been good and such conduct certificate was issued by the school authority after publication of the result of ICSE (Class X) Examination, 2011. Considering the conduct certificate which was issued by the school authority, this Court holds that the reasons for which admission was denied to the Petitioner in Class XI in Commerce Stream in the said school, are not justified. The school authority, in my view, acted illegally in refusing to admit the Petitioner in Class XI in Commerce Stream in the said school.

32. This Court, thus, disposes of this writ petition by directing the school authority to admit the Petitioner in Class XI in Commerce Stream in the said school forthwith, if it is found on verification of its record, that any student

obtaining less marks than the Petitioner was admitted in the Commerce Stream in Class XI in the said school in this academic session in 2011. Such exercise should be completed within one week from the date of communication of this order subject to deposit of admission fees and other requisite fees for admission in Class XI in Commerce Stream in the said school by the Petitioner.

33. This writ petition is, thus, disposed of.

34. Urgent Xerox certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible.

35. Let a plain copy of the operative part of this judgment duly counter signed by the Assistant Registrar (Court) be given to the learned Advocate for the Petitioner on usual undertaking.