
(2015) 12 CAL CK 0034

In the Calcutta High Court

Case No : W.P. No. 11848 (W) of 2014, C.A.N. No. 776 of 2010 in W.P. No. 14306 (W) of 2005

Kalam and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 10-12-2015

Acts Referred:

Representation of the People Act, 1951 — Section 100

Citation : (2015) 12 CAL CK 0034

Hon'ble Judges : Dipankar Datta, J.

Bench : Single Bench

Advocate : Piush Chaturvedi and Anwesha Saha, Advocates, for the Appellant; Amal Kumar Sen and Lal Mohan Basu, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Dipankar Datta, J.—Wards of 3 (three) out of the 6 (six) petitioners in W.P. No. 11848(W) of 2014 are students of Garulia Mill High School (hereafter the said school). They have called in question an order dated September 30, 2013 of the Secretary to the Government of West Bengal, School Education Department, ordering conversion of the said school from an aided school [governed by the provisions of the Management of Recognised non-Government Institutions (Aided and Unaided) Rules, 1969] to a sponsored school [to be governed by the Management of Sponsored Institutions (Secondary) Rules, 1972].

2. The impugned order refers to a resolution having been adopted by the Managing Committee of the said school on April 19, 2013 expressing willingness for such conversion. At the admission hearing of this writ petition, Mr. Chaturvedi, learned advocate for the petitioners, contended that although such willingness formed the basis of the impugned conversion order, the Secretary did not apply his mind to the materials on record and acted illegally in the exercise of his jurisdiction. He referred to the fact that since 2005, the affairs of the said school are being administered by none other than the D.I. of Schools (S.E.), 24

Parganas (North) as an Administrator appointed by the President, West Bengal Board of Secondary Education (hereafter the Board), and that his continuance in such office is not only not in accordance with the provisions of the 1969 Rules but also in clear breach of the final judgment and order dated May 21, 2009 passed by a coordinate Bench while disposing of W.P. No. 14306(W) of 2005 (being an earlier writ petition of these petitioners). At such stage, it was submitted by Mr. Dutta, learned advocate for the respondent No. 5 (the Administrator) that he had filed an application (C.A.N. No. 776 of 2010) seeking recall of the final judgment and order dated May 21, 2009 and since such application was not disposed of, the respondent No. 5 acting as the Administrator, in the absence of a validly constituted Managing Committee, had the authority to express willingness for conversion in terms of notification dated April 1, 2013 issued by the Government of West Bengal, School Education Department. By an order dated April 22, 2015, I directed enlistment of C.A.N. No. 776 of 2010 together with this writ petition on May 8, 2015. The respondents in the writ petition were restrained from giving any effect or further effect to the impugned order based on the prima facie satisfaction that willingness for conversion could not have been expressed by the respondent No. 5 while the final judgment and order dated May 21, 2009 was still in force and that the Secretary had not applied his mind. Affidavits were invited.

3. Upon exchange of affidavits, the writ petition and C.A.N. No. 776 of 2010 have been heard; the same shall stand disposed of by this common judgment and order.

4. C.A.N. No. 776 of 2010 being prior in point of time is considered first. The cause-title of the application reveals that the same is for "clarification/variation of the Order passed on 21.05.2009 by..." The prayer therein is "for reconsideration and/or clarification of the above noted order passed by..." Law is well settled that an issue decided by a Court of law finally may be reopened only in accordance with the laid down procedure, i.e. either by an appeal or a review. The applicant [the respondent No. 5 in W.P. No. 11848(W) of 2014] not having applied for review of the final judgment and order dated May 21, 2009, C.A.N. No. 776 of 2010 is not maintainable in its present form. However, since technicality ought not to stand in the way of justice being administered, C.A.N. No. 776 of 2010 has been treated to be an application for review.

5. A review of the final judgment and order dated May 21, 2009 would necessarily require ascertainment of the fact situation giving rise to W.P. No. 14306(W) of 2005. Instead of tracing and narrating it here, I consider it appropriate to reproduce below the final judgment and order dated May 21, 2009 in its entirety.

It reads:

"The Court:-The six petitioners in this writ petition dated July 21, 2005 are aggrieved by the decision of the West Bengal Board of Secondary Education

dated May 23, 2005, Annexure P13 at p. 69, declaring the Guardian Category Election of members for reconstitution of the committee of Garulia Mill High School in the district north 24-Parganas held on January 30, 2005 to be void.

The teacher-in-charge of the school applied to the board on September 7, 2004 for extension of the term of the existing committee of the school. By an order dated November 4, 2004, Annexure P3 at p. 45, the board informed the teacher-in-charge that on submission of election programme proposing completion of the entire process of reconstitution of the committee by February 28, 2005 the prayer for extension of term of the committee would be taken up for consideration. It is understood that the election programme, Annexure P4 at p. 46, was submitted to the board that issued necessary order extending the tenure of the existing committee.

The election programme was as follows: Publication of the provisional voters' list on December 28, 2004; claims for inclusion and objections against omission or inclusion of names in the provisional voters' list by January 13, 2005; scrutiny of nomination papers and declaration of names of eligible candidates on January 24, 2005; withdrawal of nomination papers on January 25, 2005; and election on January 30, 2005. The six petitioners and the eighth respondent, one Farindra Misra, were among the candidates who contested the election. The six petitioners were elected, and Farindra was one of the defeated candidates.

Finding himself defeated, Farindra filed W.P. No. 3045(W) of 2005 in this court contending that the election, vitiated by irregularities in the preparation of the voters' list and held by a committee whose tenure was not extended after October 30, 2004, should be cancelled. By an order dated February 28, 2005, Annexure P10 at p. 56, the writ petition was disposed of directing the board to decide the matter under cl. 34 of the procedure for holding election. Accordingly, after hearing the parties the president of the board gave the decision dated May 23, 2005 declaring the election to be void and directing the District Inspector of Schools (S.E.), north 24-Parganas to appoint a drawing and disbursing officer and to propose a suitable name for appointment as administrator of the school. I am told that an administrator was appointed by the board, and that the administrator is still functioning.

The writ petition was admitted by an order dated September 13, 2005. Directions were given for filing affidavit by the respondents, who, however, have chosen not to file any affidavit. The state, its officials and Farindra have entered appearance. They have not filed any opposition. Since the board did not appear in spite of notice, by an order dated December 20, 2007, while adjourning hearing, I directed advocate for the petitioners to give a fresh notice to the board. Even then nobody has entered appearance for the board. Over the course of hearing Mr. Chaturvedi's advocate-on-record has informed Mr. Kallol Basu, an advocate, that the board is a party to the writ petition. Mr. Basu, who usually appears for the board, has appeared in the case and made submissions in justification of the decision of the board. Needless to mention that the board has not filed any

opposition.

Farindra, admittedly, did not file any election petition. As a matter of fact, there is no provision in the West Bengal Board of Secondary Education Act, 1963, or in the Management of Recognized non-Government Institutions (Aided and Unaided) Rules, 1969 framed under the Act, or in the procedure laid down by the board for holding election under rr. 6 and 6A of the 1969 rules, to file any election petition challenging the election of any returned candidate.

The committee of a secondary school is to consist of the members mentioned in r. 6 of the 1969 rules, and r. 6A thereof provides the manner how the committee shall be formed. Rule 6 provides that the committee shall consist of six guardians in case of a ten-class high school. Rule 6A provides that persons whose names are entered in the register of eligible voters as guardians shall elect from among themselves to the committee six members in the case of a ten-class high school. Rule 9 of the 1969 rules provides that the procedure of the election under rules rr. 6 and 6A shall be laid down by the board, and that the date of election of a committee for the purpose of its reconstitution shall be fixed at least sixty days before the expiry of the term of the existing committee. It is in exercise of power conferred by r. 9 of the rules that the board laid down the procedure for holding election. Clause 34 of the procedure provides as follows: "34. In case of any doubt or dispute in the matter of holding election at any stage, the matter shall be referred to the Board whose decision thereon shall be final."

In this case, admittedly, Farindra did not approach the board under cl. 34 of the procedure at any stage whatsoever. Without questioning the validity of the election programme, the provisional voters' list, and the final voters' list, he submitted nomination papers as a candidate, and after defeat he filed the writ petition straight to the high court that directed the board to examine his grievances. Before the board he raised the following contentions: (i) the election programme was prepared in violation of r. 9(2) of the 1969 rules; (ii) the voters' list was incorrect; (iii) time schedule mentioned in cl. 17 of the election procedure was not followed; (iv) the scrutiny of nomination papers was defective; and (v) some tampered nomination papers were allowed as valid and the candidates concerned were allowed to contest.

The board did not record any oral evidence of the parties. It heard the teacher-in-charge of the school, examined the nomination papers submitted by the teacher-in-charge, heard Farindra, and declared the election to be void holding: (i) the candidates "pasted cello-tape on their nomination papers"; (ii) the election officer's report dated January 30, 2005 was perfunctory, because it did not contain the figures of used, unused and cancelled ballot papers with the remark that the election was held smoothly and peacefully; (iii) the report of the election officer does not reflect the complete picture of the election held on January 30, 2005.

The question is whether on these grounds the president of the board exercising

the power of the board could declare the petitioners' elections to be void.

In my considered opinion, the board has most arbitrarily declared the elections of the six returned candidates to be void, because under no circumstances the grounds mentioned by it could be considered valid grounds for declaring the elections to be void. The Act, rules and the procedure do not contain any provision stating on which grounds the election of a returned candidate can be challenged by anyone, and on which grounds the election can be declared to be void. Under the circumstances, one has to be guided by the established principles which are founded on the provisions of the Representation of the People Act, 1951, s. 100.

The recognized grounds on which the election of a returned candidate can be declared to be void are: (1) that on the date of his election the returned candidate was not qualified or was disqualified to be chosen for the seat; or (2) that any corrupt practice has been committed by the returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent; or (3) that any nomination has been improperly rejected; or (4) that the result of the election, in so far as it concerns the returned candidate, has been materially affected-(i) by the improper acceptance of any nomination; or (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent; or (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or (iv) by any non-compliance with the provisions of the Act or rules or orders made under the Act.

It will appear from what has been noticed hereinbefore that none of these grounds was there before the board that declared the elections of the six petitioners to be void. Farindra did not adduce any evidence whatsoever to show that the petitioners or anyone of them committed any corrupt practice, or that any vote was improperly received or refused or rejected, or that there was non-compliance with any provision of the Act, the rules or the procedure. It is not known how sellotaping by some candidates of their nomination papers which were not rejected by the returning officer could be a ground to declare the elections to be void. It is not known how the failure of the election officer to prepare a detailed report could either be a ground to declare the elections of the six returned candidates to be void.

Before the board Farindra did not raise the contention that at the relevant date the managing committee, whose tenure was not allegedly extended beyond October 30, 2004, was defunct. It is apparent that his contention that provisions of cl. 17 of the procedure were not strictly followed did not impress the board at all. The president of the board of his own accord fished out certain grounds to declare the election of as many as six returned candidates to be void. He completely overlooked the fact that Farindra was a defeated candidate, and that he had never raised any question regarding the conduct of the election. On these facts, I am of the view that the president of the board most arbitrarily declared

the elections of the six petitioners to be void. In my opinion, there was absolutely no reason to declare the elections to be void.

For these reasons, I allow the writ petition. The impugned decision of the president of the board is hereby set aside. The administrator functioning at present shall take steps for completing the process of reconstitution of the managing committee of the school, taking the petitioners to be duly elected as guardian category members, within four weeks from the date of communication of this order to him. After constitution of the committee he shall hand over the charge at once and thereupon he shall stand discharged. There shall be no order for costs.

Urgent certified xerox of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned."

6. The sole ground urged by the applicant for review is that the petitioners in W.P. No. 14306(W) of 2005, as on May 21, 2009 i.e. on the date of the final judgment and order, had ceased to be guardians and, therefore, the coordinate Bench ought not to have directed that for completing the process of reconstitution of the Managing Committee of the said school, the petitioners should be regarded as duly elected guardian members. It is the further case of the applicant that the election having been conducted in 2005, it is likely that the elected guardian members are no longer available and that it would be practically impossible to hand over charge in compliance with the order dated May 21, 2009.

7. At first blush, the contention does appear to be attractive. However, Mr. Chaturvedi demonstrated the fallacy in such contention by referring to the counter affidavit as well as paragraph 30(a) of the "Procedure for Holding Election" published by the Board (hereafter the Procedure). Pleadings of such counter affidavit and the documents annexed thereto are considered sufficient to demolish the case of the applicant that none of the petitioners could be regarded as guardian members. Particular reference may be made to the documents at pages 17 to 32 of the counter affidavit showing that the wards of the petitioners were students of the said school at the relevant time. The applicant has not opposed the counter affidavit by filing a rejoinder. The statements made in the counter affidavit, thus, remain uncontroverted and are treated to be correct which erodes the factual foundation of the applicant's claim. That apart, the language of paragraph 30(a) of the Procedure is clear enough to sustain the petitioners' claim that their entitlement to be regarded as guardian members is not relatable to a ward but also wards, and in case of a student who has been sent up for Secondary Examination, his entitlement would continue till the commencement of the next academic year.

8. No error apparent on the face of the record or any other permissible ground on which a review is available has been brought to my notice warranting a review of the final judgment and order dated May 21, 2009.

9. That apart, after presenting C.A.N. No. 776 of 2010 on February 4, 2010, the

applicant does not appear to have taken any step to have the same heard. The learned Judge who decided W.P. No. 14306(W) of 2005 demitted office on retirement as late as in February this year. There is reason to believe that the application was filed with some ulterior motive, which shall be discussed in some more detail while I decide W.P. No. 11848(W) of 2014.

10. In any event, there is no merit in C.A.N. No. 776 of 2010 and, accordingly, the same stands dismissed.

11. It is now time to consider W.P. No. 11848(W) of 2014.

12. An objection to its maintainability has been raised by Mr. Sen, learned senior Government advocate and Mr. Dutta on the ground that the petitioners have no locus standi to challenge the impugned order.

13. The objection has been urged to be rejected. As already noted at the beginning of this judgment, 3 (three) out of 6 (six) petitioners' wards are the students of the said school. As guardians, at least the said 3 (three) petitioners are entitled to maintain this writ petition if they feel aggrieved by the impugned order. They want the said school to continue as an aided school and not as a sponsored institution. The impugned order, if at all it seeks to convert the status of the said school in a manner not authorised by law, would confer locus standi on the petitioners to maintain the writ petition. Accordingly, the objection is overruled.

14. Turning to the merits of the writ petition, it appears that rule 8 of the 1969 Rules confers power on the Executive Committee of the Board to supersede a managing committee and to appoint an administrator/ad-hoc committee in the given circumstances. The term of office of an administrator/ad-hoc committee is laid down in sub-rule (2) of rule 8. Except for exceptional reasons and that too on being permitted by the Board by a specific order, the term of an administrator shall not exceed 2 (two) years.

15. True, the Administrator of the said school came to be appointed by the President of the Board in terms of an interim order dated September 13, 2005 of another coordinate Bench in W.P. No. 14306(W) of 2005. Read with the rectification order dated September 20, 2005 of the said Bench, the Administrator was authorized to perform day to day functioning except holding the election till the matter is decided. This interim order merged in the final judgment and order dated May 21, 2009, which required the Administrator to hand over charge to the elected body after the office bearers' election is conducted. Having regard to rule 8 of the 1969 Rules in general and sub-rule (2), extracted supra, in particular, an administrator/ad-hoc committee cannot indefinitely be in charge of administration of a recognized aided school. The reluctance and/or remissness of the Administrator in taking steps to have C.A.N. No. 776 of 2010 heard and disposed of one way or the other, on facts and in the circumstances, is held to have been actuated by a desire to cling on to the office without allowing a democratically elected body to assume charge. Mere filing of

C.A.N. No. 776 of 2010 did not amount to a stay of the order sought to be varied/clarified. Without the final judgment and order dated May 21, 2009 being reversed, recalled or stayed, the Administrator could not have and should not have expressed willingness for conversion of status of the said school from an aided to a sponsored institution. Since the Administrator himself declared in the proforma for expressing willingness that the issue relating to formation of Managing Committee of the said school is sub judice, the Secretary instead of ordering conversion ought to have call for the relevant records and satisfy his conscience as to whether the willingness expressed by the Administrator for conversion could be or should be acted upon or not. There has been gross failure to exercise jurisdiction in accordance with law and I hold that the impugned order dated September 30, 2013, in the given circumstances, is unsustainable.

16. In the result, the impugned order dated September 30, 2013 stands set aside. The said school shall continue to be regarded as an aided school and entitled to function as such and receive all the financial benefits a recognized aided school is entitled. The Administrator of the Board shall make sincere endeavor to ensure reconstitution of the Managing Committee of the said school in compliance with the final judgment and order dated May 21, 2009 as early as possible but not later than 2 (two) months from date of receipt of a copy of this judgment and order. If lapse of time and subsequent developments, if any, render it impossible to implement the direction contained therein, the Administrator of the Board shall nominate a competent officer as Election Officer. Such election officer shall have all the powers to conduct election in terms of the 1969 Rules read with the Procedure. Once the elections are conducted and the results declared, he shall hand over charge to the duly elected body. It is only such elected body that shall have the sole jurisdiction to decide on the conversion aspect, and if any such decision is arrived at, the same may be communicated to the Government for necessary order being passed. If the time limit for conversion has expired, such expiry shall not stand in the way of the Government taking a decision on the lines of the notification dated April 1, 2013. Having regard to the irresponsible conduct of some of the respondents, it is made clear that breach of any direction contained herein would be seriously viewed and consequences are likely to follow.

17. W.P. No. 11848(W) of 2014, accordingly, stands allowed to the extent mentioned above. There shall, however, be no order for costs.

18. Photocopy of this judgment and order, duly countersigned by the Assistant Court Officer, shall be retained with the records of W.P. No. 14306(W) of 2005. Photocopy of this judgment and order, if applied for, shall be furnished to the applicant at an early date.