

(2012) 11 PAT CK 0049

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 5595 of 1995

Man Comm. Madarsa Faizul Uloom and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 06-11-2012

Acts Referred:

Constitution of India, 1950 — Article 29, 30

Citation : (2013) LabIC 401

Hon'ble Judges : Navaniti Prasad Singh, J

Bench : Single Bench

Advocate : Raza Ahmad and Kumar Harshbardhan, for the Appellant; R.K. Shukla, Gyan Prakash Ojha, Raj Kishore Prasad and Rashid Alam, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—Heard learned counsels for the petitioners, State, Madarsa Board, respondent No. 5 and the intervener-respondent. By this writ petition the challenge is to the order passed by the Special Director, Secondary Education, Government of Bihar, New Secretariat, Patna, being order dated 15.7.1995 (Annexure-1) passed in pursuance to order of remand as passed by this Court in C.W.J.C. No. 5145 of 1992 disposed of on 9.7.1992 as well as by the Apex Court in SLP No. 6081 of 1992 being order dated 15.5.1992. By this impugned order, the Special Director has decided that he has jurisdiction in the matter and reaffirmed his earlier order setting aside the order of the Madarsa in question by which respondent No. 5 who was the Head Moulvi of the Madarsa has been dismissed.

2. The facts are not in controversy. It appears that there exists a Madarsa Faizul Uloom (Kabai Banghara) in the district of Samastipur, which is duly registered with the Bihar State Madarsa Education Board with effect from 1-7-1962. It has facilities for teaching up to Fazil standard which is equivalent to M.A. degree. It has a Managing Committee. Respondent No. 5, Khalilur Rahman was appointed

by the Managing Committee as the Head Moulvi and there appears to be some differences between him and the Managing Committee because of which the Managing Committee in its meeting dated 24-4-1988 suspended him which suspension was also in due time approved by the Madarsa Education Board. Respondent No. 5 challenged the said order by filing a writ petition in this Court being C.W.J.C. No. 5252 of 1988 which has been dismissed by this Court by order dated 8-12-1988. Thereafter, on 15-12-1988, the Managing Committee of the Madarsa terminated the services of respondent No. 5. It is the contention of the petitioners that against this order of termination dated 15-12-1988, respondent No. 5 did not prefer any appeal or did not take any other action. It appears that all of a sudden the Madarsa Education Board asked the District Education Officer, Samastipur to make enquiries as to the circumstances under which respondent No. 5 was discharged from service. This is apparent from Annexure-3 which is dated 15.9.1989. It then appears that the Special Director was informed by the District Education Officer, Samastipur about the circumstances under which respondent No. 5 was discharged from service. Upon receipt of the same, it seems that the respondent-Special Director by his communication dated 24.1.1991 (Annexure-4) held that the order dismissing respondent No. 5 was bad and the order of the Managing Committee of the Madarsa was accordingly set aside. This is the main order which is effectively under challenge.

3. The petitioners, having come to know of this order, filed a writ application before this Court being C.W.J.C. No. 1018 of 1991. They challenged this order, inter alia, on two counts. Firstly, that the order setting aside the order of the Managing Committee of Madarsa was passed even without notice to the Madarsa and, secondly, the Special Director had no jurisdiction in the matter. It had acted on an ex parte report not disclosed to the Madarsa in question. In the said writ application, respondent No. 5 herein was respondent No. 6. He appeared and contested the matter. The writ application was disposed of by judgment and order dated 22.8.1991 and is Annexure-4/A to the writ application. The order of the Special Director was set aside being violative of the principles of natural justice. The matter was remanded to the Special Director to decide the matter after hearing the parties. The Managing Committee, being aggrieved by this remand, approached the Apex Court by filing SLP No. 6801 of 1992, which was disposed of by the Apex Court by order dated 15.5.1992 clearly noting that the order impugned had already been set aside by the High Court and the matter remanded and, as such, there was no cause to interfere. Apparently, it was pointed out that the petitioners had raised the question of jurisdiction and, therefore, the Apex Court held that the Officer to whom the matter is remanded and whose jurisdiction is under challenge would be required to decide that issue as well. The order of the Apex Court is Annexure-5 to the writ application. It appears that again respondent-Special Director took up the matter and decided the matter by order dated 21.1.1992 by which it reaffirmed his earlier order passed on 24.4.1991 which is contained in Annexure-6 but did not decide the

question of jurisdiction at all. Petitioners, again being aggrieved by this conduct, and decision of the Special Director, filed C.W.J.C. No. 5145 of 1992 which was disposed of by order dated 9.7.1992 (Annexure-7 to the writ application) noticing the order of the Apex Court and the High Court on the earlier occasions. Once again the Division Bench of this Court set aside the order of the Special Director as passed on 21.5.1992 affirming his earlier order dated 24.1.1991 and remanded the matter once again with a direction to decide the issue of his jurisdiction as well. It is pursuant to these orders of remand that the Special Director has decided the matter by his impugned order dated 15.7.1995 which is Annexure-1 to the writ application. On the question of jurisdiction, he has held that he has jurisdiction to entertain disputes and decide the matter in relation to the authority of Madarsa and to take action in respect of its teachers in view of the fact:--

I. That the Special Director, Secondary Education in respect of Oriental Education has the status of In-charge Director of Oriental Education and, therefore, he has all the power of a Director;

II. In terms of Section 5(2) of the Bihar Madarsa Education Board Act, 1981 (hereinafter referred to as the Act) he is an ex-officio member of the Madarsa Education Board constituted u/s 5 of the Act;

III. In terms of Section 12 of the aforesaid Act (wrongly printed as 22 in the order), in absence of the Chairman, he exercises the function of the Chairman of the Madarsa Education Board;

IV. He has been notified as the Appellate Authority to represent the State Government u/s 28 of the Act and as payment of teachers in Madarsa are made from non-plan expenditure of the Government, the Government has absolute control over the Madarsa and, accordingly, he, being the Special Director, Oriental Studies, would have full jurisdiction in such a matter.

4. It is the correctness of this position, as held by him, is in question. Learned counsel for respondent No. 5 pointed out that whether the Special Director has jurisdiction or can be conferred jurisdiction by the State to hear appeal u/s 28 of the Act is a matter which has been referred to larger Bench by several Courts and, as such, this Court should await the decision in this regard.

5. Having considered the submissions, in my view, it is not necessary for the decision of this case to await the judgment, if any, rendered by a larger Bench which is yet to be constituted. The reasons are given hereunder.

6. Learned counsel for the petitioners submitted that the order impugned cannot be sustained. Firstly, because under the scheme of the Act, the Special Director has no suo motu power to set aside orders passed by the Managing Committee of a Madarsa. It is not the case of respondent No. 5 that he had filed any appeal before the Madarsa Education Board or there was any order of the Madarsa Education Board against which any appeal had been filed by respondent No. 5 to

the Appellate Authority u/s 28 of the Act. Therefore, there was no question of the Special Director, who is notified as the Appellate Authority, to usurp the jurisdiction in this matter. Thus, what is submitted is neither as the Appellate Authority in terms of Section 28 of the Act nor as an authority exercising suo motu power, the Special Director had any authority to interfere in the matter. We have, thus, to consider these two aspects of the matter.

7. It may be noted that Section 24 of the Act, as it was originally enacted, *inter alia*, had a provision that "no teacher of the Madarsa can be discharged or dismissed from the service without the prior approval of the Board". This clause had squarely come up for consideration before the Division Bench of this Court in the case of *Anjuman Ahle Hadees, Darbhanga and Others Vs. State of Bihar and Others*, and this Court declared it *ultra vires* and against the rights of minorities who administered the institution. I may also notice here that similar aspect has also recently been decided by this Court in the case of *Anjali Jain Vs. The State of Bihar and Others* and also reported in *Anjali Jain Vs. The State of Bihar and Others* wherein it has been held that in view of the Articles 29 and 30 of the Constitution, a minority is entitled to administer its educational institution without Governmental interference even if such institution receives substantial aid from the Government. Why reference has been made to Section 24 of the Act by this Court in this judgment is because if this provision is ignored, having been declared *ultra vires*, then the Madarsa Education Board also lacks jurisdiction in the matter where a teacher may be dismissed by the Managing Committee of the Madarsa then his only remedy would be to approach the Civil Court.

8. Now, coming to the issue of jurisdiction. Setting aside an order of the Managing Committee of Madarsa cannot be but deemed to be a quasi judicial exercise. An authority, which sets aside the said order, will have to show that it has the jurisdiction of interfering with the rights of others who administered their institution more so when the institution is a minority institution and enjoys the safeguards of Articles 29 and 30 of the Constitution. Jurisdiction must be specifically conferred. It cannot be assumed or inferred. Thus, we have to examine the provision of the Act to see where lies the jurisdiction and, thus, the discussion, as made above with reference to Section 24 of the Act, was important.

9. Now, let us examine what the Special Director had to say. He first states that he being the Special Director, Oriental Studies he has some sort of inherent power. There is no inherent power in any authority, as professed by him. The authority to interfere in someone rights and more so in minority institution must be found backed by authority of law and not on the whims and caprice of a person. Thus, merely because he is Special Director, who is the Director of Oriental Studies, does not give him any such authority and assumption is totally misplaced.

10. He then refers to Section 5(2) of the Act which is very important for the purposes of our decision. Section 5(2) of the Act provides that the Special

Director shall be the ex-officio member of the Madarsa Education Board. Therefore, the only thing that can be seen from this provision is that he is an ex-officio member of the Madarsa Education Board for the purposes of which the Board is created. He is one of its members. That does not give any authority to him to exercise the jurisdiction over the actions taken by Madarsa in relation to service of a teacher. If what he says is accepted then every member of the Madarsa Board would be exercising jurisdiction on such minorities? institutions. We have already seen that the power of the Madarsa Education Board u/s 24 has been curtailed by this Court.

11. Next he states that Section 22 of the Act (wrongly printed in the order which actually refers to Section 12) authorizes him in absence of the Chairman of the Madarsa Education Board, to act as the Chairman. I do not know what the learned Special Director wants to imply, because if he wants to imply that the Chairman could interfere with the order, then, surely there must be some provision for the Chairman of the Board. But, fortunately or unfortunately there is no such provision. If Chairman is not authorized to pass such order then the person officiating in his absence cannot have the authority.

12. He then refers to Section 28 of the Act. For proper consideration of this contention. I may quote Section 28 of the Act hereunder:--

28. Appeal against the orders of the Board.-- Any person or managing committee aggrieved with the decision of the Board or Chairman may file an appeal for final hearing within 60 days of the passing of the orders, to the State Government.

13. Section 28 of the Act provides that any person or Managing Committee of the Madarsa aggrieved with the decision of the Board or the Chairman may file appeal against such decision to the State Government. Apparently the State Government issued notification notifying the Special Director to exercise his power of Appellate Authority. In other words, the State Government notified the authority which would exercise the State's appellate power. As seen, Section 28 of the Act provides for appeal against orders of Madarsa Board or its Chairman. Unfortunately, the order against which the Special Director had exercised its authority is not an order which has been passed either by the Chairman of the Madarsa Board or the Madarsa Board itself. It is the order of the Managing Committee of a Madarsa. Thus, there could not be any occasion in exercising any appellate jurisdiction. It is not the case of respondent No. 5 that he had approached the Madarsa Board against that order or he had filed any appeal before the Special Director from any order of the Madarsa Education Board or for that matter he had filed any appeal whatsoever before the Special Director.

14. Thus seen, by no stretch of imagination nor any stretch of statute, does the Special Director have such an inherent power or statutory power as has been exercised by him in this case. Thus, the order cannot be sustained at all. The order is wholly without jurisdiction and consequently quashed.

15. Before parting, in fairness to Sri R. K. Shukla learned counsel appealing for

respondent No. 5, I must notice his plea that this should await the decision of the larger Bench in respect of the jurisdiction of the Special Director to hear appeals. In my view, for the reasons given above, it is not necessary to decide this issue. But, however, as extensive argument has been made, I find that there is in fact no conflict of judgments requiring the matter to be referred to larger Bench. The issue that has been raised is that in terms of Section 5(2) of the Act, the Special Director is an ex-officio member of the Madarsa Education Board. He is member nevertheless. Section 28 of the Act provides for appeal from the decision of the Chairman of the Madarsa Education Board or the Madarsa Education Board itself to the State Government. State probably did not realize this position and notified the Special Director to be the Appellate Authority. It would, thus, be seen that in absence of the Chairman of the Madarsa Education Board, the Special Director would be the Chairman. He could pass an order as a Chairman and then sit in appeal, act for the State Government and decide the validity of his own order as the Appellate Authority. Secondly, the Madarsa Board's order, of which he is a member, would again be judged by himself as Appellate Authority. This is clearly impermissible. A Bench of this Court in the case of Md. Salim v. the State of Bihar, being C.W.J.C. No. 1290 of 2000, by judgment dated 28.8.2005 clearly held that the Special Director could not be appointed as an Appellate Authority to sit over the judgment or orders of the Madarsa Board or the Chairman u/s 28 of the Act. The Bench relied on a judgment of the Apex Court in the case Roop Chand Vs. State of Punjab, . It would be an appeal from ceaser to ceaser. We then have decision of the Division Bench of this Court in the case of Md. Shamir Jung Khan v. the State of Bihar & Ors. since reported in 2010 (1) PLJR 149 on the same line noting this judgment as well. Mr. Shukla pointed out that the Division Bench in the case of Abdul Azim Haidri v. the State of Bihar & Ors., being L.P.A. No. 347 of 2008 in its decision dated 23.3.2009 held as under:--

Although it is not necessary to decide the contention raised on behalf of the appellant in the present case, prima facie, we find no merit in the contention because u/s 28 of the Bihar Madarsa Education Board Act, the State Government has the power to hear appeals and the State Government has delegated its power under valid rules to the Special Director. Such statutory arrangement suffers from no apparent defect and simply because the Special Director is also an ex-officio member of the Madarsa Board, cannot divest him of the legal authority to hear appeals unless, on facts, it is found that exercise of the appellate power will be vitiated by bias or motive in the peculiar facts of a case.

16. He, thus, submits that there is conflict of judicial opinion. In my view, there is no conflict. As pointed out in the case of Md. Salim (supra), it was clearly held that the Special Director could not have been notified as Appellate Authority. This is what was held also by Division Bench in the case of Md. Shamir Jung Khan (supra). The observations in Abdul Azim Haidri (supra), as quoted above, is by no stretch of imagination any decision or any authority for the said proposition because the Court itself noted that it was not necessary for it to decide the issue and its observations were only prima facie and not a finding. Thus, being the

position, it cannot have any precedent value at all.

17. Here, I may also refer to the Constitution Bench judgment of the Apex Court in the case of *The State of Orissa Vs. Sudhansu Sekhar Misra and Others*, as what is precedent is quoted hereunder:--

.....A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.....

18. Thus, I see no conflict of decisions.

19. Thus, even if, by any stretch of imagination, it be assumed that the Special Director was exercising appellate function on behalf of the State Government, his very appointment was illegal. He has been incompetently notified as an Appellate Authority to sit over his own orders as a member of the Board or as the Chairman of the Board in absence of the regular Chairman.

20. Thus, the impugned order as passed by the Special Director, as contained in Annexure-1 to the writ application, cannot be sustained. He totally lacked the jurisdiction in the matter. The order is, thus, set aside. Accordingly, the writ application is allowed.