
(2009) 12 CAL CK 0027
In the Calcutta High Court
Case No : Writ Petition No. 13117 (W) of 2007

Swami Sadananda

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 12-12-2009

Acts Referred:

Constitution of India, 1950 — Article 26, 30

Citation : (2009) 12 CAL CK 0027

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : Ashok De and Mr. Himadri Barua, for the Appellant; T.K. Roy and Ms. Manisha Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Indira Banerjee, J.—In this writ application, the petitioner being the Secretary of Ramkrishna Ashram Junior Basic School, has inter alia challenged the orders dated 28th November, 2006 and 14th May, 2007 issued by the Joint Secretary to the Government of West Bengal, School Education Department, Primary Branch, refusing to approve appointment of five teachers of Ramkrishna Ashram Junior Basic School and has further sought orders on the respondents to approve the appointment of the existing 9 members of the teaching staff of the said school.

2. Sri Ramkrishna Ashram, Nimpith in District South 24 Parganas is a registered society comprising of monks who are devotees of Sri Ramkrishna. Sri Ramkrishna Ashram has established schools and libraries in Nimpith, South 24 Parganas and also at Kaikhali, South 24 Parganas. The schools established by the Sri Ramkrishna Ashram cater mainly to the under-privileged Scheduled Caste and Scheduled Tribe children of the Sundarban area.

3. By an Order No.845 Sc./PII/4S-99P-62 dated Calcutta the 12th September, 1963, the Government of West Bengal, Education Directorate sanctioned grant-in-aid for Ramkrishna Ashram Junior Basic School. Nine posts of teachers have been

sanctioned for the Ramkrishna Ashram Junior Basic School since 1963. The burden of salary of the sanctioned teachers of Ramkrishna Ashram Junior Basic School, Nimpith has been borne by the Government of West Bengal. The school was duly recognized by the Director of Public Instruction, Government of West Bengal and accordingly granted aid.

4. By a Notification No. 918-Edn.(S) dated 21st September, 1990, which was duly published in the Calcutta Gazette on 23rd October, 1990, the Government of West Bengal framed special rules for the management of Sri Ramkrishna Ashram schools. The rules were to apply to all junior high, high or higher secondary schools both aided and unaided specified in the schedule to the rules.

5. The rules provided for the constitution of the Managing Committees of schools founded by Sri Ramkrishna Ashram, Nimpith, recognized under the provisions of the West Bengal Board of Secondary Education Act, 1963 as well as constitution of Managing Committees of the branch institutions including primary, basic and pre-basic schools run by the Ashram.

6. Rule 8 empowers the Managing Committee of the schools to appoint Selection Committees for appointment of teaching and nonteaching staff consisting of the Headmaster or Headmistress of the school, the Secretary of the Managing Committee of the school, one of the teachers' representatives selected by the head of the institution, one external expert in the subject concerned selected by the Managing Committee and one representative of the Ashram, the parent body.

7. The expression "branch institution" has not been defined in the special rules or in the West Bengal Board of Secondary Education Act, or in the Rules for Management of Non-government Institutions (Aided and Unaided), 1969 or in the Primary Education Act, 1973.

8. On a perusal of the rules, it is patently clear that the expression "branch institution" meant and was understood to mean the primary, junior basic and pre-basic schools run by Sri Ramkrishna Ashram.

9. The Government of West Bengal has, from time to time, been granting approval of teachers and non-teaching employees appointed to the Junior Basic School and has been bearing the burden of salary and allowances of such teachers and non-teaching employees.

10. Out of the nine sanctioned posts of teachers, 5 posts fell vacant by reason of retirement/ resignation whereupon the Managing Committee of the school appointed 5 teachers with effect from 2nd May, 1991. The aforesaid teachers were appointed in the same manner as their predecessors whose appointments had duly been approved.

11. The school appears to have been inspected by the Assistant Inspector of Schools, District School Board, South 24 Parganas on 7th August, 1993. The report makes it clear that the Ramkrishna Ashram Junior Basic School has been enjoying special rules as a branch institution of the schools specified in the

schedule to the rules. The relevant paragraph of the inspection report is extracted hereinbelow for convenience:

I visited this day (07.08.1993) the Ramkrishna Ashram Jr. Basic School at Nimpith. This school is managed by Nimpith Sri Ramkrishna Ashram, the parent body of the school and has been enjoying the Special rules sanctioned by the Education Department, Govt. of West Bengal vide Notification No. 918-Edn. (S) dated 21.09.90 published in the Calcutta Gazette (Extraordinary) of 23.09.90.

12. On 27th February, 2004, the Assistant Inspector of Schools, inspected the school in connection with approval of 5 teachers appointed in place of those who had retired and/or resigned. The Assistant Inspector strongly recommended approval of the teachers.

13. Aggrieved by the failure and/or refusal of the respondent authorities a writ petition being W.P. No.15442 (W) of 2004 was filed in this Court. At the suggestion of the respective parties, the said writ application was disposed of by K.J. Sengupta, J. by an order dated 19th May, 2004 directing the Director of School Education to treat the writ petition as representation of the petitioners and to dispose the same of in accordance with law.

14. After a year from the date of the said order, the Director of School Education passed an order dated 18th May, 2005 rejecting the representation of the petitioner for appointment of teachers on the purported ground that Ramkrishna Ashram Junior Basic School had not been named in the schedule to the Special Rules.

15. In passing the said impugned order, the Director of School Education apparently did not consider Rule 4 of the Rules which extend the application of the Special Rules to branch institutions of the institutions mentioned in the schedule.

16. On a perusal of the Special Rules in their entirety and in particular Rule 4 of the Rules, it is patently clear that pre-basic schools, basic schools and primary schools established by Sri Ramkrishna Ashram are considered branch institutions of the schools specified in the schedule.

17. Mr. Roy appearing on behalf of the petitioner submitted that on the same cause of action an earlier writ petition being No W.P.18227 (W) of 2005 has been moved, which is still pending disposal, wherein the petitioner has challenged the reasoned order dated 18th May, 2005 of the Director of School Education.

18. It cannot be said that this writ petition has been filed in respect of the same cause of action. In this writ application, the petitioner has challenged the subsequent orders dated 28th November, 2006 and 14th May, 2007 of the Joint Secretary to the Government of West Bengal, School Education Department directing the petitioner to apply to the District Primary School Council for recognition of the school.

19. The contents of the impugned order dated 28th March, 2006 are extracted hereinbelow:

"With reference to your letter dated 25.5.2006 on the above-mentioned subject, I am directed to say that u/s 60, Sub-section (1), Clause, (f), (K), (Kk) of West Bengal Primary Education Act, 1973, District Primary School Council, South 24-pgs. Has been empowered exclusively to grant recognition, pay salary of teachers etc. of free Primary Schools like yours.

As the school was once granted recognition by D.P.I., West Bengal under his no.2191 Sc/P (II) dated 2nd May, 1967 (before the said act becomes operative), we are ready to recommend your school to the West Bengal Board of Primary Education and DPSC, South 24-Parganas.

But you have to break the ice in submitting formal application to the Chairman, DPSC, South 24-Parganas through us for the recognition of your school as a "separate primary school" with separate building, hostel, playground etc."

20. The relevant part of the impugned order dated 14th May, 2007 is also extracted hereinbelow for convenience:

"After the introduction of W.B. Primary Education Act, 1973 (for South 24 Parganas) you should have contacted with DPSC South 24 Parganas "for recognition as FREE PRIMARY SCHOOL under DPSC South 24 Parganas", which you did not.

Lastly the Special Rules for Schools run by Ramkrishna Ashram is for Jr. High/ High Schools, but not for Primary School like this one.

Actually there is no such provision in the Act itself, so how could this Special Rule be accorded to your Basic/Primary School?

Primary Schools should not have any Managing Committee as such which is empowered to appoint teachers. But you have exactly done that.

But in case of your other School, Sri Ramkrishna Free Primary School, Kaikhali you have abided all these, a) Recognition by DPSC South 24 Parganas in 1993 as Free Primary School, b) Approval of Appointment of Teachers etc. So this is not facing any problem.

I would request you again, in the interest of smooth running of School to approach to DPSC South 24 Parganas for recognition (as Free Primary School). Thereafter steps may be taken to solve the problem of Ramkrishna Ashram Jr. Basic School from all the ends of School Education Directorate/Department etc."

21. This writ application is thus maintainable. Mr. Roy has also not argued that this writ petition should be rejected on the ground of pendency of the earlier writ petition.

22. In any case, the letters and/or orders impugned in this writ application, calling upon the petitioner to apply for recognition to the District Primary School

Council, South 24 Parganas constitutes a fresh cause of action.

23. A perusal of the provisions of the West Bengal Primary Education Act, 1973 as amended make it absolutely clear that the Primary School Councils have no power to recognize schools. The direction on the petitioner to apply for recognition from the Primary School Council upon reference to Section 60(1) (f), (k) and (kk) of the West Bengal Primary Education Act, 1973 is misconceived and smacks of total non-application of mind.

24. The provisions of the West Bengal Primary Education Act, 1973 quoted in the impugned order dated 28th November, 2006 as amended on that date, as also 60(1)(1) which may be relevant are set out hereinbelow for convenience:

"60. Duties of the Primary School Council. - (1) It shall be the duty of every Primary School Council -

.....

.....

(f) to arrange, in the prescribed manner and with the prior approval of the Board, for the opening of additional primary schools and expansion of existing primary schools with a view to giving effect as funds permit to such schemes,

.....

.....

(k) subject to the prescribed conditions, to appoint teachers and other staff in primary schools, to transfer any such teacher or other staff from one primary school to another primary school within the jurisdiction of the same Primary School Council and to pay to teachers and other staff salaries and allowances, if any, at such rates as may be fixed by the State Government,

(kk) to set up new primary Schools subject to fulfilment of terms and conditions and observance of the guidelines laid down in this behalf by the State Government from time to time,

(l) to withdraw recognition of any primary school on such ground and following such procedure, as the State Government may prescribe, and

(ii) to grant financial aid to a recognised primary school or to withdraw financial aid to recognised primary school on such ground, and in such manner, as the State Government may prescribe, 34(b)

(ll) to amalgamate two or more primary schools into one primary school, to split a primary school into two or more primary schools, and to shift a primary school from one site to an other."

25. The letter dated 18th May, 2009, being the subject matter of W.P. 18227 (W) of 2005 stands superceded, for all practical purposes by reason of the

subsequent orders impugned in this writ petition.

26. Mr. Roy submitted that the letter dated 18th May, 2005 of the Director of School Education and the letters of the Joint Secretary, Government of West Bengal, School Education Department, Primary Branch, impugned in this writ petition were lawful, proper and justified.

27. Referring to the West Bengal Board of Secondary Education Act, 1963 and in particular Section 2(c) thereof, Mr. Roy submitted that the term institution meant a secondary school or an educational institution or part or department of such school or institution imparting education in secondary education.

28. Referring to Section 2(1) Mr. Roy submitted that secondary education meant general education above the primary education stage, provided for students with a view to qualifying them for admission to a certificate, diploma or degree course instituted by a University or by Government or by a statutory body.

29. The definition of secondary education in Section 2(1), however, includes technical, agricultural, commercial education, education for the physically handicapped, mentally retarded and defectives, education in reformatory schools and jails or any other type of education which the State Government might in consultation with the Board specify.

30. Mr. Roy submitted that Section 45 of the said Act confers power on the State Government to frame rules including rules relating to the composition, powers and functions of Managing Committees of institutions.

31. Mr. Roy rightly submitted that in exercise of power conferred u/s 45, the State Government had framed the Management of Recognized Non-government Institutions (Aided and Unaided) Rules, 1969, hereinafter referred to as the 1969 Rules.

32. Mr. Roy submitted that the definition of institution in Rule 2B was the same as that given in the West Bengal Board of Secondary Education Act, 1963. The definition in Rules framed in exercise of powers conferred by an Act would necessarily have to conform to the definition in the Act as otherwise the rules would be rendered ultra vires.

33. Rule 33 of the 1969 Rules confers power on the State Government to frame special rules for certain institutions to which the provisions of Article 26 or Article 30 of the Constitution might apply. Article 26 certainly applies to institutions run by Ramkrishna Ashram.

34. Mr. Roy submitted that the power of the State Government to frame such rules could only be for institutions imparting secondary education and not primary education.

35. Mr. Roy submitted that the special rules relate to secondary/schools and not primary schools. This is evident from Rule 1B which states that the rules shall apply to all junior high, high and higher secondary schools, aided and unaided

specified in the schedule, run by Sri Ramkrishna Ashram.

36. Mr. Roy submitted that no primary school had been included in the schedule since the State Government had no power to frame special rules for primary schools.

37. Mr. Roy submitted that the petitioner had not claimed that the Ramkrishna Ashram Junior Basic School was a branch institution of any of the educational institutions mentioned in the schedule of the said special rules, thus the special rules could not apply to the school which had to be recognized as an independent and separate primary school under the West Bengal Primary Education Act, 1973.

38. The submission that the petitioner had not claimed that the Junior Basic school was a branch institution of the institutions mentioned in the schedule is perhaps not correct. Correspondence annexed to the pleadings reveals that the Ramkrishna Ashram all along claimed that the junior basic school was a branch institution of the institutions specified in the schedule and was treated as such. This is also evident from the report dated 7th August, 1993, referred to above.

39. First of all, Rule 4 uses the expression "branch institution" and not the expression "branch of the institution". Branch institution would necessarily mean an independent institution which is a branch institution in the sense, it is founded, run and administered by the same set of people.

40. If only the primary section of an independent school were to be covered, Rule 4 would not have specifically included Primary, Basic and Pre-Basic schools other than secondary schools run by the Ashram. The use of the plural, schools necessarily signifies more than one school. Moreover, there would be no question of any separate Managing Committee, only for the primary section of a secondary school.

41. The argument that teachers could not be approved and their salary and allowances could not be released until and unless the school applied for recognition by the Primary School Council, is legally unsustainable.

42. The school was brought under the grant-in-aid scheme of the Government of West Bengal long before the enactment and enforcement of the West Bengal Primary Education Act, 1973. The West Bengal Primary Education act does not provide for withdrawal of aid to those schools that are not recognized by the Primary School Council.

43. The respondent authorities should be well aware that there is no provision for recognition of a primary school by the Council after the amendment of section 60(1) by the West Bengal Primary Education Amendment Act, 1996.

44. Furthermore, the approved teachers are still getting salary and allowances from the State of West Bengal and approved teachers who have since retired are duly getting their pensionary benefits.

45. Under the provisions of the West Bengal Primary Education Act, 1974, which

was enforced in District South 24 Parganas in 1993, the District Primary School Council has been cast with the duty of appointment of teachers. There is, however, no provision in the said 1974 Act which debars a pre-basic school or junior basic school or a primary school run by a religious denomination from appointing teachers.

46. There is no provision in the West Bengal Primary Education Act, 1974 that is similar to section 9 of the West Bengal School Service Commission Act, 1996 which makes the recommendation of the School Service Commission binding by providing that notwithstanding anything in other law appointments to the posts of teachers of aided schools recognized by the West Bengal Board of Secondary Education or West Bengal Council of Higher Secondary Education Act or the West Bengal Board of Madrasah Education Act would have to be made by the Managing Committee or the Ad hoc Committee or the Administrator, if any, of the school, on the recommendation of the Regional School Service Commission having jurisdiction and further providing that any appointment of teacher made on or after commencement of the said Act in contravention of the provisions of the said Act would be invalid and have no effect. Moreover, even the West Bengal School Service Commission Act, 1996 protects the services of teachers appointed before commencement of the said Act.

47. It is difficult to conceive how teachers appointed in the Junior Basic school prior to enforcement of the West Bengal Primary Education Act in South 24 Parganas district, could have been denied approval of their appointment.

48. The Ramkrishna Ashram, a religious denomination has a fundamental right under Article 26 of the Constitution of India to establish and maintain institutions for religious and charitable purposes, and to manage its own affairs in matters of religion. It is immaterial that any other school run by the Ashram might have complied with any direction to seek recognition from the Council, for there can be no estoppel against law and certainly no estoppel against a fundamental right. The purpose of establishing, maintaining and/or running institutions for the poorest of the poor, the Scheduled Caste and Scheduled Tribe children of the Sundarban areas is certainly charitable.

49. The right of management of the institution is only subject to public order, morality and health. The right to manage most certainly includes the right to constitute its own Managing Committee in the manner it chooses and also the right to appoint staff for the benefit of the institution.

50. It is in recognition of the fundamental right under Article 26 of the Constitution, that Special Rules have been framed under Rule 33 of the Rules for Management of Non-government Schools (Aided and Unaided), 1969.

51. It is true as argued by Mr. Roy, that under Rule 33 of the 1969 Rules, read with section 45 of the West Bengal Board of Secondary Education Act, 1963, Special Rules can only be framed for management of an institution within the meaning of section 2 (c) of the said Act, that is, a secondary school or an

educational institution or part or department of a school or institution imparting instruction in secondary education.

52. However, the definition of secondary education includes any other type of education which the State Government might in consultation with the Board specify. By framing the Special Rules, the State Government has in consultation with the Board treated as secondary education, the type of education given by pre-basic schools, junior basic schools and primary schools that are branch institutions of schools run by the Ashram which are recognized by the West Bengal Board of Secondary Education and directed that the Managing Committees of those institutions be framed as per the Special Rules.

53. On a conjoint reading of the provisions of section 2(c), 2(h) and 2 (1) (iii) pre-basic, junior basic and primary schools which are branch institutions of an institution for which Special Rules under Rule 33 are framed having regard to Articles 26 and 30 of the Constitution of India, might be treated as institutions within the meaning of the West Bengal Board of Secondary Education Act for the purpose of framing of Special Rules.

54. Even otherwise, the West Bengal Primary Education Act does not contain any specific provision with regard to the manner of constitution of the Managing Committee of schools. There is also no allegation that the Managing Committee of the junior basic school has not been properly constituted.

55. As observed above, the West Bengal Primary Education Act, 1974 does not debar the Managing Committee of an institution covered by Article 26 from appointing teachers and/or non-teaching employees.

56. In any case, the condition set by the State Government of applying for recognition is ex facie, arbitrary, the same being incapable of compliance. In any case, there could be no justification in withholding appointment of teachers appointed before enforcement of the West Bengal Primary Education Act, 1973 in 1993.

57. The writ application is allowed. The impugned orders are set aside.

58. The respondent is directed to approve those members of the staff who have already been appointed against sanctioned posts, provided of course they have the requisite qualification and were within age at the time of their initial appointment.

The appointments shall be approved from the respective dates of appointment and/or accrual of the vacancy in the sanctioned post whichever is later.