
(2014) 07 OHC CK 0028

In the Orissa High Court

Case No : Writ Petition (Civil) Nos. 6108, 11590, 11591 and 10603 of 2014

DAVIAN Parents Association

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 11-07-2014

Acts Referred:

Citation : (2014) 118 CLT 915 : (2014) 2 ILR 414 : (2014) 2 OLR 547

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

Dr. B.R. Sarangi, J.—All these writ petitions were heard together as common questions of law and facts are involved therein and are disposed of by this common judgment.

2. DAVIAN Parents Association, Unit-VIII, Bhubaneswar and others as petitioners in W.P.(C) No. 6801 of 2014 have espoused the cause of its wards, who were prosecuting their studies in DAV Public Schools and had appeared in Class X CBSE Examination of 2014 by assailing the action of the opposite parties initiating a process of selection by way of Entrance Examination for admission into Class XI in different DAV Public Schools of Bhubaneswar before the result of Class X CBSE Examination of 2014 being published, which was the basis of admission of the passed out students of their own schools in Class XI of their very schools in contravention of the CBSE affiliation norms, the scheme of CCE and also in violation of the judgment of the Apex Court in The Principal, Cambridge School and another Vs. Ms. Payal Gupta and others, and Principal, Kendriya Vidyalaya and Others Vs. Saurabh Chaudhary and Others,

3. In W.P.(C) Nos. 11590 and 11591 of 2014 the petitioners have challenged the action of the Principal, DAV Public School, Unit-VIII, opposite party no. 5 in handing over transfer certificate, conduct certificate and migration certificate to the students so as to debar them from taking admission in Class XI in the same

school by way of class promotion.

4. In W.P.(C) No. 10603 of 2014, the petitioner who passed Class X Examination securing 93.33% of marks in ICSE Examination, 2014, an outsider, seeks to get himself admitted in DAV School against the remaining seats after admission of the students of the same school is over.

5. The sole point for consideration in these writ petitions is as to whether after the publication of Class X CBSE results, the passed out students of the DAV Public Schools are to be admitted in their very schools in Class XI or the students securing less percentage of marks should be handed over TC or Migration Certificate to seek admission elsewhere.

6. DAV Public Schools have been established by getting permission and recognition from the competent authority and affiliation from the CBSE. Sub-clause (i) of Clause 2 of the CBSE of the Affiliation Bye-laws defines "Affiliation", which means formal enrolment of a school among the list of approved schools of the Board following prescribed/approved courses of studies up to Class VIII as well as those preparing students according to prescribed courses for the Board's examinations. Clause 3 of Chapter-II of the Affiliated Bye Laws of the CBSE deals with "Norms for Affiliation", Clause-A deals with provisional affiliation, Clause-B Regular Affiliation, and Clause-C deals with permanent affiliation. Under sub-clause (iii) of Clause-C under the heading "Permanent Affiliation", it states that the school seeking permanent affiliation must also satisfy the conditions such as (a) Infrastructure, (b) General, (c) Quality of Education. It is further stated that unless the school in question satisfies the conditions stipulated under clauses (a), (b) and (c), no permanent affiliation can be given.

7. The CBSE authorities while prescribing the guidelines for adherence to the norms of affiliation have also deprecated the schools giving preference to the outside students for admission in Class XI and have specifically instructed on 29.7.2009 in Circular No. 1 under the heading "admission of students". Sub-clause (b) of the said circular reads as follows :

(b) It is noted that some schools are giving preference to outside students for admission in Class XI on the basis of higher marks which should be avoided to prevent unhealthy competition. First preference for Class XI admission shall be given to own students on the basis of common admission criteria evolved by the school.

A perusal of the above provision reveals that the said circular has issued a mandate that first preference for admission in Class XI shall be given by a school under CBSE Board to its own students on the basis of common admission criteria evolved by the school. Some grading system has been carried for Class IX and Class X from the academic session 2009-10. Under such system, it is provided that in the schools having status of Senior Secondary level, the students may get class promotion to Class XI without appearing in the Board Examination vide Annexure-2. The affiliation norms under Annexure-1 and the scheme of

examination reforms and continuous and comprehensive evaluation under Annexure-2 state that the students of a particular school are to be given compulsory preference for admission into Class-XI of their school and the Apex Court in Payal Gupta case (supra) has categorically held that admission to Class XI is neither a fresh admission nor readmission, rather it is a class promotion in the school having Class XI and XII. It has also been clarified that once a student is admitted into a school having classes up to Class XII, he/she ought not to be ousted before completing the entire available classes from the school and the Admission Test/Entrance Test for the purpose of admission into higher class within the same school has been deprecated. Such admission test or result in a particular class or school for the purpose of admission would arise only if the student of one institution goes for admission to some other institution. Therefore, no Entrance Test or Aptitude Test or any kind of admission/readmission to Class XI of students of a particular school is permissible, but without adhering to the same and contrary to the CBSE affiliation norms and scheme of examination reforms and continuous and comprehensive evaluation, advertisement was published in daily "Samaj" on 9.3.2014 inviting applications for appearing in the Aptitude Test/Entrance Test/Admission Test by paying Rs. 1,000.00 vide Annexure-4. Hence, these writ petitions.

8. While entertaining W.P.(C) No. 6108 of 2014, this Court by order dated 25.3.2014 issued notice to the opposite parties and in Misc. Case No. 5652 of 2014 passed interim order that no action would be taken pursuant to the advertisement dated 9.3.2014 under Annexure-4 till the next date.

9. Pursuant to the notice issued, the opposite parties have entered appearance.

Opposite party No. 4 has filed counter affidavit stating that the DAV Public Schools are not governed by the Orissa Education Act, 1969 and authorities of the said schools have not only designed to admit the students of their schools in their particular schools, but to provide them seats in different streams on priority basis and then to allot the remaining seats, if any, to outside students.

10. Referring to Saurabh Chaudhary case (supra), it is stated that the schools having more than one streams can lay down the cut-off marks for selection to different streams/courses giving due regard to the aptitude of the students and further in order to provide additional teaching time to the students, admission before publication of the results is being considered and in that context aptitude test was thought to be a better alternative. It is averred that admission envisaged to be given on the basis of admission test is only provisional one and that the students are to fulfill the criteria laid down by CBSE for prosecuting their studies in Class XI since the Apex Court in Saurabh Chaudhary case (supra) has authorized them to fix cut-off marks in different streams and the schools having multiple streams in Class XI admission thought of providing teaching of one month before publication of the Class X CBSE Examination result, in the interest of the students, as the cut-off marks necessarily had to be on the basis of the marks secured in the aptitude test. It was further stated that in none of the

judgments, i.e., Saurabh Chaudhary case (supra) and Payal Gupta case (supra) the Apex Court dealt with the issue of Entrance Test. The issue involved in Payal Gupta case (supra) and Saurabh Chaudhary case (supra) was as to whether the cut-off mark fixed by a school for admission into Class-XI was proper or not. The Apex Court has held that any school having only one stream in Class XI has to admit the students of Class X in Class-XI without prescribing any cut-off mark and where there is more than one stream the school is free to prescribe the cut-off marks for different streams.

11. It is stated that in order to maintain transparency in the selection, advertisement was published in the newspapers and therefore, no illegalities or irregularities had been committed by doing that and the entire action was in conformity with the judgment of the Apex Court in Saurabh Chaudhary case (supra) and Payal Gupta case (supra).

12. Mr. R.K. Rath, learned Sr. Counsel appearing for the petitioners submitted that the action of the school authorities was in gross violation of the judgments of the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra) and further issuance of advertisement inviting application and appearing in aptitude test was contrary to Annexures-1 and 2. He further submitted that instead of asking the students to exercise their option for taking admission in any stream they like in Class XI, inviting application from outside candidates for appearing in Aptitude Test as well as from their own students, was not proper. According to him, if the students of a particular school will not be accommodated in the stream they like, it will amount to non-compliance with the judgments of the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra). Without following the procedure envisaged under Annexures-1 and 2, the guidelines issued by the CBSE Board and the law laid down by the Apex Court in the aforesaid judgments, the action of the opposite parties in publishing the advertisement cannot be sustained.

13. It is stated that in the year 2012 similar steps were taken by the school authorities. The very Parents' Association also had approached this Court by filing W.P.(C) No. 4050 of 2012 and this Court deprecating fixation of cut-off marks for giving provisional admission to Class XI in respect of the students of a particular school who passed Class X examination conducted by the CBSE Board quashed the notices issued on 27.8.2011 and 1.2.2012 and directed the authorities of the concerned schools to give admission to their own students in Class XI in Science, Commerce and Humanities streams and after giving admission to their own students, to adopt Entrance Test for selection to fill up the remaining vacant seats from amongst the outside candidates in the respective courses on the basis of merit.

14. The said judgment of this Court dated 18.4.2012 passed in W.P.(C) No. 4050 of 2012 was assailed in appeal bearing W.A. No. 131 of 2012 and a Division Bench of this Court by order dated 12.2.2014 disposed of the said appeal observing that in view of the law laid down by the Apex Court in Saurabh

Chaudhary case (supra), there could be no objection to lay down the cut-off mark for selection in suitable stream giving due regard to the marks secured in Aptitude Test, where there are more than one stream. However, the students from the same school could not be thrown out on the basis of the marks in Class X Examination. Since the petitioners in that case had already been admitted and in view of the law laid down in Saurabh Chaudhary (supra), no further order was passed and the Writ Appeal was disposed of.

15. Mr. Ashok Parija, learned Sr. counsel appearing for opposite parties 6 to 9, strenuously urged that in view of the law laid down by the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra), there is no bar for fixation of cut-off mark for admission of the students in their own school where there are multiple streams available in Class-XI basing upon the marks secured in Class-X Examination. After fixation of the cut-off mark and after giving admission to the students of the own school, if any seat remains vacant, in that case, the authorities are at liberty to fill up the said seats by inviting fresh applications from the outside students even though the students from the own school are available to take admission in respect of the remaining seats. He distinguished the judgment of the Apex Court in Saurabh Chaudhary case (supra) stating that since there was only one stream available in Kendriya Vidyalaya, the Apex Court directed to get the concerned student admitted in the school in Science stream and had there been multiple streams, then the result would have been different.

16. Mr. P. Panda, learned counsel appearing for opposite party no. 4, supporting the contention raised by Mr. Parija, learned counsel appearing for opposite parties 6 to 9 submitted that fixation of cut-off mark is permissible for admission into Class-XI and no illegality or irregularity is committed by fixation of such cut-off marks by the authorities.

17. Though no notice was issued to the CBSE Board, Mr. T.N. Pattnaik, learned counsel who usually appears for the CBSE was called upon to assist this Court for a just and proper adjudication of the case and on that basis, he submitted that the DAV public schools have been given affiliation for allowing the students to prosecute the studies in Class XI. Since there are infrastructural facilities available in the said schools, the authorities have been permitted to admit the students in Class XI and except granting affiliation, the CBSE authorities have nothing to do with the admission of the students as it is the prerogative of the institution itself to do that. He has referred to the Affiliated Bye Laws of the CBSE Board and submitted that the institutions having satisfied the requirements of sub-clauses (a), (b) and (c) of Chapter-II, were granted permanent affiliation and also candidly submitted that while granting permanent affiliation, it has only granted affiliation to the courses and not the number of seats of a particular stream of the institution.

18. With such background of the case, it is now to be considered with regard to applicability of the judgments of the Apex Court in Payal Gupta case (supra) and

Saurabh Chaudhary case (supra) to the present context.

19. So far as the law laid down by the Apex Court in the aforesaid judgments is concerned, there is no dispute that the Apex Court has framed a guideline on the treatment of students of their own school. That apart, in Saurabh Chaudhary case (supra), there is a specific observation by the Apex Court that the school where a student is prosecuting his/her study cannot deny admission to him/her on the ground that he/she has failed to secure the cut-off mark in Class X CBSE Board Examination. In addition to that it has been specifically observed that it would be quite unreasonable and unjust to throw out a student from the school because he failed to get the cut-off marks in the Class X Examination and after all the school must share at least some responsibility for the poor performance of its student and should help him in trying to do better in the next higher class. Keeping in view the judgment of the Apex Court in Payal Gupta case (supra), it has been specifically observed that the authorities cannot deny to give admission to their own students as it has been held that on passing the examination, promotion from one class to the next higher class does not involve any fresh admission or readmission in the school and whether the examination is internal or a general examination by an external statutory agency, it makes no difference in the position. It has also clearly held that a student of his/her own school cannot be denied admission to higher class as it does not involve fresh admission or readmission, meaning thereby a student who was admitted in the school whether the examination is internal or a general examination by an external statutory agency, the authorities should automatically give him/her promotion to the higher class and such right to continue in the higher class cannot be taken away by the school authorities even though the student concerned has secured less percentage of marks. In other words, the school authorities are obliged under law to allow all the students, who are prosecuting their studies in the same school, to prosecute their studies in the higher class bereft of marks secured in the last examination.

20. In paragraph 11 of Saurabh Chaudhary case (supra), the decision in Payal Gupta case (supra) has been considered in extenso which reads as follows:

The submission that the decision in Paya would not apply to Central Schools is otherwise also quite unsound. It is indeed true that the case of Payal Gupta arose under the provisions of the Delhi School Education Rules, but certain observations and findings in the decision are clearly of general application. In para 5 of the judgment the Court framed two questions arising for its consideration as follows:

5. In view of the facts and circumstances stated above the short question that arises for our consideration is whether the Head of a private unaided school has the power to regulate admission by prescribing the criterion of cut-off level of marks under Rule 145 and on that basis may deny admission to the students of its own school to Class XI who had passed Class X, Central Board of Secondary Education with marks less than 50% in aggregate. A further question may arise

whether in the aforementioned situation a student who passes Class X would be entitled to automatic promotion to the next higher class i.e. XI class or it would be a case of fresh admission or readmission to the next higher class in the same school.

As may be seen the second question is in general terms. Answering the second question, in para 6 of the judgment, the Court observed as follows:

6. ... It may, however, be pointed out that it is common knowledge that once a student is given an admission in any educational institution by making an application in the manner prescribed by Rule 135, he is not required to submit fresh application forms after he passes a class for his admission to the next higher class. Once a student is given admission in any educational institution the same continues class after class until he leaves the school. In these facts and circumstances it is difficult to accept that after a student passed his tenth class of a public examination his admission to the next higher class i.e. eleventh class would be a fresh admission or readmission.

Further, in para 7 the Court observed as follows:

7. ... If a student who fails at any public examination could not be denied readmission in the school or class then it is beyond comprehension as to how a student who passed the public examination can be denied admission in a higher class in the same school from which he had appeared at such examination. That being so, the right of a student to continue his studies further in the higher class, in the same school, after passing any public examination, cannot be worse than the right of a student who fails at any such public examination.

In Payal, thus, this Court clearly held that on passing the examination promotion from one class to the next higher class does not involve any fresh admission or readmission in the school and whether the examination is internal or a general examination by an external statutory agency makes no difference in the position.

21. Considering the admission guideline of 2004-2007 in Saurabh Chaudhary case (supra), in paragraphs 17 and 18, the Apex Court held as follows :

17. Reading the 2004 and the 2007 provisions together would make it clear that any preference in favour of the school's own students that might have been assumed earlier has now been provided for expressly. But that alone, as we see in the present case does not prevent the school from denying admission to one of its own students on the ground that he/she failed to secure the cut-off marks in the Class X CBSE examination.

18. One can have no objection to a school laying down cut-off marks for selection of suitable stream/course for a student giving due regard to his/her aptitude as reflected from the Class X marks where there are more than one stream. But it would be quite unreasonable and unjust to throw out a student from the school because he failed to get the cut-off marks in the Class X examination. After all the school must share at least some responsibility for the poor performance of its

student and should help him in trying to do better in the next higher class. The school may of course give him the stream/course that may appear to be most suitable for him on the basis of the prescribed cut-off marks.

22. In view of the above position, there is not an iota of doubt that a student of the same school cannot be denied to prosecute his/her studies in the higher class in the same school even though he/she has secured less percentage of marks. So far as allocation of streams is concerned, on the basis of the admission guidelines of 2004 and 2007, the Apex Court has also held that any preference to school's own students that might have been assumed earlier has now been provided for expressly, but that alone does not prevent the school from denying admission to one of its own students on the ground that he/she failed to secure the cut-off marks in the Class X CBSE Examination. Though the Apex Court has held that the school authorities have got power for fixation of cut-off marks, that ipso facto cannot deny a student of the own school to prosecute his/her studies in the higher class on the basis of his/her aptitude in a particular stream. That itself will be unreasonable and unjust to throw away a student from the school because he/she failed to secure the cut-off mark in Class X examination. After all, the school must share some responsibility for the poor performance of its student and should help him/her in trying to do better in the next higher class. Therefore, if the seats are lying vacant in a particular stream for the reasons of fixation of cut-off mark and the students of the same school are awaiting to prosecute their studies in the very same stream, then they should have been given opportunity to exercise their option to get themselves admitted in the said stream. After exhausting the seats meant for the students of the same school, who exercised their option, if seats are available, then the school authorities may go for advertisement for filling up the vacant seats or to follow any other mode, which will be just and proper in the interest of justice and the same would be in conformity with the judgments of the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra).

23. To illustrate the above contention, in compliance with the order passed by this Court on 20.6.2014, a chart has been furnished by Mr. P. Panda, learned counsel appearing for opposite party no. 4, along with an affidavit sworn in on 26.6.2014. A detailed information chart in respect of different DAV public schools of Bhubaneswar and Cuttack has also been given in a tabular form, which reads as follows:

24. Another chart has also been submitted with regard to the admission status of own students of different DAV Public Schools of Bhubaneswar and the cut-off CGPA, which is as follows:

25. In course of hearing, a query was made by the Court from the counsel appearing for opposite party nos. 4 and 6 to 9 as to how admission process is being undertaken in the schools and whether the same is in conformity with the judgments of the Apex Court in Saurabh Chaudhary case (supra) and Payal Gupta case (supra) and referring to the aforesaid charts, it was submitted that in

respect of DAV Public School, CSPUR, 273 students have passed out in Class X Board Examination, 2014 and in DAV Public School, CSPUR the total number of seats in Class-XI in Science stream are 264, in Commerce 88 seats and in Arts 44 seats. It is stated that out of 273 passed students from Class X, transfer certificate and migration certificates have been handed over to 25 students, but the reasons of such handing over those certificates has not been specified in the affidavit filed by opposite party no. 4. On the contrary, learned counsel for the petitioner submitted that because of securing less percentage of marks, those 25 students have been handed over transfer certificate and migration certificate etc. to prosecute their studies elsewhere. If this is the reason, then the consequence will be disastrous. The school authorities cannot deprive a student of prosecuting his/her studies in his/her own school for having secured less percentage of marks and hand over transfer certificate and migration and other required documents to allow him/her to prosecute studies elsewhere, thereby violating the observation of the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra). It is further stated that so far as Science stream is concerned in DAV Public School, CSPUR, the cut-off CGPA has been fixed at 8.6 (81.7%). Therefore, the number of students having secured 81.7% marks and above of the said school, who were offered Science stream was 200, out of them only 164 students have taken admission in Science stream as against the total number of 264 seats. So far as Commerce Stream is concerned, the cut-off CGPA has been fixed at 6.4(60.8%) and though 268 students were offered to take admission in Commerce stream available in DAV Public School, CSPUR only 25 candidates have taken admission as against the total available seats of 88. Therefore, in Science stream, there still exist 100 seats to be filled up by DAV Public School, CSPUR. If 273 students have passed out in Class X and seats are lying vacant, the school authorities would have asked all the students of the same school to exercise their option and according to their option they should have chosen the subject and got themselves admitted in a particular stream. By fixation of such cut-off marks, the school authorities have deprived the students of their own school to take admission in Science stream and on the other hand, they have kept 100 seats for outside students, which is not the purport of the judgment rendered by the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra).

26. Even though seats are available in their own school, where the students can be accommodated, as per their own aptitude in a specific stream on the plea of cut-off marks the authorities have deprived the students of their own schools to take admission to a particular stream as per their aptitude. The Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra) never intended to deprive the students of their own school to prosecute their studies in the same school, rather it is otherwise, to mean, all efforts should be made by the school authorities to allow their own students to prosecute in the same school and if any seat is left out, then it will be open to the school authorities to fill up the same by issuing advertisement or other methods suitable to them for screening the

students to fill up the said seat in the school in question.

27. In course of hearing, it was stated that only 20 candidates were available and the school authorities were interested to get them admitted in the same school. Considering the greater interest of the students and different DAV Public Schools of Cuttack and Bhubaneswar, the Parents' Association relinquished its contention with regard to furnishing the names of those 20 candidates instead of wanting that the case be decided on its own merit.

28. In view of the above submission, this Court has proceeded with the matter keeping in view the available materials and the contention raised on behalf of the parties. Therefore, after hearing the learned counsel for the parties, this Court has come to a definite conclusion that there is no dispute with regard to the law laid down by the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra) save and except the only controversy that remains with regard to their application by the school authorities.

29. After analyzing the materials available on record and keeping in view the judgments of the Apex Court in Payal Gupta case (supra) and Saurabh Chaudhary case (supra), this Court directs the opposite parties-school authorities to admit the students of the same school first because it is a promotion and not a fresh admission or readmission in Class XI. Taking into account the results of Class X Examination, the students of the same school have to be admitted in different streams as per their aptitude and option exercised by them and after accommodating all the students of the own school, if at all any seats are available in any stream, it is open to the school authorities to fill up the same by issuing advertisement and selecting the candidates for admission by any mode, which will be just and proper. Depriving admission to the students of the same school in the name of securing less percentage of marks in Class X and handing over transfer certificates/migration certificates etc. to them being unjust and unfair, is not appreciated by this Court because by that the school authorities relish to shirk their responsibility, which is contrary to law laid down in Saurabh Chaudhary case (supra).

30. With the aforesaid observation and direction, the writ petitions are disposed of. No cost.