

(1982) 03 PAT CK 0010

In the Patna High Court

Case No : Civil Writ Jurn. Case No. 1216 of 1981 (R)

Sudhindra Chandra Mallik

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 26-03-1982

Acts Referred:

Bihar Private Secondary Schools (Taking Over of Administration and Control)
Ordinance, 1980 — Section 3
Civil Procedure Code, 1908 (CPC) — Section 141
Constitution of India, 1950 — Article 166, 226, 30

Citation : AIR 1982 Patna 142 : (1982) PLJR 344

Hon'ble Judges : Ramchandra Prasad Sinha, J; Lalit Mohan Sharma, J

Bench : Division Bench

Advocate : B.C. Ghose, S.B. Sinha, M.K. Laik, V.S. Prasad and T. Sen, for the Appellant; Shreenath Singh, K.K. Sahay, S.N. Singh, T. Bodra, Govt. Pleader No. 2 and B.S. Lal, Jr. Counsel to Govt. Pleader No. 2, for the Respondent

Final Decision : Allowed

Judgement

Lalit Mohan Sharma, J.—The question raised in this case is whether the Dhanbad High School is a minority school based on language. The petitioner, who claims to be the President of its Managing Committee, claimed it to be so and in the writ application, as originally filed, prayed for a writ of mandamus directing the State and certain authorities, impleaded as respondents, to publish the order passed in August, 1978, as contained in Annexure "9", and to declare the school as a linguistic minority school in accordance with Sec. 69 of the Bihar Secondary Education Board Act, 1976 (hereinafter referred to as the 1976 Act). The petitioner also challenged the notification dated 27-7-1981, Annexure "14", purporting to take over the school under the provisions of Section 3 of the Bihar Private Secondary Schools (Taking Over of Administration and Control) Ordinance, 1980 (hereinafter referred to as "the 1980 Ordinance"). The case was placed for admission on 5-8-1981 when three persons appeared and wanted to oppose the writ application. The case was admitted under the orders of a learned

single Judge on the same day, but the prayer for stay was rejected. The interveners were granted permission to be heard at the time of final hearing of the case. They will be referred to hereafter as the interveners. The petitioner went to the Supreme Court against this Court's order rejecting his prayer for stay and it is his case that while a counter affidavit was filed on behalf of the State there, he learnt about an order dated 23-6-1981 passed by the Education Commissioner, on the basis of a report by the Special Secretary, respondent No. 8, as contained in Annexure "16", holding that the petitioner's claim is not correct. He, therefore, filed a petition in the present case for amendment of the writ application by adding a relief for declaring Annexure "16" as without jurisdiction and for quashing the same and for restraining the respondents from interfering with the management of the school. The Supreme Court dismissed the petitioner's application, but observed that the case should be taken up for final hearing before 17-1-1982. Accordingly, the case was taken up for hearing by my learned brother Mr. Justice R. C. P. Sinha singly on 15-1-1982. The application for amendment of the writ petition, referred to above, was filed at that stage. Mr. Justice Sinha, after hearing the case for some time, referred it to a Division Bench. Steps for preparing the case for hearing before a Division Bench were, thereafter, taken expeditiously and it was directed to be heard on 4-2-1982. One Hargouri Prasad Singh filed a petition in person for being added as a party respondent to the case. His application as also the petitioner's application for amendment of the writ petition were directed to be placed for orders along with the final hearing. Several counter affidavits and further affidavits were also filed by the parties. The case was taken up for hearing on 4-2-1982 and it was concluded on 12-2-1982. Since the deputation of my learned brother at Ranchi was only till that date, learned counsel for the parties stated that the judgment could be delivered at Patna when I went back.

2. The petitioner's case, as made out in the writ application, is that the Bengali residents of Gobindpur, which was earlier the sub-divisional headquarters, established the school as a middle school under the leadership of Sri J. C. Mallick, the grandfather of the petitioner. The sub-divisional headquarters were shifted to Dhanbad in or about 1919 and the school was also shifted to Dhanbad. Sri Mallick was the founder Secretary of the school and continued as the Secretary of the Managing Committee till his death. In or about 1912 the middle school was upgraded up to the high school standard. After the death of Sri J. C. Mallick, in or about 1939 his son Sri H. C. Mallick was appointed as the Secretary and he continued as such till his death in 1949. His son the present petitioner, has been holding the post of Member/President of the Managing Committee of the school since 1974. It has been asserted that the control of the school has always been in the hands of the Bengali speaking minority and a number of annexures have been relied upon as the proof thereof.

3. The petitioner further referred to Section 69 of the Bihar Secondary Education Board Ordinance, 1975 which saved the religious or linguistic minority schools from its operation. Sub-section (2) of Section 69 of the Ordinance directed the

Secondary Board, established u/s 3 of the Ordinance, to decide the questions relating to the minority nature of the school in accordance with the provisions of Articles 29 and 30 of the Constitution of India. It was also provided that the State Government could be moved against the decision of the Board, and the State's decision in that regard would be final. The aforesaid Section 69 of the Ordinance was retained in the 1976 Act which followed. As the provisions of the Act were illegally attempted to be applied to the school in question, the Secretary of its Managing Committee Sri B. N. Singh Choudhury requested the Board to hold the school as a minority one and on failure thereof moved this Court in CWJC No. 23 of 1976 (R) in April, 1976. This Court by an order dated 14-9-1976, as contained in Annexure 8, directed the Secondary Education Board to dispose of the petitioner's application before it u/s 69 of the said Ordinance. In para 47 of the writ application it has been mentioned that the petitioner came to learn that the Education Minister Janab Ghu-lam Sarwar passed an order, on the basis of certain recommendations made by some State officer, to declare the school in question as a linguistic minority institution and an order in the name of the Governor of Bihar was passed in Aug. 1978, as contained in Annexure "9". A direction was also given for its publication in the official gazette, but the same was not complied with and the petitioner filed another writ application in this Court which was registered as CWJC No. 534 of 1980 (R) and was disposed of on 10-10-1980 on the terms as mentioned in Annexure "12". The Board of Secondary Education had been abolished by then, and all the schools had been nationalised. The State Government was directed to dispose of the petitioner's application filed earlier, claiming minority nature of the school, within six months thereof. The interveners, who have appeared before this Court, were allowed to take part in the enquiry. Accordingly, respondent No. 9 Sri V. S. Dubey, Director, Public Instruction and Special Secretary, Education Department, Government of Bihar (hereinafter referred to as "the Director") heard the petitioner and the interveners in Jan. 1981, but no orders were passed for several months and later the impugned notification as contained in Annexure "14" was issued. In these circumstances, the petitioner had to come to this Court again by the present writ application.

4. In his amendment petition, the petitioner stated as to how he learnt about the enquiry report of the Director as mentioned in Annexure "16" and that he had been advised to further pray for quashing Annexure "16".

5. In his application for addition as a respondent in the case, Hargauri Prasad Singh has stated that he is a teacher in the school, and since he is bound to be affected by the decisions in this case, he is a necessary party. Sri Shreenath Singh besides appearing for the intervenors has also appeared for him and contended that all these persons as also seven other intervenors, who had been heard by Sri Dubey before passing Annexure 16, are necessary parties and the writ application is liable to be dismissed in their absence. According to the learned counsel, even after adding Hargauri Prasad Singh as a party and hearing the other three intervenors, the defect is not cured as the other seven

intervenors are not before this Court. With respect to the interest of Hargouri Prasad Singh, it has been urged, and it appears to me rightly, that he as a teacher of the school is certainly interested in the dispute as to who is his employer. If the school is held to be a nationalised one, the terms and conditions of his service including his right of pension will be as those of rest of the teachers in the State working in the nationalised schools. I, therefore, hold that he is a proper party fit to be added as a respondent. Sri B. C. Ghose opposed the application on the ground that the provisions of Order 1, Rule 10 of the Civil P. C. (hereinafter referred to as "the Code") are not applicable to writ petitions as expressly declared in Section 141 (Explanation) of the Code. Sri Singh may not be right in pressing his application for addition under Order 1, Rule 10 of the Code, but it is not correct to suggest that a party cannot be added to a proceeding for writ. Authority to do so as also to pass other necessary orders for the disposal of the proceeding in accordance with law including the power of substitution, calling for the records from any inferior tribunal etc. are all necessarily included in Article 226 of the Constitution itself. In the circumstances, I add Hargouri Prasad Singh as the 10th respondent.

6. During the hearing of the case, it was made clear to the parties that they must address their arguments on the assumption that the prayer for amendment of the writ application as also the application for addition of Hargouri Prasad Singh had been allowed. Sri S. B. Sinha, learned counsel for the petitioner, Sri Shreenath Singh for the intervenors and the learned State Counsel for the respondents, had all indicated their agreement to this course as the parties, according to them, had already filed their affidavits on such an assumption and did not require further opportunity after the amendments were allowed. I would therefore, now proceed to consider the other arguments addressed before us,

7. In reply to the argument that seven left out intervenors are necessary parties, Sri S. B. Sinha argued that everybody, who may be indirectly and remotely interested in a question raised in a case, cannot be held to be a necessary party. He relied on the observations in paragraph 4 of the judgment of this Court in *Ananta Narayan Mukhopadhyay v. Union of India* (CWJC No, 1288 of 1981-R disposed of on 4-2-1982) and *The General Manager, South Central Railway, Secunderabad and Another Vs. A.V.R. Siddhantti and Others*, . Sri Sinha is right. It is difficult, rather impossible, to implead every person as a party to the case, who may be somehow interested in the result thereof, specially where the case is like the present one in which an unknown large number of people are bound to be interested in the question to be determined. Even in a regular suit, where public right is involved, Rule 8 of Order 1 of the Code has evolved a theory of representation. I, therefore, overrule the objection of Sri Shreenath Singh in this regard. So far three of the intervenors are concerned, namely, Brajendra Kishore Prasad (Municipal Commissioner), Badri Prasad Gupta (Secretary Jan Kal-yan Sangh) and Rabindra Chandra Sinha (Advocate) they along with Hargouri Prasad Singh have opposed the application through Sri Shreenath Singh and cannot have any grievance on that score.

8. The case on behalf of the petitioner was opened by Sri B. C. Ghose, who was followed by Sri S. B. Sinha. It was contended that the order in Annexure "9" determined the issue in favour of the petitioner finally and the State Government does not have any jurisdiction to ignore it or to take a contrary decision later. Annexures "14" and "16" are, therefore, ultra vires. Comparing the provisions of Section 69 (2) of the 1976 Act and Section 18 (2) of the 1960 Ordinance, it was pointed out that a decision declaring the school as a minority institution was not required to be notified in the Bihar Gazette before it could be operative. The order in Annexure "9" issued in the name of the Governor of Bihar and duly authenticated as required by Article 166 of the Constitution became operative and binding on the State and could not be later given a go-by. Sri Shreenath Singh argued that no order has finally been passed at all and Annexure "9" was merely a draft of a proposed order intended to be passed. He emphasised the fact that neither the date nor the memorandum number was given in Annexure "9" which is at page 104 of the record. The petitioner in his writ application also has, therefore, given only the month and the year of Annexure "9" and not the date. At the bottom of the order a direction had been given for its publication in the Bihar Gazette, but this was also a tentative draft without the date and the memo number, and admittedly it was never published. The number mentioned at the top of Annexure "9" refers to the file and the blank space provided for the memo number thereafter is unfilled. Correctly appreciating the inchoate nature of Annexure "9". the petitioner, in the present application prayed for a direction to the respondents to publish or notify the order therein and for a writ "directing the respondents to declare the said Dhanbad High School as a linguistic minority school in accordance with the provisions of the said Act". The petitioner had, on 15-3-1980, sent a letter to Sri N. D. J. Rao, Advisor to the Governor of Bihar, a copy whereof is Annexure "10/A" (pages 109 to 112), and in regard to Annexure "9" he had stated in the penultimate paragraph that "the order has not so far been published and put into implementation, the whole matter is still hanging in uncertainty". In his memorandum to the Chief Minister (Annexure "10/D" at pages 116 to 118) he reiterated this stand by stating :

"May your honour, in the circumstances, be pleased to direct the release of the order forthwith and restore the confidence of the minority".

The High Court, while disposing of CWJC No. 23 of 1976 (R) ordered that :

"In this (sic) circumstances, I direct the Bihar Secondary Education Board to decide the application filed by the petitioner on 11-11-1975 (Annexure 5) for declaring the Dhanbad High School as a minority school". (Vide Annexure "8" at page 103).

This again indicates that the issue was not closed in favour of the petitioner by Annexure "9". The petitioner correctly understood the position as is further clear by his letter to the Minister Janab Ghulam Sarwar Saheb (Annexure "10/F") wherein he reiterated that :

"This order of the Hon"ble High Court has been passed as early as on 14-9-1976. In view of the specific directions given by the High Court this exorbitant delay in deciding the application may expose the Bihar Secondary Board to the risk of violating the orders of the High Court". (page 122)

At the end of his letter, the petitioner made the following request :

"On behalf of the Bengali residents of Dhanbad, I humbly pray to you that order declaring Dhanbad High School as a minority school be issued without further loss of time."

Apart from the relief in the present application, mentioned above, which is not consistent with the stand taken by the petitioner's counsel at the hearing, it has been stated in paragraph 57 of the writ application as follows:

"Your petitioner states that in spite of pendency of the aforesaid representation filed on behalf of the said school and/or the petitioner, the State Government was not passing any order intentionally and deliberately in spite of clear directions made by this Hon"ble High Court in the aforesaid C.W.J.C. No. 23 of 1976 (R) dated 14-9-1976 as contained in Annexure "8" hereto."

The reliefs prayed for by the petitioner in C.W.J.C. No. 534 of 1980 (R), quoted in paragraph 58 of the writ application, also lead to the same conclusion, specially the relief (b). It is not necessary to further multiply such statements on the records indicating that the petitioner's own case, earlier as well as in the present writ petition, has been consistently contrary to what his counsel argued at the time of hearing. It has been urged on behalf of the respondents that since the argument, as addressed on behalf of the petitioner, was not to be found in the writ application, there was no question of its denial, still the State in paragraph 23 of its counter affidavit, while dealing with the other allegations said:

"It is stated that the school in question has never been declared by the State of Bihar to be a minority institution". (page 168)

The report of Sri Dubey in Annexure "16" indicates that a similar argument had been attempted on behalf of the petitioner before him, which he rejected on proper grounds. The circumstances in which the earlier order was passed by the Minister, which was later on not implemented, have been detailed, and Sri B. C. Ghose relied on the same in support of his argument. Sri Dubey has said "that the then Minister for Education ordered on 10-8-1978 on page 14/N of the file to notify the school as a minority institution, but before this could be done, the Minister happened to go to Dhanbad where he was faced with angry protest and demonstration against his order dated 10-8-1978 which was yet to issue". On his way back to Patna he asked the office by his note on page 15/N of the file not to issue his order and desired that the matter be enquired into afresh. Accordingly, the Government notification was withheld and a fresh report was called for. It was argued by Sri Ghose that these facts indicate that a final decision had actually been taken and it was wholly illegal on the part of the Minister to have

reviewed it on the protest of the demonstrators and rioters. The course adopted by him indicates negation of rule of law and victory of mobocracy. This should not be permitted.

9. In reply, Sri Shreenath Singh contended that it is wrong to equate the order by a Minister with an order by and on behalf of the State. Assuming that the Minister had, at one point of time, decided to concede the minority nature of the school, this could not close the issue until an order on behalf of the State was duly passed and notified. Annexure "9" cannot be treated to be such an order. Reliance was placed on the observations in paragraph 42 of the judgment in *The State of Punjab Vs. Sodhi Sukhdev Singh*, , in paragraph 10 of the judgment in *Bachhittar Singh Vs. The State of Punjab*, and in *State of Bihar v. Ganesh Prasad Dubey* 1969 BLJR 177. The argument is well founded. The materials on record indicate that the draft order in Annexure "9", although expressed in the name of the Governor of Bihar and signed by the Deputy Secretary, was not issued so as to be an effective order. It remained in the records without being communicated to any person interested in the matter. Although it was intended that a copy thereof should be sent to the printing press for being included in the Bihar Gazette and to the Director as also to the District Education Officer etc., no such copies were sent. The State counsel said, during the argument, that the entire connected file is in the court room and the State has no objection if the Court decided to examine the same or permit the petitioner's counsel to do so with a view to ascertain these facts. Since it was not claimed on behalf of the petitioner that the order in Annexure "9" had been communicated and the allegations in the writ application were themselves contrary to such a stand, we did not consider it necessary to examine the State's records. Annexure "9" was clearly intended to be operative only after the date and memo number were supplied and after it was duly issued for being given effect to.

10. There was some discussion at the Bar as to what is meant by "communication" of an order. Mr. Sinha relied on *State of Punjab and Others Vs. Balbir Singh and Others*, . There the Supreme Court following an earlier decision in *S. Pratap Singh Vs. The State of Punjab*, observed that once an order is sent out and it goes out of the control of the authority issuing it, so that there would be no chance whatsoever of its changing the mind and modifying it, the order must be held to have been communicated, no matter when the Government servant against whom it has been issued actually receives it. This proposition does not help the petitioner at all in view of the finding recorded above.

11. Mr. Singh also relied on the principles of *res judicata* for negating the petitioner's point, mentioned above, on the basis of the judgment in *C.W.J.C. No. 534 of 1980 (R)* by M. P. Singh, J. The case was disposed of at the admission stage itself, but only after hearing the parties including the intervenors and the order is contained in Annexure "12" from pages 132 to 136 of the records. It was urged that if Annexure "9" is deemed to have finally decided the issue in favour of the petitioner, there was no question of remitting the case to the State

Government for a decision on merits after hearing the parties including the intervenors. Sri S. B. Sinha replied to the argument by saying that a technical plea of res judicata should not be allowed to be raised where it may defeat the fundamental rights of a party and result in injustice. He relied on the observations of the Rajasthan High Court in the case reported in 1974 Serv LJ 515 that where the question relates to inherent lack of jurisdiction of an authority (hereof the State to pass an order inconsistently made in Annexure 9), it cannot be barred by the principles of constructive res judicata. Reliance was placed on the observations made in paragraph 24 of the judgment in Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, Sri Sinha also urged that the judgment of M. P. Singh, J. should be interpreted as an open remand without deciding the finality or otherwise of Annexure 9. It does not appear necessary to decide this point, as my finding earlier is sufficient to dispose of the controversy.

12. It has next been urged on behalf of the petitioner that Annexure 16 is otherwise also fit to be quashed as the finding recorded therein has been given on the basis of irrelevant and extraneous considerations and without taking into account the relevant evidence in support of the petitioner's case. On behalf of the respondents, it has been argued that Sri Dubey rightly observed in Annexure 16 (at page 351 bottom) that there was no evidence to show that the school had been founded by the Bengalee community and his conclusion that the school cannot be declared as a linguistic minority institution cannot be interfered with. Sri Shreenath Singh has challenged, as incorrect, the grievance of Sri B. C. Ghose that Sri Dubey failed to consider Annexures 6 and 6/A, the recommendations of the District Education Officer and Annexure 7, report of the District Development Officer, Dhanbad, which has vitiated his finding. I agree with Sri Singh that many of Sri Ghose's criticisms of Annexure 16 are misconceived; but for the reasons discussed in paragraph 16 below, I am of the view that Annexure 16 and consequently Annexure 14 are fit to be quashed.

13. In reply to a query by the Bench that if Annexure 16 is quashed, what further order should be passed in the case, Sri B. C. Ghose replied that the question whether the school is a minority institution should be decided on merits by this Court on the basis of the materials produced in the case. He said that since the claim is in respect to a fundamental right, the High Court cannot avoid examining and deciding the dispute on merits. Sri Shreenath Singh very enthusiastically supported the suggested course and took great pains in placing and analysing all the materials available on the record. He emphatically asserted that the petitioner has not been able to prove his case by any cogent evidence. Sri S. B. Sinha, who followed Sri B. C. Ghose in the main argument and also concluded the case by his final reply was not wholly in agreement with Sri Ghose on this point. He said that the power of the State as conferred by Section 18 of the 1980 Ordinance was quasi-judicial in nature and the correctness of Annexure 16 should be examined from that angle. If it is found that Annexure 16 is vitiated in law and fit to be quashed, this Court may remit the matter for fresh

consideration. I agree with Sri Sinha. The distinction between the present case and a large number of other cases (mainly of the Supreme Court) cited by the parties before us is that, as in the present case, there was no statutory provision for decision of the question by an authority in those cases. I am not rejecting Sri Ghose's claim that the question, if agitated, may have to be ultimately decided by the High Court on merits--indeed I am not deciding this question one way or the other at this stage; but in the present facts and circumstances, I am of the view that before proceeding further the statutory authority, i.e. the State in the present case should be asked to perform its duty in accordance with law, if its earlier decision is found to be illegal. I will further develop this aspect later.

14. For the application of Article 30 of the Constitution, it is necessary that an institution is proved to have been "established" as well as "administered" by minority. The two terms have been used in the Article conjunctively (as observed in paragraph 19 of the judgment in *S. Azeez Basha and Another Vs. Union of India (UOI)*, , and the burden lies on the petitioner to prove both the facts. The respondents are, therefore, right in asserting that if the petitioner is unsuccessful in discharging the onus, he must fail irrespective of the weakness in the respondents' evidence. Sri Shreenath Singh argued that as there is no evidence in the present case to prove as to who established the school originally or at the stage when it was upgraded as a high school, the petitioner's claim has to be dismissed. The learned counsel has emphatically asserted that direct acceptable evidence of its establishment is an absolute necessity. By that, I understand, the respondents mean that there should be contemporaneous primary evidence as to the actual facts regarding the founding of the school. I do not accept that this strict manner of proof is applicable to this case. It is permissible to a party to establish a fact by leading circumstantial evidence. Further the strict adherence to the Evidence Act is not called for in the present case. The evidence led by the parties should not, therefore, be scrutinised as strictly as suggested by Sri Singh.

15. There was considerable discussion at the Bar on the question as to whether the nature of an institution which was earlier a minority one, could later undergo a change. Sri Sinha contended that it cannot. Relying on the observations made in *K.O. Varkey Vs. State of Kerala*, and in paragraphs 162 to 164 and 170 of the judgment in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, , the learned court said that the minority character of an institution cannot be given up or waived. Sri Shreenath Singh argued that the observations made in the case of *The Ahmedabad St. Xavier's College Society (supra)* did not reflect the majority view and in view of the decisions in *S. Azeez Basha and Another Vs. Union of India (UOI)*, and *The Durgah Committee, Ajmer and Another Vs. Syed Hussain Ali and Others*, , the petitioner's argument should be rejected. This point is relevant for considering that even on the assumption that the Dhanbad High School had originally been established by the Bengali speaking people, is it permissible to examine and hold that due to the subsequent events, it lost its minority character? In paragraph 37 of the judgment in *Durgah Committee, Ajmer v. Syed Hussain Ali (supra)* it was stated

that--

"If the right to administer the properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it, Article 26 cannot be successfully invoked."

This observation clearly implies that it is possible to surrender a right under Article 26. The principle was held in a later case by the Supreme Court in *S. Azeez Basha and Another Vs. Union of India (UOI)*, to be applicable to Article 30 case. In *Arya Pratinidhi Sabha and Others Vs. The State of Bihar and Others*, , a Bench of this Court observed in paragraph 10 of the judgment that--

"It is one thing to say that cultural and educational rights embodied in Article 30 to establish and administer educational institutions of their choice are fundamental and guaranteed by Constitution and therefore, not subject to surrender or legislative control, but it is quite another thing to contend that in all cases the minorities are obliged to exercise that right even though on account of exigencies of the situation, they may decide otherwise. In the instant case, it appears that whatever may have been the position in 1957 in respect of school which may have been established by Arya Samaj, the Managers of the school gradually decided to allow the school to receive the benefit and patronage of the Notified Area Committee and later on by permitting the school to be converted into a Government subsidised school. They decided not to manage and administer the school as a minority school and this surely is a discretion which they were competent to exercise and is not at all in conflict with the guarantee and protection given by the provisions of Articles 29 and 30 of the Constitution."

I, therefore, hold that the right under Article 30 can be lost and it is also possible to surrender the same. It is another question to decide as to what shall be the circumstances in which this can be inferred and what should be the evidence required to prove it. I do not propose to deal with this aspect.

16. Now coming back to Annexure 16, it appears that Sri Dubey was influenced by the fact that two other high schools at Dhanbad have already been recognised as minority institutions. This is an irrelevant consideration. Sri Singh argued that the decision has not been influenced by this observation as is indicated by the opening words of the paragraph "Therefore, even from convenience point of view there is no justification for....." Sri Singh emphasised the word "even" and suggested that the authority has mentioned this aspect only as an additional consideration and it does not sustain the finding. Although the language does support this argument to some extent, I do not agree that this consideration could not have weighed with Sri Dubey, while forming his opinion, before he started writing his report. It was not mentioned only in the penultimate paragraph of Annexure 16, it was also emphasised earlier in the following words:

"Apart from Zila School, Dhanbad school is the only high school of general character in Dhanbad town--all other schools being of minority character--whether religious or linguistic."

Further it appears from Annexure 16 that Sri Dubey did not expect the general public to be associated with minority institutions at all. He has emphasised the fact that some of the documents relied on by the petitioner indicated that the managing committee of the school included some non-Bengali speaking persons also. He has also mentioned that subscriptions had been raised by the general public for constructing the school building, and, there are non-Bengalis amongst the students as well as the staff of the school. Sri S. B. Sinha placed the constitution of the Managing Committee in *Rev. Father W. Proost and Others Vs. The State of Bihar and Others*, and in *The Prabandhak Committee of Shree Takht Hari Manderji and Another Vs. The Chancellor of the Magadh University and Others*, to indicate that by mere participation of the non-minority communities--whether by donation or taking the benefits of the institution or by associating in the administration--does not necessarily lead to the conclusion that the institution was not a minority one. Sri Sinha also relied on *Dipendra Nath Sarkar Vs. State of Bihar and Others*, , *State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc.*, and *D.A.V. College, Vs. State of Punjab and Others*, . I do not suggest that the facts mentioned in Annexure 16 and emphasised by Sri Shreenath Singh are wholly irrelevant, but the manner in which they have been referred to and used in Annexure 16 indicates that the authority was not following the correct approach as laid down by Courts. Consequently, Annexure 16 has to be set aside.

17. In paragraph 13, I have mentioned briefly the attitude taken on behalf of the parties in regard to the course which the Court should adopt now. Since Sri S. B. Sinha agreed that remitting the matter to the State for a fresh decision on the controversy may be a proper order, the objection to such a course has to be considered as pressed and developed by Sri Shreenath Singh. He placed all the annexures to the writ application which have been relied upon on behalf of the petitioner and contended that they did not furnish any proof that the school was established and administered by the Bengali speaking minority. He argued that Annexure 1 series show that non-Bengali speaking people were also on the managing committee of the school from time to time and a representative representing the Muslim community and another on behalf of the railway were always there in the managing committee. Referring to the formation of a sub-committee consisting of the Secretary, the Headmaster and a teacher Abdul Ghani for the purpose of selecting and appointing a teacher as mentioned in Annexure 1/J, Sri Singh urged that it indicated that the control was not in the hands of the Bengali speaking persons as the Headmaster of the school could be a Non-Bengali. Reliance was also placed on Annexure B attached to the respondents' reply to the petitioner's amendment petition and referred to in paragraph 30 thereof which is a photostat copy of a report dated 16-8-1944 titled as "inspection form". At the bottom of back of page 391 (i.e. the second page of Annexure B) against the question "Are all the classes of the local community represented on the Committee". The answer is in the affirmative by the word "Yes". Against the 2nd item "If there is a proprietor, has he control over

the decision of the Committee?", the answer mentioned is "No". With respect to the report of Smt. Leela Banerjee, D.E.O. in Annexure 6 and the report of Sri B. N. Panda, District Development Officer in Annexure 7 as also the D.E.O.'s report in Annexure 6-A/2, Sri Singh argued that the same being opinions of certain officers who could not have any personal knowledge, the affairs of the school specially in relation to its past history cannot be of any use. The conclusion which one arrives at after analysing the materials produced in this case is that the petitioner has failed to produce any evidence worth the name for proving the minority character of the school. The writ application, therefore, must be dismissed on such a finding. After considering all the reasons mentioned by Sri Singh in his argument, I do not consider myself in a position to agree with him that it is case of no evidence whatsoever in support of the petitioner's claim. All the relevant evidence has not been produced in this case before us, according to the parties. Sri Sinha repeatedly stated that only some of the documents on which the petitioner relies have been placed before this Court by way of sample. In his reply he said that many of the school records are available in the school and some of them have been brought by the petitioner in the court room and were available for inspection by the Court, if it so desired. The State counsel also stated that the file dealing with the present controversy contains many other documents which support the decision in Annexure 16. They are neither detailed in the said report nor in any of the affidavits filed on behalf of the respondents. He also offered the entire records, if the Court directed them to be produced. Sri Shreenath Singh also contended that the petitioner has suppressed bulk of the school records which, if examined, would demolish his (petitioner's) case. He specially made a reference to the records of the period between the 1949 after the death of late Hemendra Chandra Mallick (as asserted in paragraph 13 of the writ application) and before 1964 when the petitioner became the Member/President of the Managing Committee (as asserted in paragraph 14 of the writ application). When admittedly all the relevant records have not been voluntarily produced by the parties before the High Court and have not been discussed in the affidavits, and were not placed before Sri Dubey and have, therefore, been not considered in Annexure 16, is it not the better course to remand the matter to the State, exercising statutory power u/s 18 of the 1980 Ordinance to reconsider the question after permitting all interested persons to file further evidence? It is not a fight for individual claims, it relates to an institution viz., members of the public--whether limited to the Bengali speaking minority or a larger body of the general public. Even if some party has failed at some stage to produce all the relevant materials, it may be desirable to allow a fresh opportunity in view of the larger interest involved in the case. Some of the decisions relied on by Sri S. B. Sinha and referred to above indicate that the features, stressed by Sri Singh are not conclusive for holding the general character of the school. They may furnish evidence which has to be considered along with other evidence on the record. I, therefore, do not consider it expedient to act in haste and close the controversy by confining the parties to the materials already relied on by them. Consequently I remand the matter for

fresh consideration.

18. Sri Shreenath Singh repeatedly urged that it is essential for the petitioner to prove that the school was originally established by Bengali speaking community before he can be granted any relief and since his case made out in the writ application is inconsistent with the case he pleaded earlier as also with his affidavits filed later, it should be disbelieved and the application dismissed. I do not propose to deal with this aspect as the matter is going on remand. The intervenors may urge the point before the State Government,

19. In answer to a further query by the Bench during the course of hearing, learned counsel for the different parties had indicated that the 9th respondent, Director Public Instruction and Special Secretary Education, Government of Bihar, is a proper person to make the enquiry on behalf of the State of Bihar u/s 18 of the 1980 Ordinance. He is accordingly directed to fix a date and inform the parties including the petitioner, the 10th respondent and the intervenors and permit them to rely on any further evidence, they may choose to file. It is expected that the petitioner will produce the entire records of the school including the records of the years 1949 to 1964. The 9th respondent should examine and discuss in his report the records of the Government file also. As the matter has been hanging for a considerable period, it is highly desirable that the same be concluded as expeditiously as may be possible, preferably within three months from the date on which the respondent No, 9 receives a copy of the order.

20. It was contended on behalf of the petitioner that in case of remand, the respondents must be directed to hand over the school to the petitioner and the other members of the Managing Committee for its management. On behalf of the respondents, this course was seriously challenged, inter alia, on the ground that a large amount of money has been given by the State on the basis of the school being a general one and the money may be squandered. The petitioner's counsel said that the amount which runs into lacs is in the Banks in fixed deposits and is not available for withdrawal. Sri Lal appearing for the State also referred to several fresh accounts opened by the State, according to the requirement of the present law applicable to the nationalised schools.

21. Sri B. C. Ghose had, in regard to these funds, suggested that the State may close these new accounts and withdraw the funds deposited therein. After taking into account all these papers, I am of the view that the school may be permitted to be run as a nationalised school, till the matter is decided against by the respondent No. 9. I would like to emphasise in this regard that the taking over of the school by the State is not dependent on Annexure 16 or Annexure 14. As a result of Section 3 of the 1980 Ordinance all the schools, excepting the minority schools, were automatically nationalised, without needing any notification in this regard. It is, therefore, not permissible to hold that the management of the school will be necessarily illegal after Annexures 14 and 16 are quashed. So long the petitioner does not establish his case about the school being a minority one, I do not see any compelling reason for disturbing the management of the school.

The prayer on behalf of the petitioner in this regard is, therefore, rejected.

22. In the result, this writ application is allowed on the terms mentioned above
There will be no order as to costs.

Ram Chandra Prasad Sinha, J.

23. I agree.