

(2014) 12 MP CK 0069
In the Madhya Pradesh High Court
Case No : Writ Petition No. 10546/2013

The Daly College

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 18-12-2014

Acts Referred:

Constitution of India, 1950 — Article 15(5), 19(1)(g), 21, 21A, 21A
Right of Children to Free and Compulsory Education Act, 2009 — Section 11, 12, 12(1)
(c), 12(2), 19

Citation : (2015) 2 JLJ 26 : (2015) 3 MPLJ 280

Hon'ble Judges : Prakash Shrivastava, J

Bench : Single Bench

Advocate : A.K. Sethi, Learned Senior Counsel and Gaurav Chhabra, Learned Counsel, Advocate for the Appellant; Vinita Phaye, Learned Counsel, Advocate for the Respondent

Judgement

Prakash Shrivastava, J.—This order will govern the disposal of W.P. Nos. 10546/2013, 5328/2011, 992/2012, 10955/2013, 1836/2014, 1881/2014, 1910/2014, 1928/2014, 1930/2014 & 2044/2014 since all these writ petitions involve the same issue in similar fact situation.

2. For convenience, the facts have been noted from

W.P. No. 10546/2013.

3. In brief, the case of the petitioner is that it is a registered society running a unaided school which also has preschool classes. The petitioner had submitted the declaration form under Rule 11 of the Right to Education Rules, 2011 in the prescribed Form No. 1 and it was granted recognition under Rule 11(4) of the Rules. The grievance of the petitioner had started when on the basis of the Circular dated 16.1.2013 the show-cause notice dated 26.8.2013 was issued to the petitioner to allocate 25% of the strength of children to the weaker section of society in the pre school classes, i.e. Nursery (Pre-KG), K.G.1 (LKG), K.G.1 (UKG) and Class 1. Hence the petitioner has filed this writ petition challenging

the Circular dated 16.1.2013 and the show-cause notice dated 26.8.2013.

4. A reply has been filed by the respondents taking the stand that the provisions of RTE Act is applicable to the preschool classes also and the petitioner is required to comply with the same and give admission to the student of weaker section of society to the extent of 25% in pre-school.

5. Learned counsel appearing for the petitioners have submitted that the Right to Education Act is applicable only to the children of age group of 6 to 14 years and to the schools from Class I and is not applicable to pre-schools and children below 6 years, therefore, the impugned circular and the show-cause notice cannot be sustained and the petitioners cannot be forced to give admission to the students of weaker section in the pre-school classes. They have also submitted that their liability to give admission in pre-school classes to the extent of 25% has come to an end after expiry of 3 years in terms of Section 6 of the Act. In some of the writ petition, argument about neighbourhood and reimbursement has also been advanced.

6. Counsel for the respondents has supported the impugned action.

7. I have heard the learned counsel for the parties and perused the record.

8. The first issue which has been raised by counsel for the petitioners is about the applicability of Right of Children to Free and Compulsory Education Act, 2009 (for short "RTE Act") to pre-school classes i.e. Nursery, K.G.1, K.G. 2 etc.

9. The RTE Act has been enacted to provide for free and compulsory education to the children. Though in the preamble, in definition Clause 2(c), 2(f) and Section 3 of the Act the children between the age group of 6 to 14 have been included, but the Act in addition to making provision for the children between the age group of 6 to 14 also contains certain provisions for the children below the age of 6 years.

10. Section 2(n) of the Act defines "School" and under Section 2(n)(iv) the recognized unaided schools not receiving any kind of aid or grant to meet the expenses from the appropriate Government or the local authority and imparting elementary education, are covered within the meaning of school. Section 2(n)(iv) reads as under:-

2. Definitions.-In this Act, unless the context otherwise requires,

(n) "school" means any recognised school imparting elementary education and includes

(i) ***

(ii) ***

(iii) ***

(iv) an unaided school not receiving any kind of aid or grant to meet its expenses

from the appropriate Government or the local authority.

11. Undisputedly all the writ petitioner Schools before this Court are covered within the meaning of school as defined in Section 2(n)(iv) of the Act.

12. Section 12 of the Act provides for the extent of school's responsibility for free and compulsory education. Section 12(1)(c) and proviso to Section 12 which is relevant for the present controversy, read as under:-

12. Extent of school's responsibility for free and compulsory education.-(1) For the purposes of this Act, a school,

(a) ***

(b) ***

(c) specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of Section 2 imparts preschool education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

13. In terms of Section 12(1)(c) read with the proviso, the petitioner unaided schools imparting pre-school education are required to admit children belonging to the weaker section and disadvantaged group in the neighbourhood in the preschool classes.

14. The constitutional validity of the provisions of RTE Act and specially Section 12(1)(c) of the RTE Act qua the unaided non minority schools has been examined by the Supreme Court in the matter of Society for Un-aided Private Schools of Rajasthan Vs. Union of India (UOI) and Another, . The Supreme Court after examining the provisions of the RTE Act in the light of Article 21, 21-A, 19(1)(g) and Article 41, 45 & 46 of the Constitution has upheld the validity of Section 12(1)(c) of the Act. It has been expressed by the Supreme Court that the RTE Act seeks to remove all the barriers including financial and psychological barriers which a child belonging to the weaker section and disadvantaged group has to face while seeking admission. The question whether Section 12(1)(c) of the Act impedes the right of the non minority to establish and administer an unaided educational institution, has also been answered in negative. It has been categorically held that after the commencement of the RTE Act by virtue of Section 12(1)(c) read with Section 2(n)(iv), the State, while granting recognition to the private unaided non minority school, may specify permissible percentage of the seats to be earmarked for the children who may not be in a position to pay their fee or charges. The argument of discrimination has also been repelled by observing that Section 12(1)(c) provides for a level playing field in the matter of

right to education to children who are prevented from accessing education because they do not have means or their parents do not have means to pay for their fees.

15. In the matter of Society for Unaided Private Schools of Rajasthan Vs. Union of India and Another, reported in (2012) 6 SCC 102, the matter relating to the validity of Article 15(5) and 21-A of the Constitution was referred to the Constitution Bench and the Constitution Bench in the matter of Pramati Educational and Cultural Trust (r) and Others Vs. Union of India (UOI) and Others, while considering the said issue, has also expressed opinion on validity of the RTE Act and has rejected the submission on behalf of the non minority private schools that Article 21-A of the Constitution and the RTE Act violate their right under Article 19(1)(g) of the Constitution. In the present matters all the writ petitioners before this court are non minority unaided schools.

16. Thus the validity of the RTE Act has already been upheld and in the present batch of writ petitions the validity of proviso to Section 12 is not under challenge and the issue is about its scope and applicability.

17. Since the proviso to Section 12 is clearly worded and in terms of the said proviso, the provisions of Section 12(1)(c) of the Act has been made applicable to admission to pre school education being imparted by unaided school specified in Section 2(n)(iv), therefore, the argument of the counsel for the petitioners that RTE Act is not applicable to pre school education, has no merit and deserves to be rejected.

18. The similar issue of admission in pre school under RTE Act had come up before the Delhi High Court and the Division Bench of the Delhi High Court by the judgment dated 19.2.2013 in W.P. (C) No. 8533/2010 in the matter of Social Jurist, A Civil Rights Group Vs. Govt. of NCT of Delhi and connected writ petitions after examining the scheme of the RTE Act in reference to the argument that the provisions of RTE Act do not apply to the admission to the pre-elementary (preprimary and pre-school) classes by private unaided schools and after considering the proviso to Section 12, has held that though the scheme of the Act is to provide full time elementary education but the extent of school's responsibility for free and compulsory education as contemplated under Section 12 is equally applicable to pre school classes to a school defined under Section 2(n) of the Act. The Delhi High Court in this regard after noting proviso to Section 12 has held as under:-

25.In the wake of the above proviso, it could be safely concluded that the extent of the schools' responsibility for free and compulsory education as contemplated under Section 12 is equally applicable to a school defined under Section 2(n) of the Act. In respect of admission even to pre-school education, a school specified in sub clauses (iii) and (iv) shall admit the children to the extent of at least twenty-five percent of the strength of that class belonging to weaker section and disadvantaged group in neighbourhood and provide free and

compulsory education till its completion. To this extent, there is no dispute between the parties. Though the Act was enacted to give effect to the object of Article 21A of the Constitution which relates to the children in the age group of 6 to 14 years as a fundamental right, in our opinion, the provisions of Section 11 and the proviso to Section 12 of the Act are traceable to Article 41 and 45 of the Constitution. As already noted, in terms of Article 41, the State shall of course within the limits of its economic capacity and development, make effective provision for securing the right to education irrespective of the age. Proviso to Section 12(1)(c) is an exception to the intent and object of the Act to provide free and compulsory education at the elementary level as in the wake of the above provision, admission to Class-I in respect of children defined under Section 2(d) and 2(e) is made applicable to pre-school education as well. Though, pre-school is not defined under the Act, it is to be presumed that it is the education prior to elementary education. The above discussion leads to the following conclusions that the Act is applicable to elementary education for the children at the age of six years to fourteen years.

19. Thus Delhi High Court has taken the view that though the other provisions of the RTE Act do not apply to the private unaided schools referred in Section 2(n) (iv) imparting pre elementary education but the provisions relating to the admission to the extent of 25% of strength of class to the children belonging to weaker section and disadvantaged school, do apply to them. Hence the view taken by this court above is duly supported by the judgment of Delhi High Court.

20. The counsel for the petitioners have also advanced argument based upon Article 21-A of the Constitution of India and have submitted that under Article 21-A right to education to all children of the age of 6 to 14 years is a fundamental right but education to children below 6 years is not a fundamental right, therefore, petitioners can not be forced to give admission to children below 6 years of weaker section and underprivileged section of society in pre school classes. Such an argument also cannot be accepted because this Court has duty to enforce not only the fundamental right but also to enforce legal rights and obligations. Proviso to Section 12 contains legal right of specified children below 6 years and obligation of the petitioners to give such admissions. Proviso to Section 12 is also relatable to Article 45 contained in Chapter 4 of the Constitution relating to directive principles of the State policy providing for State's responsibility to make provision for early childhood care and education to all children until they complete the age of 6 years.

21. The petitioners have challenged part of the Circular dated 16/1/2013 relating to 25% admission to children of weaker section in pre school classes.

22. Under Section 11 of the Act the appropriate Government is entrusted with the responsibility of making necessary arrangement for providing pre-school education for children. Section 11 reads as under:-

11. Appropriate Government to provide for pre-school education.-With a view to

prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free preschool education for such children.

23. Exercising the rule making power contained in Section 38 of the Act, the State of Madhya Pradesh has framed the rules namely Right of Children to Free and Compulsory Education Rules, 2011 (M.P.) (for short "the State Rules). The Rule 11 of the said rules provides for grant of recognition to the schools and Rule 11(4)(a) makes it clear that the recognition is subject to complying with the provisions of Section 12(1)(c) in pre-school admission. Rule 11(4)(a)(ii) and (vii) reads as under:-

11. School Recognition.

(1) ***

(2) ***

(3) ***

(4)(a) The District Education Officer on being satisfied that the school fulfills the norms and standards prescribed under section 19 shall issue the recognition certificate in Form-2 appended to these rules. The certificate shall be for a period of three years and shall be issued within 45 days from the date of making application for recognition. The certificate of recognition shall be subject to following conditions:-

i. ****

ii. the school shall give admission to a minimum of 25% in class I for the children of disadvantaged group and children of weaker section from the limit of neighbourhood. In case the school is aided school it shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent:

Provided that where a school imparts pre school education, the provisions of clause (a) to (c) of sub-section (1) of section 12 shall apply for admission to pre school;

iii. ***

iv. ***

v. ***

vi. ***

vii. the recognition shall be withdrawn in case of violation of the terms and conditions of recognition.

24. The State Government has issued the Circular dated 16.1.2013 providing for admission to the children of weaker section and disadvantaged group in pre-school primary education to the extent of 25% as under:-

25. The above Circular has apparently been issued by the State Government to implement the provisions contained in proviso to Section 12 of the Act and to discharge its obligation under Section 11 of the Act. The above circular does not run counter to proviso to Section 12 read with Section 12(1)(c), therefore, the petitioners' challenge to the above circular has no merit. The petitioners have failed to demonstrate as to how the above Circular is beyond the provisions of the Act or is without jurisdiction.

26. Counsel for the petitioners have raised the issue that under Section 6 of the Act the appropriate Government and the local authority had the duty to establish school within such area or limits of neighbourhood; where it is not so established, within a period of 3 years from the commencement of the Act and therefore, after expiry of 3 years, the petitioners cannot be asked to enforce the provisions of Section 12(1)(c) of the Act. Such an argument has no merit because implementation of Section 12(1)(c) of the Act is not dependent upon the establishment of the schools by the State under Section 6 of the Act and there is no time limit prescribed upto which the provisions of Section 12 of the Act are to operate, therefore, it is not open to the petitioners to contend that the provisions of Section 12 have ceased to have effect after 3 years.

27. The petitioners have also raised an issue that if the petitioner Schools give admission to children of underprivileged and weaker section of society in pre Nursery class then they can not be compelled to give admission to such children while giving fresh direct admissions in KG-1, KG-2 or other pre school classes. Such an argument deserves to be rejected at the outset because by virtue of proviso to Section 12, the provision contained in Section 12(1)(c) apply to admission in all the pre school classes be it, pre KG, KG-1, KG-2 or whatever name they are called. The school covered by Section 12(1)(c) read with the proviso are required to admit such children to the extent of 25% strength of the class while giving direct admission in any of the pre school classes.

28. In W.P. No. 5328/2011 counsel for the petitioner has urged the additional ground that for pre-school admission the limits of neighbourhood have not been defined.

29. Rule 2(1)(k) provides the limits of neighbourhood for classes 1 to 8 and reads as under:-

2(1)(k) "Limit of neighbourhood" means, in case of classes I to V, in rural area, the village and adjoining villages and adjoining wards of urban area, if any, and in urban areas, the ward and adjoining wards and adjoining villages, if any, and in case of classes VI to VIII, area of 3 k.m. from this limit;

30. Rule 2(1)(h) prescribes extended limits of neighbourhood and reads as

under:-

"2(1)(h) "Extended limit of neighbourhood" means the neighbourhood area of the limit of neighbourhood defined under clause (k);

31. Rule 4 prescribes areas or limits for the purpose of Section 6 and relevant Rule 4(1) reads as under:-

4. Areas or limits for the purpose of section 6.

(1) The areas or limits of neighbourhood within which a school has to be established by the State Government shall be the area or limit as defined in clause (k) of sub-rule (1) of rule 2.

32. By virtue of Rule 7(3) the limits of neighbourhood prescribed in Rule 4(1) are applicable for admission in pursuance to Clause 12(1)(c). The Rule 7(3) reads as under:-

7. Admission of children belonging to weaker section and disadvantaged group.

(1) ***

(2) ***

(3) The areas or limits of neighbourhood specified in rule 4(1) shall apply to admissions made in pursuance of clause (c) of sub-section (1) of section 12.

Provided that the school may, for the purposes of filling up the requisite percentage of seats for children referred to in clause (c) of subsection (1) of section 12 admit the children from the extended limit of neighbourhood as defined under clause (h) of sub-rule (1) of rule 2.

33. By virtue of the proviso to Section 12, the provisions of Section 12(1)(c) are applicable to the petitioners-schools for which limits of neighbourhood have been prescribed in Rule 2(1)(k), therefore, the limits of neighbourhood prescribed for Class I in Rule 2(1)(k) and extended limit in Rule 2(1)(h) becomes applicable for pre-school admission also. Counsel for the State in this regard has referred to the Circular dated 10.2.2014 issued by the State Government containing the details relating to the manner of granting admission from neighbourhood and providing as under:-

34. Even in Clause I of the declaration which is to be furnished along with Form-1 for recognition, the limits of neighbourhood for the purpose of Section 12(1)(c) of the Act is to be disclosed.

35. Thus, the counsel for the petitioner is not right in his contention that the limit of neighbourhood have not been specified. Even otherwise learned counsel for the State has also fairly stated before this Court that if the petitioners have any doubt about the limits of the neighbourhood from which they have to give admission in the pre-school classes to the extent of 25%, then it would be open to them to approach the competent authority and their grievance will be

redressed without any delay.

36. Counsel for the petitioner in W.P. No. 5328/2011 has also raised the issue that there is no provision for reimbursement of the expenditure incurred by the school on the 25% children given admission in pre-school classes from under privileged and weaker section of society. Such a contention also has no merit because Section 12(2) of the RTE Act provides for reimbursement and in the Circular dated 10.3.2010 the State Government has categorically provided that:-

37. Before this Court also counsel for the State has not disputed that expenditure incurred by the petitioner schools in admission to children of weaker and underprivileged class in pre school class is to be reimbursed in accordance with Section 12(2) and above circular.

38. In respect of grievance of the counsel for the petitioners that no reimbursement of expenditure incurred by them in the previous years on admission to the extent of 25% to the children of under privileged and weaker section of society in pre-school classes, has been made by the State till now, Counsel for the State has fairly stated before this Court that the amount will be reimbursed in accordance with law within a time bound period. Hence the petitioners are permitted to file an appropriate application for reimbursement giving all the necessary particulars before the competent authority of the respondent and if such an application is filed by the petitioners, the same will be decided and reimbursement will be made in accordance with law by the respondents, within a period of 3 months from the date of receipt of the application.

39. No other issue has been raised by the petitioners.

40. Writ petitions are accordingly disposed of.

41. Signed order be kept in the file of W.P. No. 10546/2013 and a copy thereof be placed in the connected matters.