
(1991) 09 CAL CK 0034
In the Calcutta High Court
Case No : C.O. No. 873 (W) of 1991

Smt. N. Taneja and another	Vs	APPELLANT
Calcutta Distt. Forum and others		RESPONDENT

Date of Decision : 18-09-1991

Acts Referred:

Arbitration Act, 1940 — Section 4(6), 41
Civil Procedure Code, 1908 (CPC) — Section 13(4), 3(1), 3(2), 30, 32
Constitution of India, 1950 — Article 21, 22, 226, 227, 245
Consumer Protection Act, 1986 — Section 1, 10, 10(1), 13, 13(5)
Contract Act, 1872 — Section 2
Penal Code, 1860 (IPC) — Section 193, 228
Viswa Bharati University Act, 1951 — Section 3
West Bengal Board of Secondary Education Act, 1963 — Section 2, 28(8)
West Bengal Consumer Protection Rules, 1987 — Rule 3(5), 3(7), 3(8), 5(10), 5(4)

Citation : AIR 1992 Cal 95 : (1992) 1 CALLT 234

Hon'ble Judges : K.M. Yusuf, J

Bench : Single Bench

Judgement

1. The petitioners have moved the writ application challenging the C.D.F. Case No. 900 of 1990 or another case with the cause-title of Mahangilal Barmecha v. M.Taneza and another pending before the Calcutta District Forum as well as the notice to show cause u/s 13 of the Consumer Protection Act, 1986. The petitioners prayed for quashing the plaint filed by Mr. Barmecha and the ad interim order dated 20th February, 1990 passed by the President of the Forum. The petitioners also prayed to remove the respondent No. 2, Mr. Shyam Sundar Gupta, from the office of the President of the Calcutta District Forum.

2. The case of the petitioners, in short, is that they are permanent teachers of Arya Vidya Mandir approved and recognised by the West Bengal Board of Secondary Education, The petitioner No. 1 is a Headmistress and the petitioner No. 2 is the class-teacher of Class X-A. The School imparts general education above the primary education stage qualifying the students for admission to a Certificate, diploma or degree course instituted by the University or the

Government. The petitioners were approved and appointed teachers in term of Rule 28 of the Management of Recognised Non-Government institutions Rules, 1969 so far as the dismissal of any teacher of the School is concerned, the disciplinary proceeding to that, effect would have to be taken by the Managing Committee with the approval of the Board. The main contention of the petitioners is that no authority other than Board can remove any teacher of any school except the Board. It is the further case of the petitioners that except imparting education to the students, the teacher never renders any service to any student or guardian. The rendering of service as contemplated and question of any deficiency as defined in the Consumer Protection Act has got no application. It is the further case of the petitioners that the guardians of a student in any educational institution cannot be termed as a consumer nor the student is a beneficiary of the consumer since in an educational institution education is imparted by teachers and the teachers' services are not hired. Miss. Ekta Barnecha, daughter of the respondent No. 3, was Class X-A student and she could not pass all the Terminal Examinations of Class VIII and Class IX including Annual Examination but on each occasion at the request of her mother she was promoted to higher class on the assurances that the guardians would take special care relating to her studies. In the pre-test examination held in September 1990 she again failed in several subjects while she was student in Class X-A and she also did miserably bad in selection test held from 5th to 15th December, 1990. From the table given in paragraph 8 it appears that she passed only in English and Work Education and failed in all the other Subjects. It is stated that when the selection test result was published on 19th December, 1990, the respondent No. 3 approached the petitioner No. 1 on the next day with a request to send her for Madhyamik Examination and when told that because of the poor result she could not be sent up, the respondent No. 3 expressed that in a different school by spending a substantial amount his daughter could have been sent for Madhyamik Examination. The petitioner No. 1 strongly protested and said that the education cannot be made a purchasable commodity. It is alleged that the respondent No. 3 told the petitioner No. 1 that he has got connection with high officials including the President of the Calcutta District Forum, the respondent No. 2, who is a close friend of his and at 2 p.m. on the said day the respondent No. 3 again came to meet the petitioner No. 1 with another person and introduced him as respondent No. 2 and handed over his identity card and both requested the petitioner to send the girl for Madhyamik Examination but the petitioner No. 1 refused to comply. The identity card is enclosed as Annexure "A" to the writ petition. On 22nd December, 1990 the petitioners were served with notice to show cause u/s 13 of the Act of 1986 under orders of the Calcutta District Forum directing the petitioners to appear before the Calcutta District Forum on 27th December, 1990 in person or by a pleader to show cause. With the show cause notice there was an ad interim order dated 20th December, 1990 directing the petitioners to appear in person on 27th December, 1990 failing which penal action would follow.

3. The allegation contained in the plaint is that the petitioner No. 2 bears a grudge against the daughter of the respondent No. 3 since she did not take tuition from her and further that because of the utterance of petitioner No. 2 the daughter of respondent No. 3 became nervous and could not do well in mathematics in the pre-test examination and in spite of complaint treated the daughter of respondent No. 3 with aggressive indifference and threatened to doom the career of the girl. The petitioner prayed for the dismissal of petitioners Nos. 1 and 2 for educational misconduct, penalty and also for compensation of Rs. 50,000.00 for declaring the daughter failed in the examination and refusing to send her up for the Board's Examination. The petitioners denied all the allegations in the plaint and stated that because of the poor result of the examination she could not be sent up for Madhyamik Examination. It is further stated that the case of the petitioners was not appearing after searching the file in C.D.F. Case No. 900 of 1990 as it was relating to a telephone case. It is stated that even warrants of arrest were issued against the respondents and some police officials came to the School premises enquiring about the petitioners. The allegation has also been made against the respondent No. 2. One of the major points of the petitioners is that the Consumer Protection Act has no jurisdiction to enter into the domain of Education and cannot try any proceeding against any teacher on the allegation that a student had not been sent for Madhyamik Examination. Hence the writ petition.

4. The Calcutta District Forum, the State of West Bengal and the Union of India, respondents Nos. 1, 4 and 5, respectively, did not file any Affidavit-in-Opposition. Only Mr. Shyam Sundar Gupta, President of the Calcutta District Forum and Mr. Mahangi Lal Barmecha, respondents Nos. 2 and 3 filed affidavit-in-opposition. Mr. Gupta, the respondent No. 2, opened his Affidavit-in-Opposition by stating that he is a Member of the Calcutta District Forum and he is presently acting as the President of the said Forum. His defence, inter alia, is as follows:-- The writ petition is not maintainable as the order of the Calcutta District Forum is appealable; the writ petition is not maintainable because the petitioners have impleaded the President of the Forum and challenged the proceeding of the Forum which could not be done in view of Section 28 of the Act; the writ petition is not maintainable because the writ petitioners have questioned the authority of the Forum and finally the writ petition is not maintainable because the petitioners have prayed for the removal of the President and as a removal comes under Rule 3(5) of the West Bengal Consumer Protection Rules, 1987 there is no allegation which comes under the said Rule. The statements relating to the authority of West Bengal Board of Secondary Education and Managing Committee of the Arya Vidya Mandir are not admitted by him. The respondent contended that educational institutions render service within the definition of "services" as provided u/s 2(o) of the Consumer Protection Act, 1986 and the students and their guardians are the consumers within the meaning of Section 2(d)(i) and (ii) of the said Act. The services of the teachers are indeed hired and as such they are rendering their services. The allegation contained in paragraph 7 of the writ

petition is totally denied to the effect that this defendant did not go to meet the petitioners on 20th December, 1990 at 2 p.m. nor he knows the respondent No. 3 personally nor he handed over any identity card. The xerox copy of which is annexed with the writ petition as marked "A" It is stated that on 20th December, 1990 he was holding court from 10.30 a.m. to 5 p.m. It is further contended that the Calcutta District Forum is a court and the proceedings of the Forum are the judicial proceedings and the Members of the Forum are discharging the judicial duties under the Act referred to above. It is further stated that the application of respondent No. 3 was entertained on 20th December, 1990 when show cause notice was issued but the complaint of threat to respondent No. 3 compelled the defendant to issue warrant of arrest against the writ petitioners. The petitioners disobeyed the orders of the defendant as they did not prefer any appeal against the order but a writ petition was filed making false allegation against the defendant and attempted to scandalise the Forum and shake the confidence of the people in it. The false statements made by the petitioners have undermined the dignity of the Forum as well as of this defendant and it is an act of perjury and contempt of High Court and the Calcutta District Forum. It is stated in the Affidavit that the number of the petitioner's case is C.D.F. Case No. 920(A) of 1990 and not 900 of 1990. It is denied that any abuse of the authority and the position of the President of the Forum as alleged has been done by the respondent. It is stated in paragraph 25 of the Affidavit-in-Opposition wherein the defendant No. 2 stated that he can act alone when other Members are absent and can pass orders. The further defence is that Section 27 of the Act cannot be struck down as unconstitutional. The entire allegation is mala fide and the writ petition is liable to be set aside.

5. The respondent No. 3, Mahangi Lal Barmecha, in his Affidavit-in-Opposition first of all stated that he has been served with a copy of the writ petition and read over the same and explained to him and understood the contents and purports thereof (but the fact is that the registered cover containing the writ application returned back to the learned Advocate-on-Record of the petitioner Md. Nizamudding with the remark "not available" and has been filed along with the Affidavit-of-Service and is preserved in the record). It is stated that there is no Managing Committee of the School and the Senior Advocate Mr. Mukul Prokash Banerji has been appointed by the High Court as Special Officer/Administrator of the School. The line of defence taken by the respondent No. 2 is repeated in this affidavit as well the fact that the dispute is between the consumers, the teachers and their services of teaching and the dispute comes within the purview, of the Consumer Protection Act. It is stated that as his daughter takes private tuition from a teacher other than the petitioners the petitioner No. 2 on several occasions repeatedly asked the daughter Ekta to engage her as "private tutor. But when this was not done it displeased the petitioner and this resulted in the poor performance of his daughter and the answer scripts were not properly assessed and evaluated. It is further alleged by the respondent No. 3 that her daughter was deliberately made to fail in the

examination and was not sent up for Madhyamik Examination. When the result of his daughter was communicated to the respondent No. 3 on 18th December, 1990 he met the petitioners on the next day and asked them to send her up for Madhyamik Examination but they refused and thereafter he filed the application before the Calcutta District Forum. It is denied that he met the petitioners on 20th December, 1990. It is not a fact that the respondent No. 2 is personally known to him or that he went to the petitioners. The presenting of visiting card of the respondent No. 2 is wholly false and it is for the respondent No. 2 to say and comment on the genuineness of the said card. At the same time it is alleged that many students who did not do well have been sent up by the petitioners and discrimination has been done with his daughter. When the petitioners threatened this respondent he made a complaint to the President of the Calcutta District Forum on 27th December, 1990. The threat was by Mr. Malhotra who claims to be the Secretary of the School and he alleged that they are influential persons and Mr. Banerji the Special Officer is a Senior Advocate of the Calcutta High Court and if the case is not withdrawn they would get the proceeding. On such threat this defendant made an application and the President of the Forum issued the warrant of arrest. It is once more stated that Educational Service is covered by the Consumer Protection Act and that the allegation against the respondent No. 2 for taking personal interest is wholly false. The respondent No. 3 then went on defending the President of the Forum and his function as well as his jurisdiction in passing ad interim order. It is further stated that Section 27 of the Act is intra vires and stands the test et Articles 21 and 22 of the Constitution. Any order of the Calcutta District Forum is appealable within the provision "of the Act and the remedy is speedy, inexpensive and adequate. Finally it is prayed that the writ petition is harrasing in nature and be dismissed with costs.

6. Mr. Banerji, the learned Advocate appearing for the petitioners, made extensive argument on behalf of his clients challenging the right of the Calcutta District Forum and the President of the Forum to entertain the complaint lodged by the respondent No. 3 against the petitioners and the order passed by the respondent No. 2, the President, directing the petitioners to appear in person and the subsequent order issued by him of warrant of arrest against the petitioners. He went into the facts of the case which have already been dealt with hereinbefore. The learned Advocate also dealt with the fact whether the respondent No. 2 personally met the Headmistress on 20th December, 1990. A dispute has also been raised as stated hereinbefore whether the C.D.F. Case was numbered 900 of 1990 or 920(A) of 1990 and it is argued that originally the case was numbered 900 of 1990 and afterwards it was penned through and renumbered 920 of 1990 and thereafter again the number was changed to 920(A) of 1990. It is argued that there is a separate sheet lying in the file but not order sheet in the recoid and that the warrant of arrest alleged to have been issued on 27th December, 1990 but returned with the acknowledgement refused by endorsement dated 28th December, 1990. The learned Advocate lor the petitioners has formulated a few points for adjudication by the Court, namely, (a)

Whether Consumer Protection Act, 1986 has got any application relating to the complaint lodged and whether the District Forum has got jurisdiction to entertain a petition for adjudication against the teachers who impart, education; (b) Whether the District Forum and/ or its President can issue warrant of arrest for non-appearance of the delendants on the date of hearing; (c) Whether District Forum can at all function when there is vacancy in the post of President as well as of another member out of the three and whether when there is only a lone member can the DIM rid 1 orum function at all and the orders pa-sed by the lone member be valid and legal; (d) Whether a "member can describe himself as President of the Forum in the absence of the President or while a vacancy exists in the post; if not, whether the order passed by such President is an order of the District Forum and whether the President of the District Forum can pass any order relating to the dispute instead of the District Forum or can issue ad interim order and issue warrant of arrest; (e) Whether the District Forum can be termed as Court within the meaning of Section 13(5) of the Consumer Protection Act save and except for the purposes mentioned therein; (f) Whether High Court has got any jurisdiction in its writ jurisdiction to interfere with any order passed by the District Forum when there is an alternative remedy provided under Sections 15, 19 and 23 of the Consumer Protection Act; (g) Whether any order passed by any member of the District Forum is immune from challenge under Sec. 28 of the Consumer Protection Act; (h) Whether the provision contemplated under Sec. 14(2) of the Consumer Protection Act that every order shall be signed by all the members can be made nugatory by Rule 5(5) of the W. B. Consumer Protection Rules and thereby the Rule can override the Act; (i) Whether a statutory authority can only act in the way it is specifically mentioned in the Act and should be deemed to have been prohibited to act otherwise than what is specified and whether the District Forum or its member can issue ad interim order or issue warrant of arrest; (j) Whether Article 226 of the Constitution of India is the proper remedy or Article 227 when the challenge is that the authority has got no jurisdiction to entertain and try the proceeding as the subject matter is alien to it; and (k) Whether Shyam Sundar Gupta as President should have been made a party.

7. With regard to point (a) the learned Advocate cited AIR 198S SC 1700 ; (1983) 2 Lab L.J. 491 (Miss. A. Sundaramal v. Government of Goa, Daman and Diu) as to the definition of teachers and their work. He further refers to Sec. 2(c), (h) and (1) of the West Bengal Board of Secondary Education Act, 1963 vis avis Sec. 2(o) of the Consumer Protection Act, 1986. He farther argued that the Rule 28(8) of the Management of Recognised Non-Government Insitutions (Aided and Unaided) Rules, 1969 can only be applied in case of teachers and not the Consumer Protection Act and in this connection he cited 199 (1) CHN 322 (Satyanarayan Tantia v. State of West Bengal). He further submitted that the definition of "service" as pointed out in Sec. 2(o) read with Sees. 2(c)(iii) with 2(d)(ii) and 2(g) of the Act of 1986 indicates apparently that the relationship between teachers and students of an educational institution is not a service on hire and

cannot come under the purview of Sec. 2(e) of the Act as the service of the petitioners was never hired by respondent No. 3. With regard to point (b) the submission of the learned Advocate is that under Sec. 13(4) of the C. P. Act the Forum has been authorised to exercise the power under CPC only for the limited purpose from sub-clause (i) to (vi) of Sec. 13(4) and this relates only to Sec. 30 of C. P.C. that if a person fails to appear in Court in spite of service of summons, a warrant may be issued for this arrest but under Sec. 27 of the C.P.C. to ascertain whether one would contest or not, the question of issuing any warrant of arrest under Sec. 32 of the C.P.C. does not arise in case of non-appearance Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, . It is argued that under Sec. 27 of the C.P.C. read with Sec. 13(4)(i) of the C.P. Act direction upon the petitioners to appear in person or by a pleader to show cause was made and the petitioners appeared through a lawyer and prayed for time, hence (he issuing of warrant of arrest was without jurisdiction and even technically it was wrong because only summons in case No. 900 of 1990 was issued and not in case No.920(A) of 1990. With regard to point (c) the learned Advocate submitted that Sec. 10 of C.P. Act provides that the Forum should consist of one President and two Members to be nominated by the State Government and under Sec. 14(2) of the Act every order made by the District Forum should be signed by all the Members constituting it but Rule 5(5) of the West Bengal Consumer Protection Rules, 1987 provides that no act or proceedings of the District Forum should be invalid by reason only of the existence of any vacancy among its Members. It is the most emphatic submission of Mr. Banerji that Rule 5(5) of the Rules of 1987 overrides the Act and as a matter of law the Rule cannot override the Act and must yield to the Statute. In this connection he cited The Central Bank of India Vs. Their Workmen, and a Full Bench decision reported in Chandra Kumar Sah and Another Vs. The District Judge and Others, It is further submitted very pertinently that under Rule 3(7) of the Rules if there is a vacancy in the office of the President, the seniormost Member in order of appointment shall function as President but when there is a lone member only out of three then the District Forum cannot function. It is the further contention of the learned Advocate that if two members function in the District Forum the seniormost member can discharge the function of President but cannot describe himself as President. It is argued by Mr. Banerji that since respondent No. 2 has admitted through his learned Advocate during argument that there is neither the President nor any other member and he alone is functioning as District Forum as such the District Forum is non-existing and not functioning at all and all the orders passed by respondent No. 2 alone are without jurisdiction. With regard to point (d) it is contended that according to Rule 3(7) of the Rules of 1987 if the post of President is vacant the next seniormost member can discharge the function of the President, it is submitted that discharging the function of President and to act as President are two different things. Under Sec. 10 of the Act President is nominated and during his absence there is a vacancy in the post of President as contemplated in Rule 3(7) and if the President is absent due to illness Rule 3(8) provides the seniormost member to discharge the function of President. In his

affidavit in opposition respondent No. 2 has admitted that he is a member of the Forum and he is acting as President. Mr. Banerji puts an example, for instance, that if in the High Court the Hon"ble the Chief Justice is absent on any working day without taking leave, the next seniormost Judge discharges the function of the Chief Justice but the seniormost Judge while so discharging the function cannot describe himself as the Chief Justice. According to Sec. 3(1) and (2) provides the District Forum to act and issue orders for service, granting time and giving decision of the District Forum as provided in Sec. 13(4). Sec. 14(2) postulates that every order passed by the District Forum shall be signed by the three members and there is no scope in the statute to pass any order by the President. Further under Rule 5(4) the President has been given the power to convene the sitting of the District Forum, no such thing was done in the instant case. With regard to point (e) it is contended that Sec. 13(5) of the Act provides that every proceeding before the District Forum shall be deemed to be judicial proceeding within the meaning of Sees. 193 and 228 of the Indian Penal Code which means that any false evidence given before the District Forum can be inflicted by punishment and also can inflict punishment if anybody insults or causes interruption to a public servant in discharging his duty. It is contended that for this limited purpose it is a Court and not otherwise. It is further contended that Sec. 13(4) of the Act provides when the Forum would be deemed to be a Court and there is no necessity to look in *Brajnandan Sinha Vs. Jyoti Narain*, With regard to point (f) it is submitted that an aggrieved party by the order of the District Forum can prefer an appeal from the said order to State Commission under the Act but if the Forum has no jurisdiction to entertain and pass an order then in such case appeal has no remedy. It is further argued that if the appeal is filed it would mean to submit to the jurisdiction of the C.P. Act and the State Commission can entertain a complaint where the value of the goods of services exceeds Rs. 1 lakh and from the State Commission the appeal lies to National Commission for claim for more than Rs. 1 lakh but not against the decision made on appeal from the District Forum. Similarly an appeal lies from the National Commission to the Hon"ble Supreme Court. It is submitted that if there is specific remedy then the High Court can interfere in writ jurisdiction such as jurisdictional error and the learned Advocate cited 1984 Cri LJ 122 (*Sri Dayaleswar Mahadeb Jew v. Junior Land Reforms Officer, Balurghata*); *Ram and Shyam Company Vs. State of Haryana and Others*,); and *Umaji Keshao Meshram and Others Vs. Radhikabai and Another*, With regard to point (g) it is contended by the learned Advocate that protection of immunity under Sec. 28 of the Act is cited for the members of the District Forum etc. and no suit, prosecution or other legal proceedings would lie against the members for executing any order made by it or in respect of anything which is in good faith done or intended to be done by such member. It is submitted that respondent No. 2 passed order as President^" the District Forum and Sec. 28 of the Act has got no application as it speaks of members and officers. Further writ proceeding is neither a suit nor a legal proceeding as contemplated under Sec. 28 and therefore not a bar under the said section. With regard to point (h) it is

submitted that there is a conflict between Sec. 14(2) of the Act and Rule 5(5) of the Rules of 1987. Sec. 14(2) contemplates that every order made by the District Forum should be signed by all the members constituting it while Rule 5(5) provides that no act or proceeding of the Forum shall be invalid by reason only of the existence of any vacancy among its members or any defect in its constitution. It is submitted that the said Rule 5(5) overrides Sec. 14(2) which it cannot and in this connection two decisions have been cited, namely *The Central Bank of India Vs. Their Workmen*, and the Full Bench decision reported in *Chandra Kumar Sah and Another Vs. The District Judge and Others*, While Rule 5(5) presupposes vacancy of one member, there could not be existence of the Forum in terms of Sec. 10 of the Act. With regard to point (i) the learned Advocate placed different sections to bring home his points regarding the procedure of filing the complaint and act thereafter in accordance with the Act. It is submitted that as no power under the Statute or the Rules has been granted to the authority under the Act to grant interim orders it should be presumed that the District Forum has been prohibited from passing any interim order and in this connection *Narendra Nath Chakravarty Vs. Corporation of Calcutta and Others*, is cited wherein it is stated that "where the statute does not expressly or impliedly authorise the doing of a particular thing, it must be taken to have been prohibited." The learned Advocate submitted that under S. 4(6) of the Arbitration Act read with the Second Schedule Item No. 4 the Statute itself provided for granting interim order but although under S. 41(a) of the Arbitration Act it has been provided that C.P. Act applies in arbitration proceeding yet it was held in *H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others*, that in the arbitration proceeding the procedural Rules of the CPC apply and no injunction can be issued. The learned Advocate also referred in this connection *Halsbury's Laws of England*, Third Edition, Volume 9, page 62, paragraph 129. It is contended on the basis of the above submission that the orders passed by the President of the District Forum on 20th December, 1990 and 27th December, 1990 were out of jurisdiction. With regard to point (j) it is emphasised by citing a large number of decisions that under Art. 226 of the Constitution the High Court has ample power to quash an order of any Tribunal or authority and the power of judicial supervision under Art. 227 are not greater than Art. 226. In this connection the learned Advocate cited (i) *The Maharashtra State Road Transport Corporation Vs. Babu Goverdhan Regular Motor Service and Others*, ; (ii) *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, ; (iii) *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, (iv) *Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others*, and (v) *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, With regard to point (k) it is submitted that the President alone has no power to pass any order according to S. 10 of the Act and the orders passed by the respondent No. 2 have been rightly challenged in the writ jurisdiction because the President of the Forum acted contrary to law in excess to his jurisdiction.

8. While concluding the argument Mr. Banerji referred to the submissions made

on behalf of the respondent No. 2 that by the pleadings the District Forum has been scandalised and thereby the writ petitioners and their lawyers have committed contempt of Court and thereafter he went on scanning the decisions cited by the learned Advocate on behalf of the respondent No. 2, namely M.Y. Shareef and Another Vs. The Hon'ble Judges of The High Court of Nagpur and Others, ; Rachapudi Subba Rao Vs. Advocate General, Andhra Pradesh, ; L.D. Jaikwal Vs. State of U.P., and Perspective Publications (P) Ltd. and Another Vs. State of Maharashtra, The learned Advocate for the petitioners elaborately submitted that not a single decision is applicable to the present case. It is further contended on behalf of the petitioners that the affidavit affirmed by the Notary Public and filed on behalf of the respondent No. 2 on the last date of hearing before the High Court cannot be relied upon in view of the decision in Smt. Sudebi Sundari Mondal Vs. State of West Bengal and Others, Mr. Banerji did not press prayer (d) of the writ petition relating to S. 27 of the Act.

9. On behalf of the respondent No. 2, Mr. Shyam Sunder Gupta, several Counsel appeared including Mr. Arun Prokash Chat-terjee, Mr. U. C. Ukil and Mr. M. M. Verma but the main argument was made by Mr. Verma. Mr. Verma's first submission was that the writ petition is not maintainable because under S. 15 of the Consumer Protection Act, 1986 any order of the Calcutta District Forum is appealable before the State Commission and the Commission is to dispose of the appeal within three months under Rule 8(8) of the Rules of 1987. Only one adjournment is permissible and no Court-fee is charged for preferring an appeal. The remedy of appeal according to Mr. Verma is highly inexpensive and speedy as well as adequate and because of this provision the writ application is not maintainable because of the alternative remedy. It is further argued that under S. 28 of the Act Mr. Gupta cannot be made a respondent as the Statute gives protection to any member of the Forum being proceeded against for passing any order of acting as Member of the Forum. In the submission of the learned Advocate the writ petitioners have no right to implead Mr. Gupta as partyrespondent in his personal capacity. It is further contended that the writ jurisdiction is centred round the fact that the Calcutta District Forum has exceeded its jurisdiction. If so, the learned Counsel submitted, then Art. 227 of the Constitution could be invoked and not Art. 226. So far the allegation against Mr. Gupta is concerned of his visiting the school premises on 20th December, 1990 it has been submitted by Mr. Verma that the writ petition on the point has been withdrawn indirectly by the Affidavit-in-Reply. It is argued that the Cause List of the Court of Mr. Gupta showing the number of the cases to be heard by him on 20th December, 1990 amply demonstrated that he was present in his Court room on that particular date from 10.30 a.m. to 5 p.m. Further affidavits from the Advocates who appeared before Mr. Gupta on 20th December, 1990 demonstrate that he could not leave the Court before 5 p.m. It is further stated that on 20th December, 1990 the school was closed and as such the allegation of Mr. Gupta visiting the school does not arise.

10. Mr. Verma argued very much on the point that Education is a service

amenable to the jurisdiction of the Consumer Protection Act, 1986. According to him it is clear that the students pay tuition fees for their education in Bhawani Arya Vidya Mandir for the services of the tuition render by the teachers of the school towards the students and the teachers get salary for their services and a part of their salary is being paid from the fund collected by the school authority from the students by way of Tuition Fees. This act comes within the meaning Consumer, the student becomes a Consumer of the Services of the Teachers by paying Tuition Fees. The definition of Consumer and Service are to be read harmoniously with S. 2(d)(ii) and 2(o) of the Act. It is stated by the learned Advocate that the enumerations of facilities in S. 2(o) of the Act is not exhausted but illustrative and the last words of (o) removes every doubt as to which service is not covered under the Act. It is argued that it means that all the services of any nature and description and which are not free are the services within the meaning of C.P. Act. This is the main contention of the petitioners so far as the scope of Education, Service and Consumer are concerned which according to the Court is the main point involved in the case.

11. The learned counsel for the respondent No. 2 Mr. Gupta made a plea that allegations against his client are totally false and as such the writ petitioners are liable to be punished for perjury and contempt of Court. He elucidated that after considering the statement in the writ petition and the Affidavit-in-Reply there remains no doubt that respondent No. 2 was maligned and it affected the dignity of the Forum. Making the reference to the Supreme Court he submitted that the litigant and his lawyers are liable to be punished because making false affidavit to mislead the Court amounts to perjury and contempt. By making false statements the petitioners succeeded in getting an order from the Court against Mr. Gupta to appear personally in the Court to answer the allegation and this came out in newspapers and had wide publicity whereas ultimately it is a fact that Mr. Gupta did not go to the school and did not commit the action as alleged and in this connection he cited M.Y. Shareef and Another Vs. The Hon'ble Judges of The High Court of Nagpur and Others, ; Shri Baradakanta Mishra Vs. The Registrar of Orissa High Court and Another, ; Rachapudi Subba Rao Vs. Advocate General, Andhra Pradesh, and L.D. Jaikwal Vs. State of U.P., While concluding Mr. Verma confidently submitted that as all the allegations against Mr. Gupta were found false and scandalising in nature and to malign the Calcutta District Forum, it is substantially clear that the intention of the writ petitioners was mala fide and was meant only for the purpose of denying justice to the daughter of the respondent No. 3 and as such the writ petition must be dismissed with exemplary costs.

12. Mr. Roy, the learned Advocate appearing for respondent No. 3, in his argument submitted that there is no violation of fundamental rights or legal right and as such Art. 226 of the Constitution is not at all attracted but only Art. 227 and further submitted that appeal under C.P. Act is the only remedy for getting a relief against any order of the Calcutta District Forum and the High Court cannot interfere to decide the factual points in writ jurisdiction. Mr. Roy very

boldly asserted that Education is a Marketable Commodity, rather Purchase-able Commodity and referred to Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, He brings home the point that Fee plus Education is but Service and Fee is vital part of the service of Education rendered by a teacher and thereby Fees for Education paid to the teacher brings Education within the purview of Consumer and thereby within the four walls of C.P. Act. In this connection he cited Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, He referred to a Circular of the Education Department of the Government of West Bengal whereby Tuition Fees are given straight to the teaching staff by the State Government and submitted that the very purpose of giving the Tuition Fees to the teachers as salary means to render service of teaching. In connection with the meaning of salary he referred to Black's Law Dictionary, 5th Edition and also cited City Corporation of Calicut Vs. Thachambalath Sadasivan and Others, and The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, Mr. Roy concluded that the writ petition cannot challenge the jurisdiction of the Calcutta District Forum or the Consumer Protection Act, 1986 and the Education comes within the meaning of Consumer as defined under the said Act and as such the writ does not lie and must be dismissed.

13. I have described in detail the facts, the defence, and the submissions made on behalf of the writ petitioners, and the respondents Nos. 2 and 3. The Calcutta District Forum, the State and the Union of India though appeared but did not make any submission. I have considered the matter giving my considerate thought to the various points raised by the parties. First of all, it is to be decided by this Court whether the Consumer Protection Act, 1986 is applicable to Education and also whether Education comes within the purview of the Act considering the definitions of Student, Teacher and Service. So far as Consumer and Service are concerned, the definition of these two words are given in the Act itself. u/s 2(d) "consumer" means "any person who,

(i) "buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person."

Now let us see the service how it stands defined in the Act. Under S. 2(o) the "service" has been defined as under:

" "service" means service of any description which is made available to potential user and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any service free of charge or under a contract of personal service."

It must be noted in this connection that as the term service has been defined it means service of any description which is made available to potential users but certainly does not include a personal service even under a contract. The definition of service under S. 2(r) in the Monopolies and Restrictive Trade Practices Act, 1969 is identical to the definition as given in the present Act. The word "includes" at the beginning of the definition of service must be construed in its proper perspective and must not be enlarged absurdly. This word has already been confined within sub-sec, (o) of S. 2 and its wings cannot forcibly be enlarged beyond the scope of the statute.

14. Education is not only the instructions confined to schools and colleges but education includes moral and intellectual training as well as uplifting of mental and moral faculties. It is not only confined to improvement and cultivation of mind but also of cultivation of one's religion and moral sentiments as well as physical faculties. According to Stroud, Education means training of the young in general learning, not teaching for a business or a profession (Vol. 2, 4th Edition). Halsbury states that any complaint against any school if served upon a person he may appeal from it by referring the plaint to an independent school tribunals.

15. Consumer has been described in Black's Law Dictionary as one who uses economic goods and so diminishes or destroys their utilities (4th Edition, 1951). Stroud has not linked "hire" with education, teacher or student.

16. Chamber's 20th Century Dictionary describes Teacher as one whose profession is, or whose talent is the ability to impart knowledge, practical skill, or understanding (New Edition, Reprinted 1986). More specified is the description of Teacher given in the Shorter Oxford English Dictionary on Historical Principles as one who or that teachers or instructs; one whose function is to give instruction; especially in a school (Reprinted 1964). The definition of Teacher may be referred to in the Benaras Hindu University Act, 1915 and the Aligarh Muslim University Act, 1920 but more precise is the definition of Teacher in S. 3(h) of Viswa Bharati University Act, 1951 where Teachers mean such persons as are engaged in imparting and guiding students in practical work or otherwise in the University and in the institutions under its control, and includes professors, readers, lecturers, demonstrators and other grades of teachers appointed by the University." This definition is the general definition and the functioning of teachers as defined under this Act includes the functioning of a teacher in any school or educational institution.

17. Student means one who studies or one who devotes to books or to any study

or enrolled for a course of instruction in any School, College or University (Chamber's 20th Century Dictionary). Similar is the definition of student given in the Shorter Oxford English Dictionary (supra).

18. When the question of Consumer comes it is also necessary to see what is the meaning of Seller. Seller has not been defined under the Consumer Protection Act. Seller means one who sells anything; the party who transfers property in the contract of sale. The correlative is "buyer" or "purchaser". Though these terms are not inapplicable to the persons concerned in a transfer of real estate, it is more customary to use "vendor" and "purchaser", or "vendee" in that case (Black's, supra). The above meaning contains the legal interpretation of the word Seller.

19. The first and vital point is that whether Education comes within the purview of Consumer Protection Act, 1986. From the definition of Consumer and Service as given hereinbefore it is abundantly clear that Education does not come under the purview of this Act. The service rendered by a teacher is not a kind of service as described in S. 2(o) of the Act. It does not come under the purview of banking, financing, insurance, transport, processing, supply of electricity or other energy, board or lodging or both, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any service of free of charges or under a contract of personal service. This definition of service is very widely clear and it must be noted that there is no contract of personal service so far as the teaching of a student in an educational institution is concerned, nor the contract as mentioned in S. 2(o) comes in any way under S. 2 of the Contract Act. In AIR 1988 SC 1700 (supra) the Supreme Court has very expressly spelt out "that imparting of education is in the nature of a mission or a noble vocation. A teacher educates children, he moulds their character, builds up their personality and makes them fit to become a responsible citizen. Children grow under the care of teachers the clerical work, if any they may do, is only incidental to their principal work of teaching." The definition of service under S. 2(o) if read with Ss. 2(c)(iii) and 2(d)(ii) and 2(g) of the Act, it becomes apparent that the relationship of teacher and student of an educational institution is not a service on hire because student is not such a consumer which is linked any way with the buyer of any economic goods and hire has not been linked with education, teacher and student. The contract as referred to in S. 2(g) certainly is not the contract as defined in S. 2(o) because the very conception of the contract cannot be forced into the Consumer Protection Act so far as education, teacher and student are concerned. It has been very expressly decided in 1991 (I) CLJ 226 : 1991 (1) CHN 322 (supra) that the West Bengal Board of Secondary Education Act, 1963 and the Rules and Regulations framed thereunder are quite comprehensive and completely statutory in nature and independent of any other Act. Any complaint on the part of any member of the teaching staff of a secondary educational institution can be effectively dealt with under the Management of Recognised Non-Government Institutions (Aided and Unaided) Rules, 1969 without referring it to any other authority.

20. From the above discussion it is crystal clear that Education does not come within the scope of Consumer Protection Act, 1986 and the Calcutta District Forum had no jurisdiction to entertain the complaint of the respondent No. 3 and all the orders passed on the complaint by the Calcutta District Forum are illegal and without jurisdiction.

21. Now the point arises as to the Constitution of the District Forum under S. 10 of the Act. The composition of the District Forum should be as follows:--

"(i) Each District Forum shall consist of-

(a) a person who is, or has been, or is qualified to be a District Judge to be nominated by the Government, to be its President;

(b) a person of eminence in the field of education, trade or commerce;

(c) a lady social worker."

Section 14 relates to the finding of the District Forum and sub-sec. (2) of the said section states: "Every order made by the District Forum under sub-sec. (1) shall be signed by all the members constituting it and, if there is any difference of opinion, the order of the majority of the members constituting it shall be the order of the District Forum." Rule 5(10) of the West Bengal Consumer Protection Rules, 1987 says that "the orders of the District Forum shall be signed and dated by the members of the District Forum and shall be communicated to the parties free of charge" whereas Rule 5(5) says that "No Act or proceedings of the District Forum shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in its Constitution." Here Rule 5(5) is contradictory to Rule 5(10) and also Rule 5(5) overrides S. 14 of the Act which is highly questionable. In this connection reference may be made of the Full Bench decision of Allahabad High Court reported in Chandra Kumar Sah and Another Vs. The District Judge and Others, where it has been expressly made clear that the rule making authority cannot enlarge legislatively its field. If it goes beyond what the section contemplates the rule must yield to the statute. A compliance with the laying requirements does not confer any validity to the subordinate legislation if it is in excess of the power conferred by the enabling Act. In other words a subordinate law cannot substantially modify the scheme of the Act. The Supreme Court in the Central Bank of India v. Their Workmen (supra) very clearly held that a statutory rule cannot enlarge the meaning of the section; if a rule goes beyond what the section contemplates, the rule must yield to the statute. The same principle was reiterated in the case of Hukum Chand v. Union of India, reported in Hukum Chand etc. Vs. Union of India (UOI) and Others, Rule 3(7) states that "Where any vacancy occurs in the office of the President of the District Forum, the senior-most (in order of appointment) member of the, District Forum, holding office for the time being, shall discharge the functions of the President until a person appointed to fill such vacancy assumes the office of the President of the District Forum." This Rule presupposes the vacancy in the office of the President when according to S. 10 of the Act two other members are

existing and among the two the seniormost member would hold the office of President for the time being and shall discharge its functions until appointment to fill such vacancy. Also it is clear that the member discharging the functions of the President cannot describe himself as the President of the Forum because no such provision is found either in the Act or in the Rules. It has been very frankly admitted by the learned Advocate of Mr. Gupta, respondent No. 2, that at the material time when the orders were passed in the instant case there was neither the President nor any other member of the District Fourm but the respondent No. 2 alone was functioning as constituting the District Forum. This way he was describing himself as the President of the Calcutta. District Forum contrary to S. 10 which contemplates the presence of more than one member.

22. From the above discussion it is clear that Rule 5(5) of the West Bengal Consumer Protection Rules, 1987 overrides and enlarges its scope over the statute and is absolutely contrary to Rule 5(10) and as such Rule 5(5) is bad and illegal in law. Further Mr. Shyam Sundar Gupta has no authority to act as President when he is the sole member of the Calcutta District Forum in the light of the discussion made hereinbefore. The Court repeatedly asked Mr. Verma, the learned Advocate of the petitioner, to produce any notification or paper by which it could be ascertained that Mr. Gupta could describe himself as the President and pass orders as a one member Calcutta District Forum consisting only of the President but Mr. Verma miserably failed to produce any such document or paper. It must be borne in mind that under S. 10(1)(a) the President of the District Forum shall be nominated by the State Government; and, accordingly, when the seniormost member of the District Forum discharges the functions of the President he or she must have a notification to that effect by the State Government. Under R. 5(4) "The sitting of the District Forum, as and when necessary, shall be convened by the President. "When there is no President according to the Act or any member to discharge the function of the President as said hereinbefore then there was no sitting of the Calcutta District Forum in the eye of law and any order passed by such a District Forum is but a nullity. As such Mr. Shyam Sundar Gupta has no authority to describe himself as the President of the Calcutta District Forum nor he can pass according to the Act and the Rules any order relating to Calcutta District Forum and all the orders passed by him singly as "President" are invalid, illegal and inoperative in general. In this connection reference may be made of a recent decision of my learned Brother Nirendra Krishna Mitra, J., reported in 1991 (2) CRN 131 (In re: State Transport Authority).

23. It has been argued on behalf of the respondents that an application under Art. 226 of the constitution does not lie but at best Art. 227 can be invoked. It is further submitted that any person aggrieved by any order of the District Forum may prefer an appeal to the State Commission under S. 15 of the Act within the prescribed period. But it must be stated in all fairness that if the order of the Forum goes wrong and is made palpably without jurisdiction then certainly a citizen has the right to come under the protection of Art. 226 of the Constitution.

The argument of respondent No. 2 is not tenable. In the case of *Ram and Shyam Company v. State of Haryana* (supra) the Supreme Court specifically made it clear as under: "Where the order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it, would lie to the High Court under Art. 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer of the State Government. An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits." This point is decided in favour of the petitioners.

24. It is clear that respondent No. 2 as President of the Calcutta District Forum conducted himself contrary to law as laid down in the Act and exercised power in excess of his jurisdiction. The Supreme Court in the case of *Cooverjee B. Bharucha* (supra) has already held that it is open to one under Art. 226 to approach the High Court for a "mandamus" if the officers concerned have conducted themselves not in accordance with law or if they have acted in excess of their jurisdiction.

25. It is argued on behalf of the respondent No. 2 that he should not have been impleaded as a respondent because he gets the protection of S. 28 of the Consumer Protection Act, 1986. Whatever may be the reason of the petitioners to implead Mr. Gupta as party-respondent in his personal capacity, it is established that he in his personal capacity exploited the power of the Calcutta District Forum which was not vested in him according to law and have passed haphazard orders of far-reaching consequences unilaterally describing himself as President of the Forum. His impleading in the petition as a party-respondent was not unjustified. The protection under S. 28 of the Act is a totally different thing and protects if any act is performed in good faith under the Act or the Rules but Mr. Gupta traversed much beyond his boundaries knowing full well that he was committing excesses.

26. The question whether he has gone to the school or not is no more important in the light of the discussion hereinbefore made as the main points which arose in the writ petition have already been answered hereinbefore. So far as the story of the visiting card is concerned T must state that Mr. Gupta did deny with full force that it was not his visiting card. One wonders why anybody shall make out Mr. Gupta's card with so many designations including one as "Member Judge, Cal. Dist. Forum," with official Indian insignia. Even a layman would agree that the petitioners, both ladies, have not the sufficient capacity to make out such a visiting card with accurate details of Mr. Gupta. On denial by Mr. Gupta in the Court that it was not his card, the Court asked him to produce his visiting card but he failed and expressed inability. When the Court directed Mr. Gupta to produce the visiting card by 4.15 p.m. the same day then also his learned Advocate expressed inability. I wonder why a man of the status and reputation of Mr. Gupta who once was the Mayor of Calcutta and a Member of Parliament should not have with him his visiting card, more so when he is describing himself

of his own as the President of the Calcutta District Forum. This fact which took place in the Court room has just been placed on record.

27. The submission of Mr. Verma that Mr. Gupta has been scandalised and the publication of the news in connection with this case in the newspapers hurt his reputation do not appear to me of substance because if the High Court directs any person to appear in the Court it does not put any stigma on one's reputation or lower one's esteem in the eye of public unless and until the finding of the High Court goes against him and he is indicted on that count. As the two vital points have already been discussed on which hung the fortune of this case on merit, I do not find that it is necessary by this Court to make unnecessary exercise in futility in dealing with other points raised during the arguments from both the sides save and except to clarify that the learned Advocates for the petitioners did not say anything which constituted the contempt of Court. They were simply placing the case of their clients vigorously; rather less vigorously than Mr. Verma for his client. Whether there was any contempt of Court or not is a matter to be decided by the trial Court and I say "no". So far as the controversy relating to the number of this case in the Calcutta District Forum is concerned, it was submitted by Mr. Verma that due to circumstances, as explained by him, the mistake did occur and then rectified. The correct number of the case is CDF Case No. 920(A) of 1990. This is accepted.

28. In that view of the matter, (1) I hold that Education does not come within the purview of the Consumer Protection Act, 1986 and no District Forum under the Act can entertain any complaint relating to education, and as such the proceeding in CDF Case No. 20(A) of 1990 between the petitioners and the respondent No. 3 in the Calcutta District Forum is hereby quashed. (2) I further hold that Mr. Shyam Sundar Gupta, respondent No. 2, has no authority to describe himself as the President of the Calcutta District Forum and all the orders passed by Mr. Gupta in his capacity as "President" of the Calcutta District Forum are illegal, invalid and inoperative in general. (3) This Court further holds that the Calcutta District Forum does not exist with a single member according to the Act and cannot hold its sitting. (4) I also hold that Rule 5(5) of the West Bengal Consumer Protection Rules, 1987 overrides S. 14 of the Consumer Protection Act, 1986 and as such the said Rule 5(5) is bad, illegal and inoperative. (5) The Chief Secretary to the Government of West Bengal is directed to take immediate action to constitute the Calcutta District Forum in accordance with the Consumer Protection Act, 1986 otherwise it will cause suffering to the general public. The Constitution of the Calcutta District Forum must be completed by 31st October, 1991.

29. The writ petition succeeds and is allowed. There will be no order as to costs.

30. Let the record of CDF Case No. 920 of 1990 (Shafi Nishat v. C.M.C.) be sent down to the Calcutta District Forum.

31. The Registrar, Appellate Side, is directed to forward a copy of this judgment

to the Chief Secretary to the Government of West Bengal without delay by special messenger drawing the Chief Secretary's attention to the operative portion of the judgment.

32. Let xerox copy of the judgment be made available to the parties on usual undertaking and upon compliance of necessary formalities.

33. Petition allowed.