

(1999) 07 CAL CK 0064

In the Calcutta High Court

Case No : Writ Petition No. 24113 (W) of 1998

Debasish Kar Gupta and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 19-07-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 226
Evidence Act, 1872 — Section 56, 57

Citation : AIR 1999 Cal 300 : 2 CWN 322

Hon'ble Judges : K.J.V. Sengupta, J

Bench : Single Bench

Advocate : L.C. Behani, Ashim Kr. Halder, Somnath De, Monotosh Chakraborty and Rumi Biswas, for the Appellant; Arunava Ghosh and Sambuddha Chakraborty for Respondent No. 7 and Manik Das, for the Respondent

Final Decision : Allowed

Judgement

K.J.V. Sengupta, J.—By this writ petition the petitioners herein being two guardians of their two respective wards, viz., Anewsha Kar Gupta and Rupsa Basu, have challenged the decision of the Managing Committee of the secondary stream of Brahmo Balika Shikshalaya being the respondent No. 4 (hereinafter referred to as the said school) and a notice of the Headmistress dated 13 August, 1998 of the aforesaid stream for holding admission test of the wards of the petitioners.

2. It is stated in the writ petition that such decision is wholly mala fide, illegal, arbitrary and unconstitutional inasmuch as the said two girls were admitted once in its Montessori stream of the said school and gradually these two students were successfully promoted to successive classes and by this process they have come out successful in Class IV examination whereby they have become eligible to be admitted to Class V as a matter of course and without any further admission test. The said school is an one and integral body and having three branches, viz., Montessori, Primary and Secondary. So, these two students shall be admitted

without having further test, and as a matter of course and right since once at the beginning upon test and interview they were admitted. The school authority has taken a stand that it has every right to take a policy decision regarding admission of the students in secondary stream. It is stated that the three wings are separate and distinct from each other as they are being administered by three different governing bodies and has no connection with another. So, the Managing Committee of the Secondary stream has taken a decision for a screening test amongst those students who have been promoted from primary stream following an instruction of Director of Public Instruction dated 22nd August, 1974. It is contended that the standard of the Class IV students have gone down miserably. So, in order to have better standard of the education and future benefits of the students the screening test has become inevitable to admit to Class V level. It is also the stand of the respondent that once upon a time the decision of taking screening test for admission to Class V was challenged in this Court and this Hon"ble Court has been pleased to hold amongst others such decision of taking screening test is permissible. Therefore, this point is no longer res integra.

3. Mr. L. C. Behani, Senior Advocate led by Mr. Balai Chandra Roy, Senior Advocate appearing for the petitioners, submits that factually the said school is one organisation and having three branches and it will appear from the averment made in the paragraph 18 of the affidavit-in-opposition of the respondent No. 10 that the aforesaid three streams are the branches only of the said school. So, (for) all practical purposes these three streams are nothing but part and parcel of organisation, viz., the aforesaid school. Since the said school students were tested so also their parents at the time of their admission to the said school at Montessori level and these students admittedly had been through in class examinations and in Class IV examination they have brilliantly come out successfully, so the aforesaid decision for holding admission test is wholly arbitrary and illegal aiming at to deny the right to continue their study. In any event at the time of admission which is submitted by Mr. Behani that there was no stipulation or condition that the students have to pass admission test for entering secondary level. Such a notice was never published nor given to any of the guardians of the students. Therefore, it was the legitimate and/or reasonable expectation that the students who have been admitted at the Montessori level on admission test would be allowed to study at the same school in the secondary level and without having further admission test. He submits that instruction of the Education Department to the school allowing to hold admission test has got no statutory force. In order to have a statutory force this instruction should have been published in a Gazette unless that is done it has got no binding effect. Mr. Behani further submits that same school having different streams cannot be allowed to hold further examination for admission to another class. In support of his submission he relies on a decision of the Supreme Court reported in *The Principal, Cambridge School and another Vs. Ms. Payal Gupta and others*, . He also relies on the following decisions on the point that the guideline has no

statutory force and further there is no publication in official Gazette. The aforesaid guideline cannot be enforceable affecting public at large. The decision reported in-- (i) J.R. Raghupathy and Others Vs. State of A.P. and Others, , (ii) Narendra Kumar Maheshwari Vs. Union of India (UOI) and Others, (iii) Administrative Law by H.W.R. Wade and C. F. Forsyth at page 871 under the head "Circular".

4. Mr. Arunava Ghosh, learned lawyer, appearing for the school respondent taken a preliminary point that the writ petition is not maintainable since there is no averment and/or case made out against this school respondent as to affectation of legal right of the petitioner and corresponding legal duty of the respondent. These schools are autonomous and/or private bodies and they have taken a policy decision with regard to the admission of students and such decision of the autonomous body cannot be challenged by the writ petitioners. He has highlighted the factual aspect as mentioned in the affidavit-in-opposition saying the three wings are separate and independent entities of the aforesaid school. So admission to Montessori level cannot have a passport for all the branches. Naturally the daughters of the petitioners cannot have an automatic passport for admission to secondary school. The decision taken by the secondary stream is an independent decision and the aforesaid students are to follow in order to get admission to the Class V level. He also argues that there is no law framed by the school authority or by the Government regulating and controlling admission to a higher class. In absence of such specific law on this point the guidelines and instructions given by the Director of Public Instruction has statutory force. In support of his submissions he relies on the following decisions.

Shamkant Narayan Deshpande Vs. Maharashtra Industrial Development Corporation and another, ; Mysore State Road Transport Corporation Vs. Gopinath Gundachar Char, ; V. Balasubramaniam and Others Vs. Tamil Nadu Housing Board and Others, ; Sant Ram Sharma Vs. State of Rajasthan and Another,

5. I have considered submissions of the respective learned lawyers and examined the material placed before me. It appears the bone of contention in this writ petition is as follows :--

(i) Whether petitioners have made out any case for filing the writ petition or whether writ as prayed for herein can be issued against the school authority or not.

(ii) Whether the aforesaid three sections of the said school are independent and distinct entity or not.

(iii) Whether the daughters" of the petitioners are required to sit for further admission test or not.

6. Before I decide the other questions I am to examine whether the petitioners have been able to make out a case for maintaining this writ or not:

7. Admittedly this school has got recognition of the Education Department of the State Government. This school has got three streams, viz., Montessori, Primary and Secondary. It also appears to me from the records that the school receives the financial aids and/or grants for running the school. It is the constitutional right of citizens to have education. The State Government under Articles 41 and 45 of the Constitution of India is constitutionally duty bound to impart education to the children of this country. I can take judicial notice that the State Government alone cannot make effective measure for imparting education to the children of this country. So group of private individuals have come forward for imparting education and such is the endeavour taken by Brahmo Samaj for setting up school for girls. This endeavour has been recognised by the Government and so financial aid has been provided. In my view, imparting education to the children is a public duty. So though this school is a private individual body and it has been discharging a solemn public duties in accordance with law. Therefore, it cannot be said that the respondent No. 4 while running school with state aid has no state agency and/or instrumentality. In this connection reference can be made to a Division Bench judgment of this Court reported in 56 CWN 865 wherein it has been held amongst other an incorporated body was held to be public body. Since it was entrusted with duty of discharging public duty, hence writ petition was entertained against it. Two Supreme Court decisions, reported in Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others, and Francis John Vs. Director of Education and Others, are also relevant whether writ lies against the school. The principle laid down by Supreme Court in Praga Tools Corporation case, reported in The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others, is also applicable in this case. Therefore, Article 226 is amenable as I have : already observed that right of having education is a constitutional right. So, such right is any way ! affected by the state or state instrumentality this Court under Article 226 will certainly look into such affectation. The school respondent certainly 1 in my view comes within the purview other | authorities as defined in Article 226 of the Constitution of India. So, I hold that the writ petitioners being the guardians of their minor wards have been able to make out a prima facie case for (maintaining writ as the right of having education have been affected by the school respondent.

8. Another point raised by Mr. Ghosh is whether father being the guardian of his daughter ward can maintain this writ without affectation of his individual right. Father is the natural guardian of son or daughter under law. It is settled law guardian of a minor remains as trustee and who is to protect welfare and interest of the minor beneficiary. Therefore, the father can certainly take lawful step for education of his minor daughter in a case like this as guardian qua trustee. The writ petition can therefore be maintained. For this reason I am unable to accept the submission of Mr. Ghosh that this action of fathers cannot be upheld.

9. Next point I am to see is whether the aforesaid three streams are independent and/or distinct entity or not.

10. The respondent No. 7, however, has tried best to make out a case that these streams are different and distinct entity as these three branches are governed and controlled by the different Managing Committees. The Primary stream is governed under the provision of West Bengal Primary Education Act, 1973 whereas the Secondary stream is governed by the West Bengal Board of Secondary Education Act. Since two different Acts are applicable to two different streams, therefore it should be treated that they are two different organisations and entities. This stand taken by the respondent No. 7 to a great extent has been contradicted by the respondent No. 10 in his averment in paragraph 18. In paragraph 18 of his affidavit it is stated as follow :--

"..... .I say that secondary section is the main section of the school. The primary and montessori sections are two branches of the secondary section of the school. I say that if no section is separately mentioned Brahmo Balika Shikshalaya means its secondary section."

11. On the face of the aforesaid contradictory statement it would have been very useful had the various documents with regard to the functional position of the three sections were produced. It is within the special knowledge of the school respondent and to establish before this Court u/s 106 of the Evidence Act that these three sections are different entities which have got no connection and relation with another. But no such document nor any material has been produced before this Court. Therefore, I am to accept the version of the writ petitioners that Montessori and Primary sections are the part and parcel of the Secondary section or vice versa and the aforesaid school is the one entity and it has got three different sections only. Mere functioning of two streams of the same school under two different laws do not ipso facto render two different functional and constitutional entity. The provision of the aforesaid two laws relating to education do not provide for separate and different legal entities. So, I hold the respondent No. 4 is the only body and under whom all the three streams function.

12. It is an admitted position that the two daughters of the writ petitioners duly appeared for the test when they were initially admitted to Montessori and it is an admitted position further that from Montessori level to primary level there was no readmission test though once it was attempted to be done so, but for Court's intervention it was not done and these two daughters were allowed successive classes on the basis of their performances of their annual examinations. In Class IV annual examination these two students admittedly have done bright result and in fact Mr. Arunava Ghosh the learned counsel appearing for the school authority admitted that these two girls are brilliant in school test. It is not understood by me as to why the same school after holding examination and declaring the said two students to be fit for admission to Class V at Primary level can ask for proving themselves once again fitness to admission to Class V. At the time of admission of the Montessori level it does not appear, the said school authority notified and/ or made known to the guardians that the admission to the Montessori level will not give an automatic passport to get admission to all

classes of the said school. In other words, it was not specifically mentioned and were made known to the guardian of the two students that their wards had to undergo another admission test in order to get admission to Class V. So, when a student gets admission in one school having three branches unless contrary is specified and/or were made known, he or she can reasonably expect that he or she was not required to appear further admission test on a subsequent stage of the same school. This expectation is legitimate and reasonable one. It is submitted that admission test is necessary to weed out substandard students to maintain a statutory teacher student ratio of 1:40. As the number of successful students in Class IV far exceeds this statutory ratio it has become necessary to have an admission test. In my view this admission test for the aforesaid objectives is not at all helpful because if all the students who have been promoted from Class IV passes the admission test for Class V then the problem of accommodation will still persist and this is not the sound policy for maintaining the aforesaid statutory ratio. This plea is neither reasonable nor bona fide. In order to maintain the aforesaid statutory ratio the school should take care from Montessori level and admit as many students as they do not exceed the maximum number at the secondary level. If the standard of quality in the students have fallen in primary section as it is contended that is due to the failure of the school itself and such failure cannot be attributed to the failure of the students. Therefore, it would not be proper to deny the admission of the students who have already come out successful in the annual examination at the primary level. The school is an autonomous body and can adopt any policy for the betterment of the education but such a policy should be reasonable and based on sound and workable policy. The said decision of Managing Committee and followed by notice of Headmistress are stated to be sequel to a memo of Education Directorate dated 22/23rd August, 1974. Upon careful perusal of the same it appears to me the same does not apply to the school having two streams primary and secondary like this. Even the said memo speaks of honouring certificate of Headmaster of Primary school by the Headmaster of secondary school ordinarily, in exceptional cases a test may be held. In this case there is no question of exceptional circumstances of course. So, it is not necessary to examine legal implication of the said memo. So the decisions cited by both the learned lawyers are not required to be considered. It is submitted by Mr. Ghosh that the judgment and order of S. R. Misra, J. (His Lordship then was) is decisive and being final on this subject. I am unable to accept the submission of Mr. Ghosh as the said judgment and order was rendered on concession and suggestion of the parties thereto. It is settled law any judgment rendered on concession is not precedent, but the same may be applied as estoppel against the parties therein, the writ petitions herein were not parties thereto.

13. As I have already come to conclusion when these two daughters of the writ petitioners were admitted at Montessori level and this policy decision was not in existence at that time all these years they were in expectation that they would get automatic admission to the secondary level. Accordingly, I hold that the

aforesaid notification and further decision for readmission test of the students are unreasonable and tantamount to denial of the right of admission and to continue study of the said daughters of the petitioner. So I quash the impugned resolution and notice dated 13 August, 1998. I accordingly, direct the school authority and Headmistress of the said school of Secondary Branch to admit these two students, viz., the daughters of the writ petitioners without having any admission test.

Thus, the writ petition succeeds. There will be no order as to costs.