
(2002) 07 CAL CK 0017
In the Calcutta High Court
Case No : Writ Petition No. 20216 (W) of 2000

Gopal Chandra Sardar

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 24-07-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Constitution of India, 1950 — Article 21

West Bengal Board of Secondary Education Act, 1963 — Section 19A(3), 2, 45

Citation : (2002) 07 CAL CK 0017

Hon'ble Judges : Pratap Kumar Ray, J

Bench : Single Bench

Advocate : Tapobrata Chakrabarty, for the Appellant; Tulsi Das Maiti, for Board, for the Respondent

Judgement

Pratap Kumar Ray, J.—In this writ application, the Petitioners have prayed for the following relief?s:

- a) A writ in the nature of Mandamus commanding the Respondents, their agents and servants to forbear from giving effect or further effect to the impugned memo No. s/275 dated 9th May, 2000 issued by the Respondent No. 4 being annexure "P8" herein and further commanding the Respondents to grant recognition and affiliation to the Baburchak Junior High School forthwith, without any hindrance from any quarter;
- b) A writ in the nature of Mandamus commanding the Respondents, their agents and servants to absorb and regularize the services of the Petitioner Nos. 6 to 13 as organizing staff of the Baburchak Junior High School;
- c) A writ in the nature of certiorari directing the Respondents, their agents and servants to produce all records and proceedings so that conscionable justice may be administered by quashing the impugned memo No. S/275 dated 9th May 2000 issued by the Respondent No. 4 being annexure "P8" herein and by granting the other relief?s as prayed hereinabove.

2. The Ad-hoc Committee of Baburchak Junior High School and its organizing teaching and non-teaching staff of the school are the Petitioners herein. The impugned order in this writ application is the decision of Executive Committee of the West Bengal Board of Secondary Education as taken in its meeting dated April 7, 2000 refusing to grant recognition to Baburchak Junior High School hereinafter refer to as concerned School, as was communicated by the Secretary, West Bengal Board of Secondary Education under his Letter No. 2/75 dated May 9, 2000. Reasons for refusal of recognition as stated in the said impugned letter read as follows;

1. The school claims to have been established 1971. But did not apply to the Board before 1975;

2. The school has 1 acre of land and 5 class rooms of 400 sq. ft, each. But the school building of, Kachcha construction;

3. The D.L.I.T. as well as State Govt, did not recommend the school for its recognition.

3. Earlier the Petitioners came into this Court praying necessary order of recognition of the school in W.P. No. 7051 (W) of 1998 and by the order dated September 16, 1990 passed by G.R. Bhattacharjee, J. (as His Lordship then was) writ application was disposed of by the following order:

This is a case for recognition of a school. The District Inspector of Schools (S.E.) South 24-Parganas the Respondent No. 3, is directed to get the concerned school inspected by the D.L.T. team within a period of twelve weeks from the date of communication of this order. The District Inspector of Schools (S.E.)-, South 24-Parganas, will forward the report of the D.L.T. team with his own comments; thereon to the Director of School Education, West Bengal, within three weeks from the date of submission of the report and the Director of School Education, West Bengal, shall forward the report, all the necessary papers with his own comments thereon to the Education Department, Government of West Bengal, within eight weeks from the date of receipt of the necessary papers from the D.I. of Schools (S.E.) South 24-Parganas. The Education Department shall then forward the report and the necessary papers with their own comments thereon to the West Bengal Board Secondary Education within a period of twelve weeks from the date of receipt of the necessary papers from the Director of School Education. The West Bengal Board of Secondary Education shall then consider the question of according recognition to the concerned school and pass necessary orders in the matter within a period, of twelve weeks from the date of receipt of the necessary papers from the Education Department, Government of West Bengal.

It is needless to mention that at every stage the authorities concerned shall act strictly in accordance with law. While communicating this order to the D.I. of School, the Petitioner shall also enclose therewith not only a copy of the writ petition but also copies of all relevant papers in support of their claim for

recognition of the concerned school. The writ petition stands disposed of accordingly; This order by itself shall not create any equity or right for recognition of the concerned school.

4. In pursuance of such direction of G.R. Bhattacharjee, J. school was inspected by District Level Inspection Team and a report of such inspection was referred to the State Government for their opinion. The report is dated May 24, 1999. On physical verification of the locality, the presence of nearest junior/high school, the staff pattern, the teaching staff, the intake of students and other particulars, members of the said team consisting of three persons, one District Inspector of Schools concerned, another a nominee of West Bengal Board of Secondary Education and other a nominee of the State Government under Column-N, General Remarks, opined as follows:

Baburchak Junior High School was inspected in obedience to the order of the Hon'ble Calcutta High Court dt. 16.9.98 in W.P. No. 7051 (W) of 1998 Gopal Sardar and Ors. v. State of West Bengal and Ors. The locality needs a Junior High School, but the said school did not apply to the West Bengal Board of Secondary Education with a fee of Rs. 25/- in time.

So the school cannot be recommended for recognition, though the school had obtained recommendation for recognition of the Sabhadhipati, Zilla Parishad, South 24-Parganas for considering recognition.

5. The State Government considered the report of District Level Inspection Team aforesaid through its Secretary, Education Department and send their views to the West Bengal Board of Secondary Education, which reads as follows:

In a solemn order passed on 16.9.98 Hon'ble Mr. Justice G.R. Bhattacharya was pleased to direct the Education Department forward the report and the necessary papers with their own comments thereon to the WBBSE within 12 weeks.

The DLIT Report dt. 24.5.99 has been received on 9.7.99 being sent by the DSE. On perusal of the DLIT report it appears that:

1. the school claims to have been established in 1971. But it did not apply to Board before 1975;
2. The school has 1 acre of land and 5 class rooms of 400 sq. ft. each. But the school building is 3. The DLIT Team did not recommend the school for it did not apply" to the Board for such recognition within the prescribed time. But at the same time it has remarked for the necessity of a Jr. High School in that area.

However the DLIT Report & other papers may be sent to the WBBSE for taking necessary action in accordance with law.

Sd/- Nikhilesh Das

5/8/99

6. The views of the Government, the report of District Level Inspection Team

were placed by the learned Advocate appearing for the West Bengal Board of Secondary Education in this Court, which was directed to be kept in the record. On the aforesaid factual matrix of the matter namely the report of District Level Inspection Team and the opinion of the State Government, it has been vehemently urged by the learned Advocate of the Petitioner that the impugned decision is not legally sustainable refusing to grant recognition and same is highly arbitrary and violative of the fundamental right of education as are available to the students of the locality in question. It has been further urged that considering the area in question and the location of nearby schools, this Court would be satisfied that the students would suffer to a great extent due to lack of proper educational facilities upto junior level that is Class VIII in the event recognition is not granted by this Court. This writ application has been opposed by filing Affidavit by the West Bengal Board of Secondary Education whereby they have reiterated the same points namely the ground of refusal as taken by the Executive Committee of the West Bengal Board of Secondary Education in their meeting dated April 7, 2000.

7. Before considering the rival contentions of the parties, the relevant provisions for recognition of a Junior High School or a High School in the State of West Bengal by the West Bengal Board of Secondary Education is required to be looked into. u/s 19A, Sub-section 3 Clause (c)(i) of the West Bengal Board of Secondary Education Act, 1963 hereinafter refer to as concerned Act for brevity, power was vested to the Executive Committee of the West Bengal Board of Secondary Education to grant or re-fuse recognition to institutions. The relevant provision reads as under:

19A(3)(c) [Subject to any directions] of the State Government in regard to the number, location and manner of selection-(i) grant or refuse recognition to Institutions (Sic).

8. u/s 45 of the said Act, State Government was vested to make Rules after previous publication to carry out the purposes of the said Act in terms of Clause 2(o) of the said Section. The relevant provision reads as follows:

45. Power of State Government to make rules.-(1) The State Government may, after previous publication, make rules for carrying out the purposes of this Act;

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a).;

(o) any other matter required to be prescribed or provided or made by rules.

9. Admittedly no rule has been framed with reference to exercise of the power of grant or refusal of the recognition of the institution as to be done by the Executive Committee of the West Bengal Board of Secondary Education. No guideline has been prescribed under the rule though education up to 14 years of age to the citizen concerned is a basic fundamental right in view of the settled

legal position by the Apex Court as passed in the Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., The State Government and the West Bengal Board of Secondary Education both relied upon, one Government Order issued by the Special Secretary, Education Department, Secondary Branch, Government of West Bengal under No. 553-Edn. (S) dated Calcutta, April 26, 1978 as the relevant direction in this field for grant of recognition of the school as issued by the State Government. The said Memo No. 553-Edn. (S) dated Calcutta, the April 26, 1978 hereinafter refer to as Memo No. 553-Edn. (S), reads as follows:

Government Of West Bengal Education Department Secondary Branch No. 553-Edn. (S) Dated, Calcutta, the 26th April, 1978 From Shri B.N. Chatterjee, I.A.S., Special Secretary to the Govt, of West Bengal.

To: The Director of Secondary Education, West Bengal.

Sub: Recognition of Secondary Schools in West Bengal w.e.f. 1.1.78, The undersigned is directed to say that after due considerations of financial resources it has been decided by the State Government that a limited number of schools including Girls' Schools separated from Co-educational Schools should be recommended for recognition from 1.1.78 or from subsequent academic sessions. A district-wise panel should be prepared for the purpose in the manner indicated below.

2.(a) The schools should be selected strictly on the basis of the need of area, population and general educational considerations. There should be a Central Committee for screening the applications. The Committee may consist of the following members:

- (i) Three persons nominated by the Board,
- (ii) The D.S.E.,
- (iii) The D.D.P.I., (S.E.)
- (iv) The D.D.P.I. (S.E.W.),
- (v) Three persons nominated by Government.

The committee will consolidate the reports received from the districts and send the consolidated report to Government with recommendations. The list finally approved by the Government will be sent the Board for consideration:

(b) There should be a District Level Inspecting Team consisting of (i) D.I. of Schools (Secondary), (ii) a nominee from the Board and (iii) a nominee from the Government. The Inspecting Team will fill up a questionnaires and given general remarks in the questionnaires. The questionnaires may include the following points:

- (i) Name and Distance of three nearest High/Jr. High Schools from the school under inspection;

- (ii) The year in which the school was established;
- (iii) Year-wise Rool Strength;
- (iv) Number of students sent up for examination during the last three years if specially permitted to do so;
- (v) Pass/Failure (Year-wise);
- (vi) Accommodation;
- (vii) Library;
- (viii) Sanitary arrangement;
- (ix) Economic condition of the school including reserve fund;
- (x) Present Rool Strength (Class-wise);
- (xi) Any other information required according to the norms prescribed by the Board.

(c) The Board and the Directorate will place a District-wise list of applicant schools with location and date of application to the respective D.I. of Schools (Secondary) [The applications pending with the Board/Directorate should be sent back to the respective District,]

(d) Inspection may be taken up in each district with ten to twelve such schools from among each of the categories of Boys"/Girls" and Bifurcated Girls" Schools according to Board"s Circular, if any. The oldest school and the comparatively unschooled area must be inspected first. Applicant Jr. High Schools of the same number may also immediately be inspected and the report sent to the Central Committee with a Priority list as soon as the inspection is completed. The remaining applicant schools may be subsequently inspected by the District Inspecting team and a panel of eligible schools may be prepared and sent to the Central Committee for recommendation for future recognition.

(e)" Organizations of spontaneous and Voluntary schools should from now, be discouraged. Schools may be started only under instructions from the Government or the Board.

(f) Co-education, in general, shall not be discouraged. Only in these cases where co-education effects the roll strength of the existing recognized schools, there should be restrictions.

(g) The Director of School Education and the Board have been requested to conduct a survey to identify pockets where new schools are necessary. These areas should be given precedence over other areas in the matter of recognition of schools. If necessary, Government may be moved for establishment of new schools, specially in educationally and economically backward areas.

3. Government will retain power of specially recommending schools of the

following type for recognition, namely:

- (i) Schools set up and maintained by linguistic minorities.
- (ii) Schools set up and maintained by any Central or State Government undertaking including those in developing townships like Haldia.

4. Government schools like the one in Salt Lake Township or Kalyani should receive special consideration for the purpose of recognition.

24.10.94

Sd/- Special Secretary.

10. Said Government Order No. 553-Edn. (S), subsequently was modified by G.O. No. 676-Edn. (S), dated Calcutta the May 28, 1991 as issued by the Joint Secretary, Education Department, Secondary Branch, Government of West Bengal whereby Director of School Education, West Bengal was allowed to discharge the functions of the Central Committee in lieu of the Central Committee as was prescribed under Clause 2(a) of Memo No. 553-Edn. (S) dated April 26, 1978. Memo No. 676-Edn. (S) dated May 28, 1991 reads as follows:

No.: 676-Edn. (S) Dated, Calcutta, the SS-5/91 28th May, 1991.

From: Shri H.P. Mukhopadhyay, I.A.S., Joint Secretary to the Government of West Bengal.

To The Director of School Education, West Bengal.

Sub Recognition of Secondary Schools in West Bengal.

In Partial modification of G.O. No. 533-Edn. (S) dated 26.4.78 on the aforementioned subject, the undersigned is directed to say that after careful consideration, the State Government has decided that the Central Committee, constituted in terms of Para 2(a) of G.O. No. 533-Edn (S) dated 26.4.78 for screening the applications in connection with recognition/ upgradation of Secondary Schools, shall be dissolved with immediate effect.

The Director of School Education, West Bengal shall henceforth discharge the functions of the said Central Committee until further orders.

25.10.94

Sd/- Jt. Secretary.

11. Hence, for recognition of the School, the only guideline as issued by the State Government is the said Memo No. 553-Edn. (S) aforesaid. In the earlier writ petition whereby G.R. Bhattacharjee, J. passed the order directing inspection of the school by District Level Inspection Team and thereby to process the matter for recognition by submission of such report of Inspection Team to the Director of School Education, Government of West Bengal and thereafter reference of all papers with opinion of the State Government to the West Bengal Board of

Secondary Education for consideration of the matter by the West Bengal Board of Secondary Education,, reached its finality as the order dated September 16, 1998 passed by G.R. Bhattacharjee, J. in W.P. No. 7051(W) of 1998 was not challenged in appeal by the State of West Bengal who contested the case. Hence, the basis of adjudication of this matter has been contoured by the order of G.R. Bhattacharjee, J. as aforesaid. Under Clause 2(b) of GO. No. 553-Edn. (S) dated April 20, 1978 it is abundantly clear that the report of District Level inspection Team got its greater weightage for the purpose of recognition of the school. From the constitution of,-District Level Inspection Team, it appears that in the team, the concerned District Inspector of Schools, a nominee from the West Bengal Board of Secondary Education and a nominee of State Government are included. The representation of State of West Bengal and West Bengal Board of Secondary Education was made with a definite object. Since, the West Bengal Board of Secondary Education and/or its Executive Committee who grant recognition had no scope to visit each and every school and to assess the merits and de-merits of recognition of the school on the basis of the intake, of students, location of the school and need of the school, a nominee of the said Board accordingly was included in the Inspecting Team as if the West Bengal Board will see the entire matters through the eyes of their nominee. Similarly for the Education Department of the State Government, it was not possible to visit each and every school to assess the merits for recognition of the school.; accordingly a nominee of State government was placed so that the State Government can decide the matter through the eyes of such nominee. Nominee of someone represents the persons concerned who nominate. Hence, from the phraseology of the word and the constitution of the District Level Inspection Team as appears in Clause 2(b) of the said memo 553-Edn. (S) it is clear that the school was inspected not only by the District Inspector of Schools concerned but also by State Government and the West Bengal Board of Secondary Education through their respective nominees. Any act done by the nominee and any opinion as framed by the nominee accordingly is acceptable to the body concerned who nominated and same is binding to them. Law of nomination is very much vital in this field accordingly is required to be discussed. The purpose of nomination and the question whether action of nominee and/or its recommendation how far would be binding, herein below is dealt with.

12. Hence, having regard to the legal position of the nominee and its binding effect to the body concerned who nominate, it is clear that the West Bengal Board of Secondary Education and the State Government was bound by the decision reached by their nominees being members of District Level Inspection Team. Hence, to adjudicate this matter, the only point to be looked into as to whether the report of District Level Inspection Team was rightly, considered and was given proper weightage as same is the basic foundation determining the different factual matters namely the location, manner of selection, need of the school. On scanning of the report of District Level Inspection Team hereinafter for brevity referred to as D.L.I.T., the following points emerge:

- (a) That the school was established on 1st January, 1971 and it is a co-educational school;
- (b) Land of the school was gifted by the person concerned by registered deed on 26th July, 1972 measuring 1 acre;
- (c) School has its own building but construction in Kachcha ;
- (d) There are five class rooms measuring 20 ft. by 20 ft. each and a staff room. Sanitary arrangements also were made properly having two latrines, one for boys and another for girls. Drinking water facilities was made by installing a tubewell nearby to the school by the Panchayat Samity;
- (e) Total girls students who were present on the date of inspection for four class unit 90 whereas number of boy students was 76 and thereby it was noted that in Class-V there were two sections namely A and B consisting of 32 and 32 students respectively, in Class - VI number of students was 24 in Class- VII it was 35 and in Class- VIII figure was 27;
- (f) So far as the staffs are concerned, it appears from the report that all the teaching staffs were graduate including two Science teacher, one is of Bio-Science and another is of Pure Science;
- (g) Nearest schools as were available to the students of that locality were mentioned as in the North and; South there are two schools, which are six kilometers away, in the East, there is a river and in the West there is a school which is ten kilometers away;
- (h) The feeder schools have been recorded being total No. 7, which are all Primary Schools, located in the nearby areas within the radius of two kilometers;
- (i) Recommendation was made by Zilla Parishad, South 24-Parganas for recognition of the school.

13. Hence, upon having regard to all these particulars, the District Level Inspection Team submitted their report. It has been recommended by the said team "the locality needs a Junior High School" and "school was recommended for recognition by Sabhadhipati, Zilla Parishad". But despite the fact that there was a need of a school in the locality on the basis of its location, intake of students, feeder schools and location of other High Schools at far off distance, District Level Inspection Team did not recommend to recognize the school only for one reason that the school did not apply with a fee of Rs. 25.00 in proper time for recognition. The State Government considered the views of the District Level Inspection Team and the Secretary of the State Government simply reproduced the opinion of the D.L.I.T. in his report and thereby referred the matter to the West Bengal Board of Secondary Education. The Executive Committee of the West Bengal Board of Secondary Education refused to grant recognition on three grounds as already referred to. The first ground is that the school did not apply to the Board before the year 1975. This point that the school

did not apply before the year 1975 is absolutely a technical point and it has no nexus with reference to recognition of a school. It was opined by the D.L.I.T. that the locality needed a Junior High School. Grant of recognition of an institution has a nexus on the need of the locality. When such need was established by physical verification of the school, the intake of students and the locality, by a properly constituted D.L.I.T., the refusal to grant recognition only on the ground that the school did not apply had no reasonable basis which is too much technical point within the domain of procedural law. Beside, in the earlier writ application on the same factual matters, the school approached this Court for necessary direction of recognition when G.R. Bhattacharjee, J. directed the inspection of the school by D.L.I.T. and to process the matter in the manner as directed. This order reached its finality as no appeal was preferred by the State Government. Once, the dispute was crystallized to a judgment of this Court directing to decide the question of recognition on compliance of different procedures namely inspection by D.L.I.T., opinion of Director of School Education, West Bengal, opinion of State Government and thereby a decision of Executive Committee of the West Bengal Board of Secondary Education, the ground that the school did not apply in 1975 as now has been taken is not legally sustainable. This point was adjudicated upon in the earlier writ application and the direction was given to complete the inspection and other follow up action.

14. Once, a point has been decided by the Court, the Executive Committee cannot take up the point in view of application of the principle of *res judicata*. The State Government could have opposed the prayer for inspection by D.L.I.T. and thereafter different follow up actions as directed by this Court by the order of G.R. Bhattacharjee, J. and the State Government and the West Bengal Board of Secondary Education both could have preferred an appeal challenging the order of G.R. Bhattacharjee, J. whereby school was directed to be inspected by the D.L.I.T. and thereafter to take different follow up action. Once, the State Government and the West Bengal Board of Secondary Education failed to challenge this judgment delivered by G.R. Bhattacharjee, J., they are estopped from taking the point that the school did not apply in the year 1975 as a ground to refuse recognition of the school. In this context, reference may be made to the judgment of the Apex Court holding, *inter alia*, that principle of constructive *res judicata*, which is squarely applicable in the writ proceeding and also with reference to the claim and defence both. Reliance may be placed to the judgment passed in the case *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.)*, *Andheri and Others*, relevant portion of para. 20 reads as follows:

An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying explanation IV is that where the parties have had an opportunity, of controvert a matter that should be taken to be the same

thing as if the matter had been actually controverted and been constructively in issue it cannot be said to have been actually heard and decided. It could not only be deemed to have been heard and decided.

15. Same view has been reiterated in a subsequent judgment passed in the case G.K. Dudani and Others Vs. S.D. Sharma and Others, the Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, Apex Court held:

When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.

16. The House of Lords has also considered this aspect and relying its earlier decision in the case Thoday v. Thoday 1964 All. E.R. 341 p. 352, the Indian Endurance Republic of India and Ors. v. India Steamship Co. Ltd. 1993 (1) All. E.R. 998, held "cause of action also merges with the judgment".

17. Our Apex Court also in a recent decision held accordingly in the case P.K. Vijayan Vs. Kamalakshi Amma and Others, .

18. Hence, having regard to such legal position as discussed above, the stand as taken by the West Bengal Board of Secondary Education and the State Government by way of a ground to refuse recognition by holding that school did not apply prior to the year 1975 cannot be taken even if it is assumed that res judicata principle is not applicable, as the same is hit by doctrine of constructive res judicata, as in earlier writ proceeding, G.R. Bhattacharjee, J. (as His Lordship then was) when decided the matter and passed a judgment directing the said Respondents to take necessary action as per the direction. The present point also merges with the judgment and now they are estopped from taking that as a ground. Besides, it has also been settled by the Apex court that the res judicata and estoppel principles are also applicable in a proceeding before Administrative Authorities as they are based on public policy of justice. Reliance may be placed to para. 26 of the report passed in the case Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another, a Bench consisting of three Judges, which reads as follows:

It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstrated wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue, which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common

law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same, parties in which the same issue arises. Section 11 of the CPC contains provisions of res judicata out these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice.

19. Taking the matter in that way also, the judgment as earlier delivered by this Court in earlier writ proceeding wherein the Respondents appeared, not only is binding to them but they are also estopped from taking grounds while considering the matter for a decision which as a defence they could have taken in the earlier writ application, namely that the school in question since did not apply prior to year 1975 had no right to pray for recognition following the inspection by D.L.I.T. in terms of Government order and thereby to have a consideration of the matter by the State Government and the West Bengal Board of Secondary Education, as was directed to be done by the Court.

20. so far as the second point is concerned that due to kachcha construction of school building recognition was refused, same is also not sustainable. It has been recorded in the decision impugned herein that the school got 1 acre of land and there are five classrooms as per prescribed norms. Once there is a school with six rooms, five classrooms and one staffroom, two latrine and other facilities and there is intake of the students in proper numbers, and there are need of the school as recommended by the D.L.I.T., it is immaterial whether school is a pucca or kachcha building, particularly having regard to the economic condition of our country more particularly economic condition of the village people. In the village more than 90 per cent houses are kachcha that is mud built with thatched roof and/or tin shade. Amongst these, 100 per cent houses wherein the poor members that is agricultural labourers and small farmers reside belonging to Scheduled Caste and Scheduled Tribe community under different castes namely Duie, Bagdi, Hari, Dom, Muchi, Kamar (Blacksmith), Chhutor (Carpenter), their houses are not only mud built with thatched roof but they have no sanitary facilities and also no facilities for drinking water. Under this scenario when the students of that locality from those families come to read in the school to have education up to junior level, the building whether kachcha or pacca is immaterial in their angle. It is highly arbitrary and can be termed as "wednesbury unreasonableness" in terms of principle set out to test any action as unreasonable in the case *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* 1947 (2) All. E.R. 680. The relevant paragraph from the said report whereby Lord Greene, M.R., expounded the principle is quoted herein below:

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a General description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters, which he is bound to consider. He must exclude from his consideration matters, which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense, in another it is taking into consideration extraneous matter. It is so unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another.

21. The standard of unreasonableness is nominally pitched very high: "so absurd that no sensible person could ever dream that it lay within the powers of the authority". In the *Tameside* (1977) A.C. 1026, Lord Denning MR also held "so wrong that no reasonable person could sensibly take that view". Lord Diplock considered that issue in the case *Council of Civil Service Unions. Minister for the Civil Service* (1985) A.C. 410, wherein it is held "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

22. When recognition of the school is refused on the ground that the building is kachcha, the question is what to be considered as prime consideration, whether the building or the basic need of education? In a village where it appears from the D.L.I.T. report that there are eight feeder primary schools within the radius of two kilometers whereas there is no junior high school in the locality and the high schools are situated at a long distance of six to ten kilometers respectively, only whether on the ground that the school has no building made of bricks and reinforced concrete, recognition to be refused? In India, considering the socio economic condition of the people when more than 50 per cent people are living under poverty line and they are living in mud built houses with thatched roof even without any sanitary facilities, it is an Utopian idea and thereby an extraneous consideration that unless and until the school building is made of bricks and concrete structure as to be made by the poor villate people of that locality, the school would not be recognized. The Executive Committee of the West Bengal Board of Secondary Education sitting in their chamber at Calcutta city failed to feel the nerve of village and to understand the social and economic background of the village people, the condition of their residence and the facilities as are available to them. There are so many villages, which are not even connected by any road. Student of a particular locality in a village area cannot travel more particularly who are below 14 years of age, a longer distance of six

to ten kilometers to reach in a high school. In village area, since, there is no road kachcha (ailes) of the fields is the only way to reach one place to another, which also becomes a very troublesome to cover not only in the rainy season but also in other situation. Hence, the decision as reached that the building is "kachcha", so recognition could not be granted is absolutely an arbitrary decision based on extraneous consideration in the context of the village people Who resides in the area. Village people, need the light of education so that they can elevate themselves and may come out from different bondages namely social, economic, political, etc. It will-be a real injustice to refuse the facility of education only because school building is kachcha. Even the lives of some of the great educationist and philosophers are considered, it will be seen that they came out from the village on completion of their education from schools whose building were Kachcha i.e. mud built. The Nobel Laurate and a multi Dimensional Genius Sri Rabindra Nath Tagore had set up a school under open sky in "mango groove" popularly known as "Amrakunja" at Santiniketan to provide education to the students. Highly spiritual and philosophical writings of Sri Tagore were written from the house "Uttarayan" and "Shyamali", which are kachcha building made of mud. From such type of School, the present Nobel Laurate Sri Amartya Sen came out as a successful man in his life though he got the educational facilities in the junior level stage from the said environment of Santiniketan. Hence, the concept that unless school building is pucca i.e. made of bricks and concrete, the students will not get proper education is absolutely a vague and arbitrary decision, which reminds me the "Wednesbury case".

23. Hence refusal to grant recognition of a school on the ground that the school building is kachcha cannot be accepted as a fair and reasonable ground even on application of doctrine of proportionality. Said doctrine is an opening of new horizon in the Administrative Law, It has been discussed in the Book "Judicial Review of Administrative Actions" of De Smith, Wolf and Jowell, 4th Edition and 3rd Impression at page 595 to 597, which reads thus:

As it is applied in its European context (by the European Court of Justice, the European Court of Human Rights and in some of the Member States, of the European Union), there are two principal formulations by which proportionality is tested. These are: (a) the balancing test and (b) the necessity test. There is also a third test which is occasionally applied, namely, (c) the suitability test.

(1) The balancing test requires a balancing of the ends which an official decision attempts to achieve against the means applied to achieve them. This exercise requires an identification of the ends or purposes sought by the official decisions. In addition, it requires an identification of the means employed? to achieve? those ends, a task which frequently involves an assessment of the impact of the decision upon affected persons. Different ends or purposes and different means will be accorded different weights. From example, in the context of European Community law, it would appear that where the purpose of an infringement of a fundamental norm. such as Article 30 of the E.C. Treaty, is the protection of

human health. Similarly, if the means pursued to achieve a measure involve a breach of a human right or the deprivation of a person's livelihood, these factors are likely to be weighed more heavily than one that affects individuals in a more trivial manner. The application of the balancing test is well illustrated by the case of *Bela-Muhle Josef Bergmann v. Grows-Farm* where the Court of Justice held unlawful a Council Regulation which made compulsory the use of skimmed milk powder in the feeding of livestock. The purpose of the Regulation was to diminish the surpluses of skimmed milk powder, but its effect, which was to make the cost to users three times that of the equivalent amount of vegetable feeding stuffs, was held disproportionate;

(2) The necessity test requires that, where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective. Like the United States' principle of the "least restrictive alternative", this aspect of proportionality requires public bodies to adopt those regulatory measures which cause the minimum injury to an individual or community. It only applies where more than one means is available to implement the law's objective. For example. In *Cassis de Dijon* the Court of Justice held that a German measure totally prohibiting the marketing of a black-current liqueur whose alcohol content fell below a required percentage was disproportionate. It was held that other measures, such as labeling the product, could achieve the same result by less restrictive means.

(3) The suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful. For example, in a case in Germany it was held that the police may not require the owner of kennels to reduce noise by keeping the dogs in closed rooms, in a manner inconsistent with the law relating to the protection of animals.

24. Applying the necessity test in German Law an innkeeper would not be fined for excessive noise emanating from his premises if the noise could effectively be controlled by advancing his closing hours. (See the decision of March 16, 1907 17 BWVGHE 227) as were in the footnote of said book of De Smith, Wolf and Jowell at page 596.

25. Applying the said principle, the apex court also considered the matter in respect of imposition of penalty in a departmental proceeding. Reliance may be placed to the judgments passed in the case *Ranjit Thakur Vs. Union of India (UOI) and Others*, *Bhagat Ram Vs. State of Himachal Pradesh and Others*, ; *Ved Prakash Gupta Vs. Delton Cable India (P) Ltd.*, ; *V.R. Katarki Vs. State of Karnataka and others*, ; *Union of India and others Vs. Giriraj Sharma*, .

26. The Court held in those judgments that every action must be proportionate to the injury as to be sustained qua the statutory regulation. In the instant case same principle is squarely applicable. It has already been held by the apex court in *Unni Krishnan (Supra)* that education is a fundamental right up to the junior

level stage in respect of the children up to 14 years of age. Such constitutional mandate whether can be abrogated and/or be downgraded by the West Bengal Board of Secondary Education upon taking a ground to refuse-recognition that the school building is kachcha? Refusal to recognize a school on the ground of the features of the building is a disproportionate view which otherwise is arbitrary applying the said doctrine of proportionality" in the angle of Secondary review doctrine on principle of "Wednesbury Arbitrariness".

27. Refusal to recognize the present school on the ground of the feature of the building being made of mud whether was a justified ground now to be tested on application of doctrine of proportionality. The three tests as already referred to namely the balancing test, the necessity test and the suitability test if applied, the decision to refuse recognition on the ground of feature of the building will lead to a conclusion that authorities acted un-reasonably and arbitrary way by setting up the said norms. In the angle of balancing test as formulated, it was clearly identified that authority concerned while deciding the matter was considering the recognition of a school which provides educational facilities, a constitutional mandate to the students of the locality. Once the purpose of identification to exercise the power is to decide the issue which is encompassed with constitutional mandate in the language of Unni Krishnan (Supra) case, the authorities concerned ought to have considered the matter about the impact of the decision refusing to grant such recognition on the ground of the features of the building to the persons who are affected which herein neither the school building nor the teaching staff but the students concerned who are getting educational facilities. Having regard to such balancing test, the impugned decision to reject the recognition on the ground of feature of the building is not tenable. The angle of necessity test which otherwise can be said as consideration of the matter to find out "least restrictive alternative", the public bodies herein the said Board ought to have applied their mind to cause the minimum injury to an individual or the community in the matter of recognition of the school., From the report of DLIT when it was opined that there was necessity of the school on proper consideration of the students intake, non-availability of junior level educational facilities, availability of primary feeder schools in the locality, which are the relevant factors, the Board misdirected itself to decide the matter on an irrelevant factor about the structure of the school building. The structure of school building as was constructed by the poor village people by their own means with an object to provide such educational facilities to the children concerned therein who are also have come up from the poor family, it is absolutely an immaterial and irrelevant consideration to reject the recognition of the school by taking the point that school building is not a pacca one that is not built of bricks and re-inforced concrete. Necessity test of doctrine of proportionality postulates that the public bodies must adopt those regularity measures as would cause a minimum injury to an individual or community. The decision to refuse recognition by adopting regularity measures of consideration of the school building has not satisfied the test of necessity. Applying the suitability test also under the doctrine

of proportionality when in the village scenario and its socio economic situation as well as its environmental set up does not help to have a pucca building of the school, to refuse recognition applying that suitability test really putting an embargo to the basic fundamental need of education to the students concerned. The action of the authorities accordingly otherwise in contradiction to the dictum of the Apex Court passed in the Unni Krishnan(Supra) The said Board practically by assigning such type of reason has down graded the constitutional mandate and rights of education, a fundamental right.

28. Hence, applying the said doctrine of proportionality and its different tests, I am of the view that the decision to refuse recognition of the school of the ground that the school had no pucca building is not only disproportionate view to the object as to be achieved but the same is arbitrary and unreasonable.

29. Now the intensity of review for proportionality doctrine is to be considered. Prior to deciding that issue the purpose of education and its constitutional mandates are being discussed first.

30. In this context it will not be relevant to mention that education upto junior level not only is now a fundamental right but it is the only means by which a citizen can bloom in his life and a child can grow to be a good citizen of India. Unless and until knowledge is spread by way of providing basic education, the democracy also cannot sustain its longevity. In a country if the people are not made educated even by providing a junior level education up to Class VIM, which is now the concerned matter in this writ petition, it will have a great impact on the socio politico and socio economic condition. It is the basic urge of the Indian {civilization from its inception to know himself and to know the world around it. Echoing the said ideas, Danisad" also speaks "Tamoso Ma Jotirgayama" which means "lead us from the darkness to light". The light has been described in the "Upanisad" is the knowledge. It is the knowledge, which pierce all our prejudice in social life. It enriched our moral and cultural values. By; education we only can achieve such knowledge. In the language of Swami Vivekananda "education is nothing but manifestation of perfection already in a man". It was: the views of Swami Vivekananda to spread the; knowledge of "Vedanta" philosophy so that people can; understand and can fight in all situations to achieve the; goal of life. The great Philosopher further uttered "give the ideas to their heads, they will do the rest. Put"the; chemicals together, crystallization will takes place; according to the law of nature". Hence, until and unless: the ideas are transmitted to the heads of the new generation who would be the citizen of India by providing education on recognizing the school primary, junior and/ or secondary, the village students would be deprived of! from an opening in their life and by this process they: will suffer from infringement of Article 21 of the; Constitution of India which in terms of the Apex Court: judgment passed, in the case Dr. Ashok Vs. Union of India and others, has encompassed every rights of the life: for evenly growth as human beings in the language of said report that "Life does not mean mere existence or; animal existence without any avenues of growth?." Education

is the only means to achieve overall growth: in the life. In that angle of Article 21 of Constitution of India whereby right to know and right to information have been declared as fundamental, the exercise of discretion refusing to grant recognition considering the feature of the school building is contrary to the constitutional mandate.

31. Now the question is how far this Court will-exercise his power of judicial review in its degree to; decide the issue which otherwise may be termed as intensity of review under Administrative Law. This point can be elucidated by referring one passage from the Book "Judicial Review of Administrative Action" of De Smith, Wolf and Jowell, 5th Edition at page 599 which reads thus:

Under proportionality different margins of appreciation apply in different circumstances. " Varying levels of the intensity of review will be appropriate in different categories? of case and this will, in turn, correspond to the different formulations of the test (balancing, necessity, suitability) outlined above. In many cases, decision-makers enjoy a wide margin of appreciation and courts will strike down a decision on the grounds of proportionality only when the balance was manifestly inappropriate or when the rights or interest of the complainant have been subjected to an unnecessarily excessive burden.

32. In the instant case since the matter relates to providing education to the children below or up to 14 I years of age by the recognizing a junior high school, which got its recognition as a fundamental right by Several judgment of the Apex Court, the degree and/or Intensity of review in the instant case would be high. The Administrative Body in exercise of their discretionary power regarding grant of recognition of a school is well as the Government Authorities in exercise of Their executive function in the matter in question cannot drown grade the constitutional mandate by resorting to such type of grounds, which are opposed to the "(fulfillment of the need, which is fundamental in character. In that view of the matter the impugned decision to She looked into by applying the higher decree of intensity of review to fulfill our constitutional goal. Said view is fortified by the judgment passed in the case Ft. v. Secretary of State for Transport and Ors. (1989)1 All. E.R. 933 C.A. ex parte de Rothschild and Anr. by Croom-Johnson LJJ in Prest v. Secretary of State for Wales (1982) 81 L.G.R. 193 at 211 observed to this effect: "The use of statutory authority for the destruction of those rights requires to be most carefully scrutinized. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.

33. So far as the ground No. 3 is concerned that the D.L.I.T. as well as the State Government did not recommend the school is a ground which has no basis and foundation as its appear from the records. Sri Nikhilesh Das, Secretary, Education Department by his communication dated August 5, 1999 as referred to

the Board of Secondary Education did not opine anything which to be considered as refusal to recommend.

34. Rather in the report of the State Government, it has been emphasized about the necessity of a Junior High School on reproduction of the report of D.L.I.T. Furthermore, in the D.L.I.T. report on considering all the materials that is the locality of the school, building of the school, intake of students, nearby feeder schools, teachers qualification etc., in unequivocal term it was opined by the said team about the need of a Junior High School in the locality. The D.L.I.T. did not recommend only because that the school did not apply before the year 1978. The D.L.I.T. did not refuse to recommend on the ground that the school is of kachcha building. Hence, it appears clearly that the ground No. 3 is absolutely a vague ground and it is not supported from the documents as placed that is D.L.I.T. and the views of the State Government.

35. Having regard to the factual matters of this case and the judgment earlier delivered by G.R. Bhattacharjee, J. which reached its finality and having regard to observation and findings above, I am of the view that the impugned decision is not legally sustainable and accordingly same is set aside and quashed. Now the question is whether the matter to be referred back further to the Executive Committee of the West Bengal Board of Secondary Education for a decision regarding grant of recognition of the school. On perusal of the records it is abundantly clear that there is a need in the locality of a Junior High School, which not only has been highlighted by the District Level Inspection Team but also by the decision of the State Government as was referred to. Once, there is a need of the school in the locality and when grant of recognition has been refused on technical points that the school did not apply before 1975 though this point cannot be taken further applying the doctrine of constructive res judicata, in view of the earlier judgment of this Court passed and on the other ground that the school has kachcha building, it is a fit case not to refer back the matter for de novo decision of the Executive Committee as both the two grounds are not legally sustainable to refuse the recognition of a Junior High School when there is a serious and urgent need of a school. Hence, without referring the matter back further, this Court upon exercising the power of judicial review now is to consider the relief. This view is taken by this Court even being mindful of the fact that seldom, this Court exercises the power to issue a mandatory direction to grant something. Normally this Court not usurps the power of any authority but in the instant case the relief by way of directing the authority to recognize the school if is granted same would not be an usurpation of the power of authority. The only ground to refuse recognition is that school building is "kachcha" that is mud build which cannot be a ground in the context of socio economic condition of the village people as well as their means of livelihood, their own residence etc. Hence, having regard to those factors, it is an unnecessary formality to refer back the matter to executive committee. It is a settled law that when a statutory authority has a discretion in the matter, the writ Court can also issue necessary direction when conditions therefore are satisfied. Reliance may be placed to the

judgment passed in the case Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], . The Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, ; Union of India and Others Vs. Subir Mukharji and Others, ; Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, .

36. Having regard to the aforesaid judgments of the Apex Court, it is a fit case to pass an order by this Court regarding grant of recognition of the school as the conditions for such recognitions are squarely satisfied from the materials namely the report of D.L.I.T., the recommendation of the State Government who in unequivocal terms opined the need of a junior High School in the locality. Such need has been, however, refused by statutory authority, West Bengal Board of Secondary Education exercising their discretionary power only on the ground that school building the kachcha, which is an arbitrary ground. Hence, having regarding to all factual matrix of the case and the judgment of the Apex Court as passed in the Unni Krishnan (Supra) case declaring that right to education as fundamental right, it is not a fit case to remand the matter back but a fit case in which the Court will pass the necessary direction on the reflection of judgment of Air India Statutory Corporation (Supra) and the other judgments as referred to. Hence, a mandatory direction is passed by this Court directing West Bengal Board of Secondary Education and its Executive Committee to grant recognition of the school as Junior High School within 4 weeks from the date of communication of this order. The impugned order is set aside and quashed.

37. So far as the prayer (b) is concerned regarding the absorption of the organizing staff as prayed for in the writ application, this Court is not deciding the matter on merit. To decide such question, factual matters are required to be dealt with. Accordingly this is left open for decision by the Director of School Education, West Bengal in accordance with law when such occasion will arise after recognition of the school.

38. It is made clear that for adjudicating this writ application, prayer (b) as prayed for, has not been dealt with on merit by this Court. The Petitioners are at liberty to pray for such relief in appropriate forum even by approaching the Director of School Education, West Bengal when the school would be recognized.

39. Writ application is allowed partly in terms of prayer (a).

40. Let urgent Xerox certified copy of this order, if applied for be given to learned Advocates appearing for the parties expeditiously.