

(2011) 09 CAL CK 0079

In the Calcutta High Court

Case No : F.M.A. 490 of 2011; M.A.T. 567 of 2010; C.A.N. 9554 of 2010

State of West Bengal

APPELLANT

Vs

Swami Sadananda, Secretary, Sri Ramkrishna Ashram Junior
Basic School

RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Bengal (Rural) Primary Education Act, 1930 — Section 1, 105(3), 105(4), 106(3), 54
Bengal General Clauses Act, 1899 — Section 8, 8A
Civil Procedure Code, 1908 (CPC) — Section 10
Constitution of India, 1950 — Article 13, 26, 29
West Bengal Board of Secondary Education Act, 1963 — Section 1, 45

Citation : (2011) 5 CHN 735

Hon'ble Judges : Syamal Kanti Chakrabarti, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Tarun Roy, Manisha Mukherjee, Manash Ghosh, Arijit Banerjee, for
the Appellant; Asok De . Himadri Barua for respondent No. 1., for the Respondent

Final Decision : Dismissed

Judgement

K.J. Sengupta, J:

1. The above appeal is directed against the judgment and order of the learned Single Judge dated 24th December. 2009 passed in Writ Petition No, 13117 (W) of 2007. By the judgment and order impugned the learned Trial Judge directed to approve the members of the Staff who have already been appointed against the sanctioned post. The short fact of this case leading to filing the writ petition and preferring appeal is as follows:- The first respondent is the Secretary of Sri Ramkrishna Ashram Junior Basic School P.O. Nimpith Ashram, Joynagar in the District of South 24 Parganas. The said Sri Ramkrishna Ashram, Nimpith is the registered society, and within its object clause of the bylaws of the society the said Ashram has established several schools at remote villages of Sundarban area for educating children belonging to Scheduled Caste, Scheduled Tribes community and also other backward classes. This area is widely known to be the

most backward area as such this avowed scheme for imparting free education to this section of people has been adopted by this society which the Government has not been able to do so. The society therefore has established 11 schools with all required facilities in the locality of South 24 Parganas in remote places of Sundarban area. One of the schools is Ramkrishna Ashram Junior Basic School at Nimpith. This school has been established not only to impart the general education but also to educate them in practical education for reformation of the society and to build the future generation as a responsible citizen who can do the social work also. The said school at all material times had and still has been run by the said society which is described and recognized as religious institution within the meaning of Articles 26 and 29 of the Constitution of India. The said Junior Basic School was established long time back. The society has got its own rules and regulations with power to appoint teacher to run the administration of the said school. The said Junior Basic School has been sanctioned by the then Director of Public Instruction, Government of West Bengal under G.O. No. 845-SC/P (ii) dated 12th September, 1963 and at all material times the same has been run smoothly since then under the management of its parent body Sri Ramkrishna Ashram, Nimpith enjoying Special Rules vide Memo No. 918-Edn.(S) dated 21st September, 1990. There were 9 sanctioned posts in the said school and all the 9 staffs were appointed by the management of the said school.

2. Subsequently, after recognition of the said school, 5 out of 9 approved teachers were transferred to elsewhere for their own interest during the period of 1986 to 1988. In view of the vacancy having arisen the Managing Committee of the school duly appointed 5 new teachers and thereafter School Authorities sought for approval of appointment unsuccessfully. Several representations have been made for approval of the school. The said Junior Basic School is a Class - X unit with roll strength of 657, and nine (9) teaching staff are still working in the said school and out of 9 teachers only one approved teacher is serving. When no decision was taken with regard to the approval of appointment as above, the respondent No. 1 on behalf of the said society filed a writ petition in this Court and prayed for amongst other granting approval. The said writ petition was disposed of by a learned Single Judge by an order dated 9th May, 2001 directing the Director of School Education (Primary) to consider and dispose of the representation. Thereafter, pursuant to the said order dated 18th May, 2005 Director of School Education (Primary) considered the representation and rejected prayer for approval of the appointment observing that under the Special Rule the society had no power to fill up the vacant posts. Challenging the said order another writ petition has been filed and the same is still pending. During pendency of the said writ petition the Secretary made representation to the Secretary of Education Department to grant approval of appointment of 9 teachers and to release their arrears and current salaries. In response to the said representation dated 25th May, 2006 the Joint Secretary, by letter dated 26th November, 2006 informed the respondent herein that according to Section 60 sub-section (i), Clause f, k, (kk) of West Bengal Primary Education Act 1973, the

Primary School Council, South 24 Parganas has been empowered to grant recognition, pay salary of teachers of Pre-Primary School and the respondent No. 1 was advised to approach the Primary School Council concerned for getting recognition as a separate Primary School and informed that as this school was granted recognition by D.P.I. on 2nd May, 1967. The D.P.I. is to recommend the name for granting recognition to South 24 Parganas District Primary School Council. The said communication of the Joint Secretary was replied to by another representation dated 2nd December, 2006. On receipt of the representation, Joint Secretary, Department of School Education, respondent No. 1A in the writ petition enquired the petitioner whether prior permission was taken from District School Board before giving appointment of 9 teachers of the said school and how Special Rules would be applicable to the Primary School while there is no provision of Special Rule in West Bengal Primary Education Act. On receipt of the said letter dated 8th January, 2007 the petitioner contended that the said school was recognized prior to West Bengal Primary School Act, 1973 came into force as such recognition was not required under the said Act. While recognizing this school earlier the Government has permitted the management of the said school by the society itself, accordingly granted approval to the appointment of teacher and releases all salaries without any dispute. Ultimately no approval to the appointment has been granted. The respondent-writ petitioner made formal demand of justice through their learned lawyers. The Chairman, South 24 Parganas District Primary School accordingly refused to grant approval to the appointment by letter dated 14th May 2007 on the ground mentioned therein. Being aggrieved by and dissatisfied with the said communication dated 28th November 2006 and 14th May, 2007 of the respondent No. 5 the above writ petition was filed.

3. It appears basically the case of the writ petitioner-respondent is that since this institution is run by religious institution a Special Rule has been framed to enable them to manage and run school and by virtue of such Rule the appointment of teachers to the said Junior Basic School was made and in spite of appointment being made to the vacant sanctioned post approval was not accorded.

4. The case of the appellant before the learned Trial Judge was that the writ petitioner had no power, authority to appoint the vacant post of the teachers of the Junior High School and it can only be done by the District Primary School Council. Therefore, question of approval to the appointment does not and cannot arise since the appointment is illegal. The Special Rule applies to the Secondary Schools not the primary ones.

5. Mr. Tarun Kumar Roy learned Senior Advocate, appearing for the appellant contends that the learned Trial Judge ought not to have granted relief in the subsequent writ petition when identical issues are pending for adjudication in the prior writ petition wherein challenge is made to the decision of the Director of Primary Education rejecting the prayer for approval to the appointment of the teachers. Until and unless the said order is set aside by the Court and present

writ petition should not have been heard.

6. We are of the view that this portion of his submission has correctly been dealt with by the learned Trial Judge as basic issue in both the matters is whether the appointment made by the management of the said Ramkrishna Ashram should be approved or not. Under the law one can file more than one proceeding raising identical point on fact and law even later proceeding can be heard out finally, unless and until stay of hearing of the same is granted by the Court by applying the principle of section 10 of the CPC as there is no bar to hear the later proceeding by the Court. Only legal implication is that the issue or controversy decided in the later proceeding will operate as res judicata in the first proceeding. Besides the learned Trial Judge has rightly held the Joint Secretary who is the almost highest authority has taken stand identical to that of Chairman, Primary School Council. This gives rise separate cause of action. As the issue is identical whether earlier writ petition was heard or not is immaterial. Hence, the contention of Mr. Roy on this aspect is not tenable in law.

7. Now on merit he contends that the Special Rule empowering the Ashram to appoint teaching and non-teaching staff does not apply to any institution lower than the Secondary Institution.

8. He contends that it will appear from section 1 of the Rule that the same will be applicable to all junior high, high and higher secondary schools specified in the schedule. In the schedule instant basic school is not a scheduled institution. Therefore, the power of appointment to the teachers is not applicable to this Managing Committee under the said Rules.

9. He also contends that said rule was framed in exercise of power conferred under Rule 33 for Management of Recognized Government and Non- Government Institutions (Aided and Unaided) Rules, 1969. The said Rule 1969 was framed under the appropriate provision of the West Bengal Secondary Education Act, 1963. Under these circumstances, the said Rule cannot be made applicable to any institution below the Secondary Junior High School or High School.

10. According to him, in view of the commencement of the West Bengal Primary Education Act, 1973 it is the District Primary School Council who is to make appointment in any post of teacher of Primary institution.

11. The learned Trial Judge, therefore, has misconstrued the said Rule and its provision and has wrongly applied the law while directing to grant approval.

12. Mr. De, learned Senior Counsel appearing for the respondent-writ petitioner submits that the West Bengal Primary Education Act, 1973 has no manner of application and there is no need to obtain recognition afresh since the recognition was granted prior to the said Act came into force. In 1969 u/s 54 of the West Bengal (Rural) Primary Education Act, 1930 the recognition was granted and since then the salaries have been released to all the 9 teachers appointed by the management of the said Ashram granting approval. Thereafter, the said Act

was repealed by the West Bengal Primary Education Act, 1973. In the present Act there is no provision for granting recognition to any school. Even the management of the present school has not been taken over by District Primary School. The recognition granted earlier has not been withdrawn.

13. He has also drawn our attention to the provision of the West Bengal General Clauses Act to contend that if any previous Act is repealed by the subsequent Act unless different intention appears then earlier provision will continue to remain in force.

14. He further contends that the Supreme Court in the decision of *Bramchari Sidheswar Shai and others etc. Vs. State of West Bengal etc.*, has recognized that persons belonging to or owing allegiance to Ramkrishna Mission or Ramkrishna Math belong to religious denomination within Hindu religion or section thereof as would entitle them to claim fundamental rights conferred under Article 26. Therefore, by virtue of Article 26 Clause (a) of Constitution of India this society has constitutional right to run and manage its own institution irrespective of the Special Rule being granted. This case has got the approval of later decision of Supreme Court reported in *T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others*,

15. We have considered contention and rival contention of the parties. A survey as to status of this Mission is necessary to address to the issue, in view of the Supreme Court judgment.

16. The Supreme Court in the former case in paragraph 52 has clearly held as follows:-

52. For the said reasons, we hold that persons belonging to or owing their allegiance to Ramkrishna Mission or Ramkrishna Math belong to a religious denomination within Hindu religion or a section thereof as would entitle them to claim the fundamental rights conferred on either of them under Article 26 of the Constitution of India and answer Point-2, accordingly, in the affirmative.

17. In paragraph 53 of the same report it is held as follows:-

53. Since we have held while dealing with Point-2 which arose for our reconsideration that the persons belonging to or owing allegiance to Ramkrishna Mission or Ramkrishna Math as followers of Ramkrishna, form a religious denomination in Hindu religion, as a necessary concomitant thereof, we have to hold that they have a fundamental right of establishing and maintaining institutions for a charitable purpose under Article 26(a) of the Constitution of India, subject, of course, to public order, morality and health envisaged in that very Article.

18. It appears that Primary School Council u/s 60 of Act 1973 amongst other, is to set up new Primary School and further to grant recognition to Primary Schools with or without conditions or to withdraw recognition and to grant financial aid to any such Primary School or to withdraw such aid in such manner as may be

prescribed. It is also the duty of the Council to release fund for payment of salaries to the teaching and non-teaching staff of the Primary Schools. It thus appears the said Act by itself does not disturb at all functioning of school earlier recognized.

19. In our considered view fresh recognition or for that matter the approval to the Junior Basic School of the writ petitioner herein is not required, since recognition of the school was accorded under the Bengal (Rural) Primary Education Act, 1930. Therefore, by virtue of sub-section 3 of section 105 of the Act 1973 the said school is deemed to have been recognized under the present Act. Effect of repealing of the earlier Act has also been explained in section 105 sub-section (4) so far as this institution is concerned. The said sub-section 4 of section 105 reads as follows:-

Notwithstanding the repealing of the Bengal (Rural) Primary Education Act, 1930, all rules, orders and notifications made or issued from time to time under the said Act applicable to the District School Board and continue in force immediately before such repeal shall continue in force in so far as they are not in consistent with the provisions of this Act, until they are repealed or amended.

The aforesaid provision has to be read in conjunction with sections 8 and 8A of Bengal General Clauses Act, 1899.

20. Section 8 Clause (c) is set out hereunder;-

Section 8. Effect of repeal:-- Where this Act, or any Bengal Act, or West Bengal Act made after the Commencement of this Act, repeals any enactment thereto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

.....

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed.

21. It has been rightly urged by Mr. De, learned Counsel that in view of combined reading of the aforesaid provisions the recognition of school under the repealed Act allowing the management of the writ petitioner-respondent No. 1 to run its affairs is not taken away by Act 1973. We think that the learned Trial Judge has correctly recorded that the District Primary School Council did not withdraw the recognition even after commencement of the 1973 Act, on the contrary the financial aid continued to be supplied without any interruption.

22. It is true as appropriately submitted by Mr. Roy the Special Rule for management of the schools of Sri Ramkrishna Ashram was framed in exercise of the power conferred by Rule 33 of the Management of Recognized Government and Non-Government Institution (Aided and Unaided) Rules, 1969 which has its

origin from West Bengal Secondary Education Act, 1963 as the said Management Rule has been framed u/s 45. It is also correct to suggest that any Rule framed under the aforesaid Act obviously relatable to the schools above the primary institutions. But Rule 4 of Special Rule as mentioned above provides for composition of Managing Committee of the branch institution including Primary, Basic and Pre Basic Schools other than Secondary Schools run by the Ashram. The said Rule 4 though inappropriate in the context of the said Rule 33 of the Management Rules which meant for Secondary Institution but the intention of the Government is very clear that the management of the Primary Basic and Pre Basic Schools other than the Secondary School have been left with the writ petitioner-society.

23. It is contended by Mr. Roy that there is no provision for making any Rule relating to the Management of this Primary School by the writ petitioner itself under the provisions of West Bengal Primary Education Act 1973. In this context we have examined the rule making power given u/s 106 of the Act 1973. In sub-section (3) of section 106 in its Clause (v) the State Government has been empowered to frame Rules in other matters which are not classified in Clauses (a) to (u). According to us when in the Special Rules there has been mention of the composition of management the State Government is quite competent to make similar rule specifically for the institutions of this organization other than secondary institutions. Indeed, the State Government is cognizant of the aforesaid legal position and that would be reflected from an order passed by learned Single Judge of this Court on 21st March, 1994 in C.O. No. 4196 (W) of 1993. In the said order (at page 99 of the paper book) the learned Trial Judge has been pleased to direct the Director of School Education (Primary), West Bengal, District Inspector of Schools (Primary), South 24-Parganas and also the Chairman of District Primary School Council, South 24-Parganas to approve up gradation and extension of the Special Rules to the upgraded Primary School and the existing organizing teaching and non teaching staff of the said school.

24. There is yet another aspect of the matter that no Act or Rules can be read in derogation of the constitutional provision namely Article 26 of the Constitution of India. The Act 1973 has to be read and be applied subject to the said Article. By virtue of Article 13 Clause (2) of the Constitution of India the aforesaid rights cannot be taken away by Act 1973. We therefore appropriately quote the Article 13 Clause (2):-

Article 13 Clause (2)--The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

25. Under Article 26 Clause (2) of the Constitution of India read with judgment of the Supreme Court *Bramchari Sidheswar Shai and others etc. Vs. State of West Bengal etc.*, writ petitioner Society has fundamental right of establishing and maintaining institution for a charitable purpose. We are of the view that imparting free primary education is one of best charitable purpose.

26. Withholding of the approval to the appointment made by the respondent No. 1 in the vacant post according to us denial of granting aid.

27. On discussion as above, we are of the view that the stand taken by the State Government as well as the District School Council, South 24-Parganas are absolutely prohibited by the constitutional mandate and contrary to the stand earlier taken on various occasions.

28. We, therefore, think that the learned Trial Judge has granted the appropriate relief.

29. In order to avoid future complication we think the State Government shall consider to frame separate Special Rules for the Primary Schools under wings and branches of the writ petitioner No. 1 so that avowed constitutional guarantee through this institution as recognized by the Supreme Court, are fulfilled as it has already been done in case of the secondary schools. We, therefore, do not find any reason to interfere with the judgment and order of the learned Trial Judge. The appeal is therefore dismissed. There will be no order as to costs.

S.K. Chakrabarti, J.:

I agree.