

**(1981) 12 CAL CK 0003**  
**In the Calcutta High Court**

Rama Prosad Majumder

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision :** 04-12-1981

**Acts Referred:**

COMPANIES ACT, 1956 — Section 237

**Citation :** (1981) 12 CAL CK 0003

**Hon'ble Judges :** B.C. Ray, J

**Bench :** Single Bench

**Advocate :** B.N. Sen, B.B. Giri, J.K. Banerji, for the Appellant; A.P. Sircar, Suproakash Banerjee for Board, R.N. Mitra and A.B. Chatterjee, for the Respondent

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## Judgement

1. These two writ applications are at the instance of the petitioner who is working as Head Master of Salkia Hindu School in the Civil Rule No. 916(W) of 1980. A challenge was thrown on the charge-sheet dated 16th January, 1980 which was served on the petitioner by the Administrator of the school directing him to show cause against the said charges. The other application is directed against the order dated 14th March, 1980 whereby the Secretary of West Bengal Board of Secondary Education intimated the administrator of the school that the administrator of West Bengal Board of Secondary Education have approved the proposal of the administrator of the school for initiating disciplinary proceedings against the petitioner. The said application is also directed against the letter dated 5th of May, 1980 issued by the Secretary of the West Bengal Board of Secondary Education intimating that the President of the Board accorded approval to the proposal of the administrator of the School for removing the petitioner from the services of the school under Rule 28(8) of the Rules for Management.

2. The application whereon Civil Rule 916(W) of 1980 was issued on 13th February, 1980 and an interim order was made to the extent that the disciplinary proceedings may continue but no final order be passed without the leave of the court has now become infructuous inasmuch as the administrator has already

accorded approval to the proposal of the administrator of the school, the Respondent No. 4, for removing the petitioner from the service of the school under Rule 28(8) for Management of Recognised Non-Government Institutions (Aided and Unaided), 1969 subject to the conditions that the services of the temporary Headmaster should not be terminated without the prior leave of this Hon"ble Court.

3. As regards the other writ application the petitioner as stated hereinbefore challenged the validity of the order dated 3rd May, 1980 passed by the President of the West Bengal Board of Secondary Education according approval to the proposal of Respondent No. 4 for removal of the petitioner from his services as headmaster of the School.

4. The petitioner was appointed as an Assistant Teacher of the said school on August 25, 1947. On August 23, 1972, an Assistant Teacher Madan Mohan Payne challenged the appointment of the petitioner as Headmaster and also the confirmation of the petitioner in the post of Headmaster in Civil Rule No. 1438(W)/72. There was an interim order that confirmation of the appointment of the petitioner as Headmaster will abide by the result of the Rule. This Rule was heard and disposed of. It was held that prayer "A" of the said writ petition challenging the confirmation of the appointment of the petitioner as Headmaster of the school was not maintainable in the writ court and other orders were made which are not relevant for our present purpose. On 30th December 1977, one Sri A. K. Gupta who was formerly the District Inspector of Schools was appointed as Administrator of the School with all powers of the Managing Committee and he was asked to review the appointment of the petitioner as Head Master. The Administrator took steps for reconstitution of the Managing Committee by preparing and publishing the election programme fixing the date of election on May 21, 1978. On 27th of February, 1980, a letter was issued by the Secretary, West Bengal Board of Secondary Education directing the Administrator of the School not to hold the election until question of appointment of the petitioner as Head Master was reviewed and the Administrator was asked to intimate if the case was reviewed or not. Another letter was sent by the Secretary, West Bengal Board of Secondary Education on 11th of June, 1978 directing the Administrator not to proceed with the reconstitution of the Managing Committee till the case of the petitioner was reviewed. On 27th of July, 1978, the Administrator was changed and Respondent No. 4 was appointed as Administrator for 6 months with all powers of the Managing Committee and all powers of reconstitute the Managing Committee within the term of his appointment. He was also directed to review the appointment of the petitioner as Head Master and to submit a report. This term of the Administrator was extended by order dated 21st February, 1979 for a further period of 6 months up to 26th of February, 1979. On 10th August, 1979, the Administrator, West Bengal Board of Secondary Education was reappointed by the President for a period of 6 months until further order. On 13th August, 1979, the District Inspector of Schools, Secondary Education, Howrah directed the Administrator, Respondent No. 4 to pay the increments and special

pay attached to the post of Head Master to the petitioner. This is the short background of the case.

5. Mr. Bholanath Sen, learned counsel appearing on behalf of the petitioner has made a three-fold submissions. The first dimension of Mr. Sen's submission is that the power to accord approval by the West Bengal Board of Secondary Education, the Respondent No. 6 as made on 3rd May, 1980, under Rule 28(8) of the Rules for management of Recognised Non-Government Institution (Aided and Unaided). 1969 as amended has not been properly exercised as it does not appear from the order itself that there was an emergency which necessitated the exercise of the powers of the Board under Rule 28(8) by the President of the Board. The second dimension of Mr. Sen's argument is that the condition precedent for exercise of these powers under S 28(2) of the West Bengal Board of Secondary Act, 1963 is totally absent and as such the order impugned is wholly unwarranted and without jurisdiction. The third dimension of Mr. Sen's submission is that there has been no compliance with the mandatory requirements as provided in S. 28(8) of the said Act by not reporting to the Board the action taken by him in this case with reasons for taking such action. Therefore the order impugned is wholly illegal and unwarranted and bad.

6. Mr. Sircar, learned Advocate appearing on behalf of the West Bengal Board of Secondary Education, the Respondent No. 5, has submitted that the word "may" in Sub-s.(2) of S. 28 of the said Act confers upon the President a discretion to exercise the powers of the Board if there is an emergency. Whether there is an emergency or not for exercise of these powers it is the President alone who will decide and it is the President who will decide if there is an emergency and whether he will exercise the powers of the Board under S. 28(2) of the Act. In this case the President has in his discretion thought fit to exercise the powers under S 28(2) of the Act because in his opinion there is an emergency. The impugned order, therefore, cannot be challenged as being illegal and unwarranted. It has been submitted in this connection by Mr. Sircar that the powers of the Board co-terminus with that of the President. It was next submitted by Mr. Sircar that Section 28(2) provides that the President after exercising the powers of the Board. In an emergency has to report to the Board the action taken by him as soon as after the order has been made. This does not mean that the order impugned has to be placed at the next meeting of the Board otherwise the order will be held illegal and bad. The President may place the matter before the Board in any meeting of the Board. The impugned order cannot be attacked on the ground of its being not placed in the next meeting of the Board. It has been lastly contended that the President has spelt the circumstances in the order which constituted the emergency and the same could not be questioned before this Court.

7. The power to accord approval to the proposal made by the Administrator of the School, the Respondent No. 4, for dismissing the petitioner from service is conferred on the Board under Rule 28(8) of the said Rules. Section 28(2) of the

West Bengal Board of Secondary Education Act, 1963 provides that the President may, in an emergency, exercise any of the powers of the Board provided he shall not act contrary to the decisions of the Board and shall as soon as thereafter as may be, report to the Board the action taken by him together with reasons therefore. Therefore, the President can exercise the power of the Board in the matter of accord of approval of the action proposed by the Administrator of the School for taking disciplinary action provided he is satisfied that there is an emergency which requires him to exercise his powers u/s 28(2) of said Act. In this case if the order is scrutinised the reasons stated for exercise of the emergency powers are as follows:

- (a) It will take some time before the Board could sit for its deliberations,
- (b) Formation of the Executive Council will, of necessity, also take sometime.

None of these reasons stated in the order dated 3rd May, 1980 does disclose any circumstance from which the President can come to the opinion that there was an emergency.

8. In the affidavit-in-opposition that has been filed on behalf of the Respondent nos. 5 to 7 it has not been stated what are the circumstances on consideration of which the President came to the opinion that there was an emergency which necessitated the exercise by him of the powers of the Board under S. 28(2) of the said Act. It is now well settled that the exercise of discretionary powers is subject to judicial scrutiny. It has been observed in *Hond Philips's Constitutional and Administrative Law* (6th Edition) page 599 that "a power, that is discretionary. i.e., not coupled with a duty is abused or misused if it is exercised for an unauthorized purpose, if relevant considerations are disregarded or irrelevant considerations taken into account. Even where a discretion seems unfettered the courts will interfere where it has been exercised in a way which thwarts or frustrates the objects of the Act conferring the power." Similar observations have been made in *S.A. De Smith's Judicial Review of Administrative Actions* (4th Edition) at page 339 : "If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations, a court will normally hold that the power has not be validly exercised." In *HR Wade's Administrative Law* (4th Edition) page 375, it has been observed : "Subjective language as if the minister is satisfied as used in statutes refers to subjective discretion of the Administrative authority and the court cannot judge objectively. But the discretion is to be exercised reasonably and in good faith and upon proper grounds. "The minister is of opinion", and it was held that court could quash the order of minister if the opinion is based on no evidence or unreasonably or had gone wrong in law.

9. In the case of *Barium Chemicals Ltd. v. Company Law Board & ors.* it has been observed by the Supreme Court that "before the discretion conferred by S. 237(b) of the Companies Act, 1956, to order an investigation can be exercised,

there must exist circumstances which in the opinion of the Authority suggest what has been set out in Sub-cl. (i), (ii) or (iii). If it shown that the circumstances do not exist or that they are such that it is impossible for any one of to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute." The same view has been reiterated in *Rohtas Industries Vs. S.D. Agarwal and Others*, at page and AIR 1979 SC 710 *Beliappa's case*. The power to accord approval to proposal for taking disciplinary action against a teacher made by the Managing Committee or the Administrator is vested in the West Bengal Board of Secondary Education and this power of the Board may be exercised by the President only in an emergency as provided in S. 28(8) of the Act. It is not a routine procedure intended by the Legislature as observed by A. K. Sen, J in C. R. No. 5629(W) of 1972 *Sarat Chandra Mal & Ors. v. The President of West Bengal Board of Secondary Education* decided on 25.9.73. This has been followed in (1976) 2 CLJ 289 ( : 1976 CHN 810) *Sachi Nath Ghose v. W. B. Board of Secondary Education*.

10. In the light of the decisions and observations quoted hereinbefore to exercise the power under S. 28(2) which is vested in the Board under Rule 28(8) of the said Rules by the President by virtue of the provisions of the S 28(2) of the said Act it is incumbent on the President to consider the relevant and germane circumstances wherefrom he formed his opinion that an emergency exists which necessitates the exercise by him of the powers of the Board. In this case the reasons that have been stated for coming to the opinion that thee is an emergency are, in my opinion, do not constitute relevant circumstances for formation of such an opinion. The West Bengal Board of Secondary Education as evident from the order of the President dated 3rd May, 1980, was re-established with effect from 14th March, 1980 and the first meeting of the Board was convened under order of the President on 28th July, 1980 and the Second Meeting of the Board was held on 29th of July, 1980. Therefore, it cannot be said that the matter regarding approval of the proposed action of the Respondent No. 4 could not be placed before the West Bengal Board of Secondary Education and there is nothing to show that the is such an emergency which requires immediate exercise of power under Rule 28(8) by the President under S 28(2) of the said Act. No affidavit has been filed stating the circumstances which impelled the President to form an opinion that an emergency had arisen and the power of the Board was required to be exercised by him under S. 28(2) of the said Act. In my opinion, formation of opinion about emergency was made on irrelevant considerations and on a disregard of relevant considerations and as such the condition precedent to form the opinion about the existence of emergency is totally absent. No such circumstance, I am constrained to hold existed and as such the impugned order made by the President is wholly ultra vires, illegal and the power had not been validly exercised. The argument advanced by Mr. Sircar, learned Advocate appearing on behalf of the Respondent No. 5, that it is a

discretionary power and the President is the sole authority to determine whether there is an emergency which necessitates the exercise of the power of the Board by him or not is devoid of any merit as the opinion is to be formed on a consideration of relevant circumstances and whether the conditions precedent, or in other words, the relevant circumstances were considered or not is justifiable. The next question requires to be considered is that whether the President of the Board is to report to the Board the action taken by him together with the reasons therefore in the next meeting of the Board as provided in S. 28(2) of the Act. There is no doubt that the President by exercising the power of the Board in an emergency has to comply with the mandatory requirements of the provisions of the aforesaid section which enjoins that he shall have to report to the Board about the action taken as soon as thereafter. This is because the Board in which the power is vested is the ultimate authority to decide at its meeting whether the action taken by the President by exercising the power of the Board under S. 28(2) of the said Act will be approved by the Board or not. If the Board does not approve of the action of the President then the order made by the President will be set aside and it will be ineffective as evident from Sub-s (2) of S. 28 which clearly specifies that the President "shall not act contrary to any decision of the Board." Therefore any action taken and/or any order made under S. 28(2) of the said Act is required to be placed as early as possible before the meeting of Board for its consideration and approval.

11. In this case as has been contended by Mr. Sen that though the impugned order has been made by the President on 3rd May, 1980 yet the President did not report this matter to the meeting of the Board held on 28th July, 1980 as well as on 29th of July, 1980 as evident from the notices of the aforesaid meetings annexed as Annexures "Y" and "Z" to the writ petition. It has been stated in paragraph 30 of affidavit-in-opposition that there are many other urgent matters which were required to be disposed of by the Board at a meeting and in view of the shortage of time in the meeting of the Board the matter relating to the said order dated May 3, 1980 could not be placed at the meeting of the Board. It has been stated that the matter relating to the said order of the President could not be reported to the Board at the two meetings-in-question referred to in paragraph 40 of the said petition. It has also been stated by Mr. Sircar on a query by this Court that no other meeting of the Board has been held since its re-establishment on March 1980. Therefore the mandatory provisions of S. 28(2) which enjoins on the President to report to the Board the order made by him by invoking his emergency powers under S. 28(2) in respect of matter which the Board is empowered under the Rule to decide whether the approval would be accorded or not has not been complied with. Under S. 29 of the said Act it is the President who will convene the meetings of the Board and shall give to each member of the Board notices of the meetings. Therefore, this action on the part of the President in not placing the impugned order made by him or the meeting of the Board with the reasons for exercising the powers of the Board renders the impugned order invalid and inoperative. It is well settled that statutory powers

are to be exercised in the manner and mode provided in the statute and as there has been non compliance with the mandatory provisions of the S 28(2) of the Act, the impugned order, in my opinion, cannot be sustained.

12. In the premises aforesaid the contentions, raised on behalf of the petitioner having succeeded the Rule succeeds. The Rule is made absolute, Let a writ of Mandamus be issued commanding the respondents to forbear from giving the effect of the impugned order dated 3rd May, 1980 made by the President, West Bengal Board of Secondary Education, Let a writ of Certiorari be issued commanding the respondents to quash and set aside the impugned order dated 3rd May, 1980 according approval under Rule 28(8) of the Rules for Management for Recognised Non Government Institutions (Aided and Unaided), 1969 to the proposal of the Administrator, Respondent No. 4 removing the petitioner from his service as Head Master of the School. There will be no order as to costs.

13. This will not, however, prevent the authorities concerned from proceeding in accordance with law.