
(2004) 03 J&K CK 0021

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 171 of 2004

Master Akshit Ashok

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-03-2004

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2004) 2 JKJ 232

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : K.S. Johal, for the Appellant; J.P. Singh and Neeru Goswami, for the Respondent

Final Decision : Dismissed

Judgement

Permod Kohli, J.—Petitioner a student of Class- 12th (Commerce) of K.C. Public School, an Educational Society being denied the

admission to final examination of Class-12th to be conducted by the Central Board of Secondary Education (CBSE), has invoked writ jurisdiction

of this court for a direction in the nature of mandamus to the respondents to issue admit card to the petitioner for appearance in Class-12th annual

examination scheduled to be held in March, 2004. The claim of the petitioner is to be examined in the background of the factual averments made in

the pleadings of the parties. Petitioner is a student of K.C. Public School, an Educational Society registered under the Societies Registration Act.

He was admitted to Class-Xth in the year 2001& on being promoted, became the student of Class -XIIth (Commerce Stream). According to the

petitioner, he was a regular student of the school and filled up his examination form for the final Class XIIth examination in the month of October,

2003 and also deposited fee of Rs. 700/- as examination fee with the Vice Principal (respondent-5). He also appeared in the Pre-Board

Examination held in January, 2004. All the students of Class-XIIth were issued admit cards by the School Management for entry in the final

examination scheduled to be held in the month of March, 2004. However, petitioner was not provided with the admit card. On enquiry, he was

informed that his form was held back on the instructions of respondent-4 to ensure 100% result of Class -XIIth by the management. Petitioner

claims to have protested this approach of the management and informed his parents, who approached the management and were informed that the

management is desirous of 100% result of the school and consequently form of the petitioner was not forwarded to Central Board of Secondary

Education apprehensive of Ms success in the final exams. A notice dated 19.2.2004 was issued by the petitioner through his advocate to

respondent-3 requesting for the admit card. A photo copy of the said notice was also faxed on 19.2.2004 to the same respondent. Petitioner

received reply dated 23.2.2004 from the Regional Office of the Central Board of Secondary Education that the name of the petitioner has not

been sent in the list of the candidates by the School, as such he is not eligible to appear in All India Senior School Certificate Examination 2004

under the Examination Bye Laws of the Board. Petitioner claims to be fully eligible for participation in the final exams of Class 12th (Commerce).

It is stated that the respondents 4 and 5 illegally deprived the petitioner of his fundamental right of undertaking the exam being a regular student on

irrelevant consideration, which is impermissible under law. According to the petitioner, it was bounden duty of the institution affiliated with

prestigious board like CBSE to forward the form of the petitioner to the board enabling him to sit in the examination. It is further stated that the

matter was brought to the notice of respondent-6, who was the Principal at the relevant time. The Principal also did not approve the approach of

the management and resigned on this issue of 100% result of the school. A copy of the resignation letter submitted by respondent-6 and his

affidavit, has also been placed on record with the writ petition. Respondent-6 in his affidavit has stated that he resigned from the school for the

reasons that respondents 4 and 5 connived to detain the form of bonafide student like petitioner.

2. When the matter came up before this court, a notice was directed to be issued to respondents 7 and 8 on 27.2.2004 and the case was directed

to be listed on 1.3.2004. On 1.3.2004, respondents were allowed time to file objections by 4-3-2004 and the matter was taken Up on 5.3.2004.

3. Objections have been filed by respondents 4, 5, 7 and 8. While denying the allegations made in the writ petition, it has been brought on record

that the petitioner who was a student of Class-12th (Commerce), was in the habit of remaining absent from the class. Month-wise details of his

attendance w.e.f. the month of April, 2003(period of admission) to January,2004, has been given. Even the attendance sheets of all these months,

have been placed on record. It is stated that petitioner attended class only for 87 days during these months with the following details:

Month Attendance

April,03 14

May,03 13

June,03 4

July,03 7

August,03 8

Sept.03 14

October,03 10

November,03 10

December,03 2

January,04 5

Total 87 days

4. Respondents have relied upon CBSE Regulation, which requires 75% attendance as eligibility criteria for appearance in Class-12th

Examination. Reference is made to Regulation 1.9 of CBSE. It is stated that the petitioner had not secured requisite attendance and consequently

he was detained for shortage by he the Principal (respondent-6). Respondents have also placed on record copy of green sheet containing names of

as many as six students of Class-12th(Commerce) including that of the petitioner, against whose names, it is mentioned ""detained for shortage in

attendance."" It has also been mentioned that the decision of the Principal to detain the petitioner for shortage, was conveyed to him by respondent-

6 himself. However, after he resigned from the school, he connived with the petitioner and filed a false affidavit to tarnish the image of the school.

Respondents have also taken stand that when the decision was conveyed by the Principal, the petitioner did not insist for filling up the form but

decided to continue his studies in the school and was prepared for the examination in the next year.

5. Respondents have also specifically averred that the petitioner even failed in Ist Pre-Board Examination in four compulsory papers and chose not

to appear in the 2nd Pre-Board Test. They have also placed on record the result of the Pre-Board Examination as Annexures R-2 and R-3 with

the reply.

6. Petitioner has also submitted supplementary affidavit, disputing the stand taken by the respondents. He claims that he had been attending the

Class regularly all along. According to him, the attendance sheets have been fabricated to carve out a defence. A request was made by the

petitioner to summon the original attendance register. Further case of the petitioner as projected in the supplementary affidavit, is that in terms of

the rules of the Society as incorporated in the School Diary, it is stipulated that repeated absence without permission for more than six consecutive

days, renders the student liable to have his/her name struck off the rolls and the mere fact that the name was not struck off the rolls despite absence

for more than six consecutive days in few months, itself shows that the attendance sheets are forged. It is also the stand of the petitioner that under

Rule 1.14, 75% attendance is required upto the date of examination whereas forms are filled up in the month of October, 2003 and even if the

petitioner had deficient attendance, his form could not have been held back.

7. Mr. J.P. Singh, learned counsel appearing for respondents has taken a preliminary objection that the writ petition is not maintainable against the

School, which is run by an unaided Educational Society, the same being not a State or Authority within the meaning of Article 12 of the

Constitution. Another objection raised, is that, neither the society nor the management have been impleaded as party respondents.

8. With a view to bring home his point of maintainability of the writ petition, reliance is placed on two Division Bench Judgments of this court

passed in LPAs(w)578/99,345/99,630/99 decided on 2.6.99 and SWP No. 1415/1996 decided on 17.2.1997. In both these petitions, the

question involved, was whether the Army Welfare Society and School run by it, are amenable to writ jurisdiction being a State or Authority within

the meaning of Article 12 of the Constitution. In Judgment date 2.6.99, following was held:

. So far as the Army Welfare Society which is running the school is concerned, it is not an authority for the purposes of Article 12 of the

Constitution..

Similarly, in SWP No. 1415/1996 decided on 17.2.1997 on consideration of various facts, the Division Bench of this court held as under:

In view of the foregoing, we answer the question that the Army Welfare Education Society is not an instrumentality of the State under Article 12

of the Constitution..

9. In response to this, Mr. K.S. Johal, learned counsel appearing for petitioner, has placed reliance upon Andi Mukta Sadguru Shree Muktajee

Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , wherein the Apex Court has held as under: --

If the rights are purely of a private character no mandamus can issue, if the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. The law relating to mandamus has made the most spectacular advance. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is striking departure from the English Law, Under Article 226, writs can be issued "for the enforcement of any of the fundamental rights and for any other purpose." The term "authority" used in Article 226, in the context must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non- fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied. It may be pointed out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is very wide remedy which must be easily available 'to reach injustice wherever it is found.'

Technicalities should not come in the way of granting that relief under Article 226.

10. He also relied upon (2002) 10 SCC 487 wherein the Apex Court declined to interfere in the order of the High Court where - under certain directions were issued to the management of the Engineering College of unaided society. Further reliance is placed on the constitution bench judgment of the Apex Court in case Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., wherein the Apex Court has

held ""the private recognized / affiliated educational institutions running professional courses supplement the function of the State institutions and

what applies to the main activity equally applies to the supplemental activity as well"". Further reliance is placed upon General Manager, Kisan

Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrugan Nishad and Others, wherein the Apex Court has held as under :

. For coming within the purview of Article 12 the form in which the body is constituted, namely, whether it is a society or a cooperative society or

a company, is not decisive. The real status of the body with respect to the control of Government would have to be looked into. The various tests

laid down in Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, would have to be applied and considered cumulatively. There can

be no hard -and-fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an

authority under Article 12 of the Constitution. In this context, bye-laws of the Mill would have to be seen.

11. On the basis of the averments made at the bar and pleadings of the parties, following issues are involved in the petition :

(i) Maintainability of the petition against unaided society;

(ii) Eligibility of the petitioner for the examination; and

(iii) Adjudication on question of facts involved in the petition.

12. Mr. J.P. Singh besides raising issue of non-maintainability of the petition, has also argued that the writ petition involved disputed questions of

fact, which cannot be gone into in exercise of writ jurisdiction. He has referred to the allegations made in the writ petition, wherein the petitioner

claims to have attended the class regularly whereas according to the respondents, he was irregular in attending the class and his attendance upto

October, 2003, was only 50% as against the requirement of 75% attendance being the eligibility criterion for participation in the examination. He

has also referred to the attendance sheets to demonstrate that even from November, 2003 to January, 2004, the attendance of the petitioner was

only 47% as against the requirement of 75%. Petitioner in his supplementary affidavit has again reiterated that he attended the class regularly. He

has even gone to the extent of alleging fabrication of the attendance sheets and prayed for examination of the original attendance register. Mr. J.P.

Singh has also produced original attendance register, which contains the signatures of the class teacher as also the Principal i.e. respondent-6, who was incharge of the school at the relevant time.

13. In view of the contrary stand taken by both the parties, the question involved, whether petitioner had been attending the class regularly or

intermittently, is a disputed question of fact. It is very difficult for this court to ascertain this question though respondents have produced the original

record wherefrom it is evident that the attendance of the petitioner was less than the required, the details whereof have been noticed hereinabove. I

am afraid, this court can effectively return a finding on such a disputed question of fact, As regard question of eligibility of the petitioner is

concerned, there is no dispute about the fact that 75% attendance is required to enable a student to appear in the final examination of Class-12th

(Commerce) to be conducted by the CBSE.

14. Mr. K.S. Johal, learned counsel for petitioner has placed reliance upon Rules 1.9, 1.11 and 1.14, which are reproduced hereunder :

1.9. Admission to Examinations: Regular candidates

All India/Delhi Senior School Certificate Examination will be open to such regular candidate who has submitted his duly completed application for

admission to the concerning examination, and his/ or her name in the manner prescribed by the Board, alongwith the prescribed fee forwarded to

the Controller of Examinations by the Head of the Institution/ School with the following duly certified by such head:

(i) that he possesses the academic qualifications as laid down in Exam. By Laws;

(ii) that he has not passed equivalent or higher examination of any other Board or University;

(iii) that he is on the active rolls of the school;

(iv) that he has completed a ""regular course of Study"" as defined and detailed in Exam. By Laws in a school in the subjects in which he would

appear in the examination;

(v) that he bears a good moral character and is of good conduct;

and

(vi) that he satisfies all other provisions applicable to him/her, of the examination Bye Laws and any other provision made by the Board by

governing admission to the examination concerned, if any.

1.11 A Regular Course of Study:

(i) The expression "'a regular course of study'" referred to in these Bye Laws means at least 75% of attendance in the Classes held, counted from

the day of commencing teaching of Class XII upto the 1st of the month preceding the month in which the examination of the Board commences.

Candidates taking up a subject(s) involving practicals shall also be required to have put in at least 75% of the total attendance for practical work in

the subject in the laboratory. Heads of Institutions shall not allow a candidate who has offered subject(s) involving practicals to take the practical

examination(s) unless the candidate fulfils the attendance requirements as given in this Rule.

(ii) The candidates who had failed in the same examination in the preceding year and who rejoins Class XII shall be required to put in 75% of

attendance calculated on the possible attendance from the 1st of the month following the publication of the results of that examination by the Board

upto the 1st of the month preceding the month in which the examination of the Board commences.

(iii) In the case of migration from other institution, attendance at the institution/school recognized by the Education Department of the State/Union

Territory from which the candidate migrates will be taken into account in calculating the required percentage of attendance.

1.14 Detaining of Eligible Candidates

Heads of affiliated school shall not detain eligible candidates from appearing at the examination of the Board except for very grave reasons and

with the previous permission of the Chairman.

15. Based upon aforesaid provisions and taking into consideration the definition of regular course of study as defined under Rule-1.11, it appears

that 75% attendance is required in the month preceding month upto the examination of the Board commences. According to him, the examination

is to take place in the month of March, 04 and therefore, the requirement of 75% attendance was to be seen upto ending January, 2004, which

was the last month for attending the classes. It is contended that form of the petitioner was detained in the month of October, 03 on the alleged

failure of the petitioner to complete 75% attendance, which is in contravention to

the CBSE Regulation.

16. I have gone through the attendance sheets, as produced by the respondents as also the original attendance register. It is relevant to notice that

even for the month of October, November, December,03 and January,04, petitioner has attended classes only for 17 days, as against 46 working

days, which comes about 37%. Even if the contention of the petitioner is accepted, he is ineligible to participate in the examination. It is settled

proposition of law that no mandamus can be issued contrary to the statute.

17. There is another aspect that admittedly petitioner's form has not been forwarded to the CBSE. It is again disputed question whether petitioner

failed to fill up the form or management did not forward the same. How can a court issue direction to CBSE to allow the petitioner to participate in

the examination, when his form is not with them and the same has not been processed and the name of the petitioner has not been brought on the

roll of the CBSE. I am of the considered opinion that under such circumstances, no relief can be granted to the petitioner.

18. I have carefully considered the judgments referred to by the parties on the question of maintainability of the writ petition, though a mandamus

can be issued where a person is enjoined with public duty irrespective of its status as that of a State or authority. In case *Unikrishanan JP*, the

Apex Court subjected private educational institutions imparting professional education to the mandate of Article 14 being affiliated and recognized

bodies. It is also observed that they supplement the duties of the State in imparting education but these institutions particularly unaided institutions,

have not been declared as an authority or State within the meaning of Article 12 of the Constitution. In *General Manager, Kisan Sahkari Chini*

Mills Ltd., Sultanpur, U.P. Vs. Satrugan Nishad and Others, writ petition preferred against a Cooperative Society having certain nominees of

the government on its management, was declared not to be a State within the meaning of Article 12 of the Constitution. A writ petition filed by

employees against the Sugar Mill run by a Cooperative Society was held not maintainable, Society being not amenable to the writ jurisdiction of

the court. In case of *Army School Society* where the entire management was of the Army Officials, who are admittedly employees of the Union,

has been held not a State within the meaning of Article 12 and was not subjected

to writ jurisdiction of the court.

19. In view of the position of the law referred to above, I am unable to accept the contention of the petitioner that the management of K.C. Public

School or its-functionaries are amenable to writ jurisdiction of this court. It was also contended by Mr. Johal that he is seeking direction against the

CBSE, therefore, writ jurisdiction should be exercised. The question of issuing direction to CBSE will only arise, if CBSE failed to perform in its

duties or obligation enjoined upon it or there has been any violation of statute or rules by the Board.

20. In view of the admitted factual position, that the form of the petitioner was never forwarded to CBSE, therefore, CBSE has had no role to

play. In these facts and circumstances, the CBSE has not failed to discharge any of its duty. The dispute in the writ petition is primarily between the

student and the management of unaided school run by a society. Petitioner has not brought any material on record to show that the conditions

applied by the Apex Court in case of Purna and Another Vs. State of Uttar Pradesh, are fulfilled to declare educational society which runs K.C.

Public School a State or any other authority within the meaning of Article 12 of the Constitution.

21. I hold that respondents-management of the school and/or its functionaries, are not amenable to writ jurisdiction of this court. This petition

accordingly fails on all counts and is dismissed.