

(2010) 08 SC CK 0076
In the Supreme Court Of India
Case No : Civil Appeal No. 2676 of 2010

Mrs. Satimbla Sharma and Others

APPELLANT

Vs

St. Paul S. Senior Secondary School and Others

RESPONDENT

Date of Decision : 11-08-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226, 30(1), 36
Delhi School Education Act, 1973 — Section 10, 11, 12, 8, 9
Right of Children to Free and Compulsory Education Act, 2009 — Section 2, 23(3), 38(2)(1)

Citation : (2011) 3 GLH 162

Hon'ble Judges : R.V. Raveendran, J;A.K. Patnaik, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A. K. Patnaik, J.—This is an appeal against the judgment dated 25.07.2008 of the Division Bench of the High Court of Himachal Pradesh, Shimla, in Letters Patent Appeal No. 48 of 2004.

2. The facts very briefly are that in 1923 the Respondent No. 1-School (for short the School') was initially established as a mission school by the Respondent No. 2. The School adopted the 10+2 system in 1993 and is presently affiliated to the Himachal Pradesh Board of School Education. Before independence in 1947 the School was receiving grant-in-aid from the British Indian Government and thereafter from the Government of India upto 1950. From 1951 to 1966, the School received grant-in-aid from the State Government of Punjab. After the State of Himachal Pradesh was formed, the School received grant-in- aid from the Government of Himachal Pradesh during the years 1967 to 1976. From the year 1977-1978, the School has not been receiving any grant-in-aid from the Government of Himachal Pradesh and the teachers of the School are being paid less than the teachers of Government schools and Government aided schools in the State of Himachal Pradesh.

3. Not satisfied with their salary and allowances, some of the teachers of the School filed a Writ Petition, CWP No. 1038 of 1996, in the High Court of Himachal Pradesh for a direction to pay the salary and allowances at par with the teachers of Government schools and Government-aided schools and by judgment dated 11.10.2004 the learned Single Judge of the High Court of Himachal Pradesh allowed the Writ Petition and directed the Respondent Nos. 1 and 2 to pay to the writ Petitioners salary and allowances at par with their counter-parts working in the Government schools from the dates they were entitled to and at the rates admissible from time to time. Aggrieved by the judgment of the learned Single Judge, the Respondent Nos. 1 and 2 filed Letters Patent Appeal No. 48 of 2004 (for short the LPA") before the Division Bench of the High Court and by the impugned judgment dated 25.07.2008, the Division Bench of the High Court set aside the judgment of the learned Single Judge and dismissed the Writ Petition of the Appellants.

4. Learned Counsel appearing for the Appellants submitted that the Appellants do the same work as the teachers of Government schools and Government aided schools and yet are being paid lower than the teachers of Government schools and Government aided schools. He further submitted that the Himachal Pradesh State Government Recognized Aided Schools Teachers' Association and others had filed Writ Petitions, C.W.P. No. 413 of 1989 and 414 of 1989, in the Himachal Pradesh High Court for appropriate writs/directions to the State Government to pay 95% of the grant-in-aid towards approved expenditure in a school year to the privately managed recognized schools borne on the grant-in-aid list with a view to enable the managements of such schools to pay the teachers and allied staff of the schools, the same pay scales and allowances as are paid to their counter-parts working in the Government schools in the State of Himachal Pradesh and by order dated 09.09.1992, a Division Bench of Himachal Pradesh held that teachers of such private recognized aided schools are entitled to same emoluments as received by their counter-parts in the State Government and allowed the writ petitions and directed the State Government and the management of the private recognized aided schools to work out the emoluments of the teachers and pay the same to teachers of the private recognized aided schools. He further submitted that against the order dated 09.09.1992 of the Division Bench of Himachal Pradesh High Court, the State of Himachal Pradesh came up in appeal to this Court in Civil Appeal Nos. 1233 and 1234 of 1993 but this Court dismissed these two appeals on 10.05.1995. He vehemently argued that only with a view to wriggle out from the liability to pay salary and allowances to its teachers and staff at par with the salary and allowances of Government schools, the School has unilaterally decided to stay out of the grant-in-aid scheme since 1977-1978. He submitted that the learned Single Judge rightly held in his judgment dated 11.10.2004 in C.W.P. No. 1038 of 1996 filed by the Petitioners that the School, which had been receiving grant-in-aid till 1977-1978, could not of its own volition stop to receive grant-in-aid and rightly directed the School to pay to the Appellants salary and allowances at par

with their counter-parts working in the Government schools.

5. Learned Counsel for the Appellants submitted that the Division Bench of the High Court has set-aside the judgment of the learned Single Judge after taking an erroneous view in the impugned judgment that the School was under no obligation to have accepted the grant-in-aid which would have led to diminution of its rights guaranteed under Article 30(1) of the Constitution. He further submitted that the Division Bench of the Himachal Pradesh High Court has also sustained the contention of the School that the teachers of private recognized schools had no right to claim salary equal to that of their counter-parts working in Government schools and Government aided schools. He submitted that Rule 45-Q of the Grant-in-Aid Rules of the State of Himachal Pradesh provides that management shall introduce such scales of pay and allowances for teachers and other staff members as prescribed by the Government for corresponding staff in Government schools. He submitted that if the teachers of Government aided schools are entitled to same salary and allowances as the teachers of the Government schools, there is no reason as to why only the teachers of private unaided schools should be denied the salary and allowances of Government schools. He submitted that if the pay and allowances of the teachers of private minority schools such as Respondent No. 1 are not made the same as that of the pay and allowances of the teachers of the Government schools and Government aided schools, the teachers of private minority schools will suffer discrimination and their right to equal pay for equal work under Article 14 read with Article 39(d) of the Constitution will be violated. He relied on the decision of this Court in *Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Others*, wherein Section 12 of the Delhi School Education Act which made the provisions of Section 10 providing for parity of scales of pay and allowances of the employees of the recognized private schools with that of the schools run by the appropriate Authority inapplicable to unaided minority institutions as discriminatory.

6. Learned Counsel for the Appellants submitted that in *State of H.P. Vs. H.P. State Recognised and Aided Schools Managing Committees and Others*, this Court relying on *Miss. Mohini Jain Vs. State of Karnataka and others*,) held that the right to education is a fundamental right guaranteed under Part-III read with Part-IV of the Constitution of India. He submitted that since the right to education is a fundamental right, school education has a public element in it and the Court can always issue a mandamus to enforce a public duty in matters of education. He submitted that in *K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another*, employees of a non-aided private educational institution claimed parity in pay-scales with the employees of Government institutions and this Court held that the employees had an enforceable right and there was an element of public interest in such a claim and the teachers of a private unaided institution is entitled to avail the remedy provided under Article 226 of the Constitution and they cannot be denied the same benefits which were available to other teachers working in Government

institutions.

7. Learned Counsel for the Appellants submitted that the School is provisionally affiliated to the Council for the Indian School Certificate Examinations and the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in Clause (5)(b) that the salary and allowances and other benefits of the staff of the school must be comparable to that prescribed by the State Department of Education. He referred to the report of the Education Commission 1954-66 to the Ministry of Education, Government of India, recommending that the scales of pay of school teachers belonging to the same category but working under different managements such as Government, local bodies or private managements should be the same and this principle of parity should be adopted forthwith. He submitted that Sub-section (3) of Section 23 of the Right of Children to Free and Compulsory Education Act, 2009 (for short the 2009 Act') provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. He referred to Section 38(2)(1) of the 2009 Act which provides that the appropriate Government may, by notification, prescribe the salary and allowances payable to, and the terms and conditions of service of, teacher under Sub-section (3) of Section 23. He submitted that the appropriate Government as defined in Section 2(a) of the 2009 Act, namely, the State Government, therefore, can issue a notification prescribing the salary and allowances payable to, and the terms and conditions of service of, teacher, under Sub-section (3) of Section 23 of the 2009 Act.

8. Learned Counsel for the Respondent Nos. 1 and 2, on the other hand, supported the impugned judgment of the Division Bench of the High Court. He further submitted that if the School is made to pay to its teachers the same salary and allowances of teachers of Government schools and Government aided schools, it will have to increase the school fees and this would affect the students whose parents cannot afford higher school fees.

9. In our considered opinion, the Division Bench the High Court has rightly held in the impugned judgment that the teachers of private unaided minority schools had no right to claim salary equal to that of their counter-parts working in Government schools and Government aided schools. The teachers of Government schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority schools. Similarly, such unaided private schools are not State within the meaning of Article 36 read with Article 12 of the Constitution and as

the obligation to ensure equal pay for equal work in Article 39(d) is on the State, a private unaided minority school is not under any duty to ensure equal pay for equal work.

10. In *Frank Anthony Public School Employees' Association v. Union of India and Ors.* (supra), relied on by Learned Counsel for the Appellants, the scales of pay and other terms and conditions of service of teachers and other employees of the Frank Anthony Public School, New Delhi, which was a private unaided minority institution, compared very unfavourably with those of their counterparts of the Delhi Administration Schools and the Frank Anthony Public School Employees' Association sought equalization of their pay-scales and conditions of service with those of teachers and employees of Government schools. Sections 8 to 11 of the Delhi School Education Act dealt with the terms and conditions of service of employees of recognized private schools. Section 10 of the Delhi School Education Act provided that the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of the recognized private schools shall not be less than those of the corresponding status in schools run by the appropriate Authority. Section 12 of the Delhi School Education Act, however, provided that the provisions of Sections 8 to 11 including Section 10 were not applicable to unaided minority institutions. The case of teachers of Frank Anthony Public School was that if Sections 8 to 11 were made applicable to them, they would at least be as well off as teachers and other employees of Government schools. The Frank Anthony Public School Employees' Association therefore challenged Section 12 of the Delhi School Education Act as discriminatory and violative of Article 14 of the Constitution and this Court held that Section 12 of the Delhi School Education Act insofar as it makes the provisions of Sections 8 to 11 inapplicable to unaided minority schools is discriminatory. This was thus a case in which the employees of unaided minority institutions were not given the benefits available to employees of other private institutions under Sections 8, 9, 10 and 11 of the Delhi School Education Act only on the ground that unaided minority institutions enjoy autonomy of administration under Article 30(1) of the Constitution and this Court held that this could not be a rational basis for differentiation of service conditions, pay and other service benefits between employees of unaided minority institutions and the employees of other private schools and the Court declared Section 12 as discriminatory. In other words, the State by making a statutory provision in Section 12 of the Delhi School Education Act which was discriminatory, had violated the mandate to the State under Article 14 of the Constitution not to deny the equal protection of the laws within its territories. This decision in the case of *Frank Anthony Public School Employees' Association v. Union of India and Ors.* (supra) does not assist the Appellants in any manner because the guarantee of equality, as we have said, is not available against an unaided private minority school.

11. We also do not think that the Court could issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and

allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. In *Sushmita Basu and Others Vs. Ballygunge Siksha Samity and Others*, , the teachers of a recognized private school known as Ballygunge Siksha Sadan in Calcutta filed a Writ Petition in the High Court of Calcutta praying for issuance of writ of mandamus directing the Authorities of the school to fix the salary of teaching and non-teaching staff of the school and to remove all anomalies in the scales of pay as recommended by the Third Pay Commission as extended to other Government aided schools and Government schools and this Court held that in the absence of statutory provision no such direction can be issued by the High Court under Article 226 of the Constitution. Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the present case, there was no statutory provision requiring a private unaided school to pay to its teachers the same salary and allowances as were payable to teachers of Government schools and therefore a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances as were payable to Government institutions.

12. In *K. Krishnamacharyulu and Ors. v. Sri Venkateswara Hindu College of Engineering and Anr.* (supra), relied upon by the Learned Counsel for the Appellants, executive instructions were issued by the Government that the scales of pay of Laboratory Assistants as non-teaching staff of private colleges shall be at par with the Government employees and this Court held that even though there were no statutory rules, the Laboratory Assistants as non-teaching staff of private college were entitled to the parity of the pay-scales as per the executive instructions of the Government and the writ jurisdiction of the High Court under Article 226 of the Constitution is wide enough to issue a writ for payment of pay on par with Government employees. In the present case, there are no executive instructions issued by the Government requiring private schools to pay the same salary and allowances to their teachers as are being paid to teachers of Government schools or Government aided schools.

13. We cannot also issue a mandamus to Respondent Nos. 1 and 2 on the ground that the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in Clause (5)(b) that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State Department of Education because such conditions for provisional affiliation are not statutory provisions or executive instructions, which are enforceable in law. Similarly, we cannot issue a mandamus to give effect to the recommendations of the report of Education Commission 1964-66 that the scales of pay of school teachers belonging to the same category but working under different managements such as Government,

local bodies or private managements should be the same, unless the recommendations are incorporated in an executive instruction or a statutory provision. We, therefore, affirm the impugned judgment of the Division Bench of the High Court.

14. We, however, find that the 2009 Act has provisions in Section 23 regarding the qualifications for appointment and terms and conditions of service of teachers and Sub-section (3) of Section 23 of the 2009 Act provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. Section 38 of the 2009 Act empowers the appropriate Government to make rules and Section 38(2)(1) of the 2009 Act provides that the appropriate Government, in particular, may make rules prescribing the salary and allowances payable to, and the terms and conditions of service of teachers, under Sub-section (3) of Section 23. Section 2(a) defines "appropriate Government" as the State Government within whose territory the school is established. The State of Himachal Pradesh, Respondent No. 3 in this appeal, is thus empowered to make rules under Sub-section (3) of Section 23 read with Section 38(2)(1) of the 2009 Act prescribing the salary and allowances payable to, and the terms and conditions of service of, teachers. Article 39(d) of the Constitution provides that the State shall, in particular, directs its policy towards securing that there is equal pay for equal work for both men and women. Respondent No. 3 should therefore consider making rules u/s 23 read with Section 38(2)(1) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution as early as possible.

15. With these observations, the appeal is disposed of. There shall be no order as to costs.