
(2003) 09 AHC CK 0067
In the Allahabad High Court
Case No : C.M.W.P. No. 18707 of 2003

Shubham Bhushan

APPELLANT

Vs

St. Mary"s Convent Inter College

RESPONDENT

Date of Decision : 19-09-2003

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 32
Law Commission Act, 1965 — Section 3(1)
Supreme Court Act, 1981 — Section 31

Citation : (2003) 6 AWC 4990

Hon'ble Judges : Anjani Kumar, J

Bench : Single Bench

Advocate : D.S. Singh, for the Appellant; P. Padia, for the Respondent

Final Decision : Dismissed

Judgement

Anjani Kumar, J.—The Petitioner Shubham Bhushan (minor), through her father, approached this Court by means of present writ petition under Article 226 of the Constitution of India with the following prayers, (a) issue a writ, order or direction in the nature of mandamus commanding the Respondents to permit the Petitioner to pursue studies in class XII with Respondent No. 2 and appear in I.S.C. examination, 2004, conducted by Respondent No. 1 ; and (b) to issue a direction, directing the Respondent No. 2 to re-check the copies of Physics and Mathematics papers and re-examine the Petitioner in terms of regulations.

2. The contention of learned Counsel appearing on behalf of the Petitioner is that the institution, in which the Petitioner was studying, is a recognised institution which prepares the students for appearing in class XII examination conducted by Respondent No. 1. The Petitioner after passing class X examination was admitted to class XI in the same institution. Unfortunately, according to the progress report, Annexure-2 to the writ petition, the Petitioner failed in class XI. This would be clear from the tally of the marks and points, which demonstrate that since the Petitioner has secured less than 39 per cent of marks in two subjects,

therefore, she has been declared failed in class XI examination by the institution. From the progress report of the Petitioner, it is clear that the Petitioner has secured the following marks as has been shown in the chart and the remarks of the teacher, which read thus:

Grade System:

Marks Points

90-100 1

80-99 2

73-79 3

72-68 4

61-67 5

55-60 6

49-54 7

40-48 8

0-39 9 (Fail)

Parents/guardians failing to receive this report should communicate with the principal.

English, Hindi and S.U.P.W. are compulsory.

Failure in two subjects will be a failure.

Promotion according to the year's work.

The report card will not be issued if fees are in arrears.

A pupil failing twice in the same class will have to be withdrawn from the school.

Due to sickness, if any child fails to appear in the exams.

Certificate from a Registered Medical Practitioner should be submitted within the period of exams. In no case will re-examination be taken.

Subjects

Ist Term

2nd Term

3rd Term

Years Average

Value Education

Good

Good

Good

Good

English Language

45

50

46

51

49

51

51

English Literature

54

55

52

Hindi

45

52

56

51

Physics

11

33

30

25

Chemistry

43

41

41

42

Mathematics

13

07

36

19

S.U.P.W. and Community Service

B

A

A

Attendance

76/80

64/67

45/46

Personal, Social and Works Habits Integrity Good Good Good Self-esteem Good
Good Good Leadership in service Good Good Good Openness to Growth and
change Good Good Good

REMARKS

Ist Term : Shubham, you have to take your studies more sincerely with sincere efforts and regular work. You can definitely do it. Be more attentive in class.
Parent?s signature Teacher?s signature

2nd Term : Shubham, you need to devote more time to maths and be more attentive and serious in class. Your promotion to class XII is going to be very difficult if you do not make up in Maths and Physics. Parent?s signature Teacher?s signature

3rd Term : Shubham, do not be disappointed. Failures are stepping stones to success.

I am sure you will do well next session. Parent?s signature Teacher?s signature

Promotion REFUSED

Monday, January 03, 2011

3. Learned Counsel appearing on behalf of the Petitioner argued that according to the regulations framed by the Respondent No. 1, the institution/college do not have right to say to student, like Petitioner that she will not be promoted to class

XII, as has been done in the case of the Petitioner, because according to learned Counsel for the Petitioner, the Council for the Indian School Certificate Examination (in short "I.S.C.E."), the Respondent No. 1 provides Scheme of Examination, which has been quoted in paragraph 14 of the writ petition, which reads thus:

13B. Scheme of Examination.

1. (a) The syllabuses in English (Compulsory) and in Indian Languages (Elective) have not been bifurcated. Questions will be set from the entire syllabus for the year-12 examination.

(b) The Syllabuses in Elective Subjects (except Indian Languages) are prescribed separately for class XI and class XII. The syllabus prescribed for class XI will be examined internally by the school and the syllabuses for class XII will be examined externally by the Council.

4. Learned Counsel for the Petitioner further submitted that, as stated in paragraph 16 of the writ petition that the action and conduct of Respondent No. 2, namely, the institution/college concerned in detaining the Petitioner in class XI is against the regulations framed by Respondent No. 1 and that this action is not only arbitrary, but also discriminatory. It was on the strength of the aforesaid arguments and regulations the Petitioner claimed the reliefs, referred to above. The fact that the Petitioner had not been able to secure minimum required percentage of marks and declared failed in class XI, is not disputed. It is also not alleged that the action of the Respondent No. 2 has been biased or suffers from prejudice, but relying upon the regulations, particularly, last sentence of para 13 of the writ petition, which reads thus:

Candidates may be entered only by the school, they are attending and in this respect, the decision of the Head of the School is final.

5. Learned Counsel appearing on behalf of the Petitioner further submitted on the strength of the aforesaid "Scheme of Examination" that students once admitted in class XI, there is no condition, much less pre-condition that they must pass class XI examination before they are allowed to appear in class XII examination to be conducted by Respondent No. 1 in the year 2004. Relying upon the aforesaid "Scheme of Examination", learned Counsel for the Petitioner submitted that the Respondents are acting in wholly arbitrary manner and are damaging the future of the students.

6. In reply to the aforesaid arguments advanced on behalf of the Petitioner, learned Counsel appearing for Respondent No. 2 contested the writ petition firstly on the ground that institution being a private body, no writ can be issued by this Court in exercise of power under Article 226 of the Constitution of India, therefore, this writ petition is liable to be dismissed on this ground alone. Apart from the aforesaid preliminary objection, learned Counsel for the contesting Respondent further contended that according to the "Scheme of Examination",

as stated above, the Council Respondent No. 1 is entrusted with the duty of examining the students in class XI internally, which pre-supposes that the candidate has to secure the minimum pass marks as prescribed by the Respondent No. 2 before he/she is allowed to appear in class XII examination of Indian School Certificate Examination, 2004.

7. Learned Counsel appearing on behalf of the Petitioner in reply to the aforesaid preliminary objection raised by the Respondent, relied upon the decision in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, . Learned Counsel for the Petitioner has relied upon certain relevant paragraphs, which are quoted below:

14. 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. It has to be appreciated that the Appellants-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character (See *The Evolving Indian Administrative Law* by M. P. Jain 1983 p. 266). So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty, relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

15. Law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord, Chancellor) in pursuance of Section 3(1) (e) of the Law Commission Act, 1965, requested the Law Commission "to review the existing remedies for the judicial control of administrative acts and commission with a view to evolving a simpler and more effective procedure." The Law Commission made their report in March, 1976 (Law Com. No. 73). It was implemented by Rules of Court (Order LIII) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act, 1981. It combined all the former remedies into one proceeding called judicial review. Lord Denning explains the scope of this "judicial review":

At one stroke the Courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction, even damages.

The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a Judge.

The statute is phrased in flexible terms. It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The result is that the Courts are not bound hand and foot by the previous law. They are to "have regard to" it. So the previous law as to who are-and who are not-public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This means that the Judges can develop the public law as they think best. That they have done and are doing." (See the closing Chapter by Rt. Hon" Lord Denning p. 122).

17. Article 226 reads:

226. Power of High Courts to issue certain writs (1) Notwithstanding anything in Article 32 every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases any Government, within those territories directions, orders or writs, including (writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari) or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose.

18. The scope of this Article has been explained by Subba Rao, J., in *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, at :

This Article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England ; but the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself.

19. 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.

21. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative Act 4th Ed. p. 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a 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. We, therefore, reject the contention urged for the Appellants on the maintainability of the writ petition.

8. Thus, raising objection that a writ is not maintainable against an unaided or affiliated private institution, though the same is performing a public duty of imparting education, is unwarranted and is liable to be rejected. Learned Counsel has further relied upon a decision in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, and also a decision of Apex Court in The Principal, Cambridge School and another Vs. Ms. Payal Gupta and others, . Learned Counsel has further relied upon a decision of this Court in support of his contention in Purnima Banerjee v. Council for the Indian School Certificates Examinations, New Delhi and Ors. 1995 (1) UPLBEC 265.

9. According to the learned Counsel appearing on behalf of the Petitioner, in view of the aforesaid law laid down the objection raised by the Respondent with regard to the maintainability of the writ petition is liable to be rejected. On merits, learned Counsel for the Respondent submitted that in view of the scheme emphasised above, since the Council has entrusted the job of examining the students in class XI of the institution concerned, in the present case the Respondent No. 2, therefore, according to the norms prescribed by the Respondent No. 2, Petitioner has to pass class XI before he/she is promoted to class XII. This is admitted fact and according to learned Counsel for Respondent the Petitioner has not secured minimum pass marks in two subjects, therefore, if the meaning of the words "The syllabus prescribed for class XI will be examined internally by the school are the syllabuses for class XII will be examined

externally by the Council", has to be given the meaning that it is an institution/ college concerned, which has to examine the students on the strength of the syllabus prescribed and the examinee has to pass minimum qualifying marks.

10. It may be reminded that the prescription of the minimum qualifying marks for promotion to class XII has not been challenged in this writ petition. This is also not denied that the Petitioner has not been able to secure even minimum pass marks in class XI so that she may be promoted to class XII for appearing in the Indian School Certification Examination, 2004.

11. In view of what has been stated above, I am of the view that overruling the preliminary objection raised by Respondent No. 2 that a writ petition against an institution, i.e., the Respondent No. 2 is maintainable, but on merits of the case as set out above in the body of the judgment, since the Petitioner has not been able to secure minimum pass marks as prescribed by Respondent No. 1, in view of the Scheme of Examination, as quoted above, the action of the Respondent No. 2 cannot be, either said to be contrary to any constitutional right guaranteed to the Petitioner, or is hit by any of the provisions of the Constitution. It is also not contrary to any statutory provision. It is further submitted that the Petitioner cannot claim as of right in the Scheme of Examination of the Respondent No. 1, as enumerated above, that once she is admitted to class XI after passing class X, she cannot be stopped from appearing in class XII examination to be conducted by Respondent No. 1 in the year 2004. This does not spell out from the reading of the Scheme of Examination, as quoted above. Thus, in the circumstances of the admitted facts of the case, the action of the Respondent No. 2 in not permitting the Petitioner to appear in class XII Examination cannot be said to be, either illegal, or arbitrary.

12. In view of the above discussions, this writ petition is devoid of any merits deserves to be dismissed and is hereby dismissed. However, on the facts and circumstances of the case, there will be no order as to costs.