

(2019) 07 PAT CK 0288

Patna High Court

Case No: Civil Writ Jurisdiction Case No. 15217 Of 2018

Pt. Ujjwal Kumar Mishra

APPELLANT

Vs

Bihar School Examination Board
And Ors

RESPONDENT

Date of Decision: July 30, 2019

Acts Referred:

- Constitution Of India, 1950 - Article 12
- Right Of Children To Free And Compulsory Education Act, 2009 - Section 5, 14, 14(1), 18, 38, 38(2)(5)
- Right Of Children To Free And Compulsory Education Rules, 2011 - Rule 9, 11, 18

Hon'ble Judges: Anil Kumar Upadhyay, J

Bench: Single Bench

Advocate: Abhinav Srivastava, Mahendra Thakur, Satyabir Bharti

Final Decision: Allowed

Judgement

1. Heard learned counsel appearing on behalf of the petitioner and learned counsel appearing on behalf of the Bihar School Examination Board

(hereinafter referred to as "the Board").

2. The petitioner-institution is aggrieved by Memo No. 2721 dated 16.04.2018 issued by the Director (Academy), Bihar School Examination Board, respondent No. 4, whereunder the school code of the petitioner-institution has been suspended.

3. The petitioner had approached this Court earlier in CWJC No. 7943 of 2017 against the decision of the Board when the Board, after allowing the students to appear in 2017 Matriculation Examination, took a decision against the petitioner- institution on the premise that the candidates, who were

allowed to appear from the institution were over age. The action of the Board was based on some kind of enquiry by the District Education Officer,

Vaishali and the Sub-Divisional Officer, Mahnar. The relevant part of the discussions of this Court in the judgment dated 11.7.2017 passed in CWJC

No. 7943 of 2017 is quoted below:-

â€œ9. The Board has brought on record a report submitted by the Sub-Divisional Officer, Mahnar, dated 03.03.2017, based on an enquiry conducted

by a team consisting of:-

(i) Sub-Divisional Officer, Mahnar

(ii) Sub-Divisional Police Officer, Mahnar

(iii) Land Reforms Deputy Collector, Mahnar

(iv) Block Education Officer, Mahnar.

10. The said report has been prepared on the basis of a random check done by the said Committee, where 40 examinees out of 400 of Kendriya

Rajeshwari Ucha Vidyalaya, Hazipur and 368 examinees from petitioner- school, taken together, were questioned. Those 40 students, as would appear

from the said report, dated 03.03.2017, could not disclose correctly the names of the Schools and the Principals. They disclosed their age to be 20

years, 24 years, 28 years and 30 years. They were residents of Patna, Saran and Hazipur and they appeared not to be the regular students of the

Schools.

11. The District Magistrate, Vaishali, thereafter, asked the District Education Officer, Vaishali to enquire into the matter in the light of report

submitted by the four-man Committee. The District Education Officer, Vaishali, constituted a three member enquiry committee and submitted its

report to the Board on 27.04.2017, which has been brought on record by way of Annexure-D to the counter affidavit. He too, reported the same as

was reported by the Sub-Divisional Officer, Mahnar. It has been mentioned in the report, dated 27.04.2017 that the examinees appeared to be

â€œbetween 25 to 30 years of ageâ€™. In addition, the District Education Officer, Vaishali reported that 440 students were admitted in Class VIII on

the basis of declaration and no student was admitted on the basis of transfer certificate.

12. The report submitted by the Sub-Divisional Officer, Mahnar and the District Education Officer, Mahnar are the two materials which are the basis for impugned action of the Board.

13. Learned counsel appearing on behalf of the petitioner has submitted that there is no illegality in taking admission as regular students in Class VIII

on the basis of declaration. He has submitted that there is no statutory provision or guideline or instructions issued by the Board or any competent

authority, requiring the Schools to take admission only on the basis of transfer certificates. It is his contention that the materials relied on by the Board

could not have formed the basis for a declaration that all the students who had appeared for 2017 matriculation examination from the petitioner's

school were over-aged and their admissions were illegal, the same being based on declaration made by them.

14. Mr. Lalit Kishore, learned Senior counsel appearing on behalf of the Board, justifying the action of the Board, has submitted that the irregularity

and illegality in admitting the students by the petitioner's school and allowing them to fill up forms for matriculation examination being writ large, no

in-depth enquiry was required as that would have been a mere formality. He contends that since the students, who had appeared for the examination

in their appearance seemed much more in age than they had declared, the Board rightly cancelled their registrations and decided to withhold their

results. He has submitted that what is obvious needs no proof.

15. I am unable to accept the submissions made on behalf of the Board. It is apparent from the reports submitted by the Sub-Divisional Officer,

Mahnar and the District Education Officer, Mahnar that no exercise, worth enquiry was conducted. The opinion of the said Committee is apparently

based on what the members could perceive on seeing some of the examinees. Further, nothing has been shown to this Court that admission of

students on the basis of their self declaration in Class VIII as regular students was per se illegal. Further, without reaching a definite conclusion that

the students of the School had fudged their age at the time of admission, their registrations could not have been cancelled and results withheld. In no

event, the Board could have taken such decision without giving the students an opportunity to explain.

16. The impugned action of the Board of cancelling the registration of the students of the petitioner's school as regular students and withholding of

their results of 2017 matriculation examination are unsustainable, being illegal, arbitrary and in violation of principles of natural justice. No

instrumentality of the State within the meaning of Article 12 of the Constitution of India has the authority to act arbitrarily in breach of law and

principles of natural justice. For this reasoning, the action of the Board is unauthorized also.

17. I declare accordingly and set aside the impugned orders and decisions of the Board in this regard.

4. After setting aside the impugned order and the decision of the Board, the Court directed the Chairman of the Board to take a fresh decision on the

question of cancellation of registration of the students and withholding their result of matriculation examination, 2017. The Court also directed for

determination of age of the candidates, whose candidature was doubted by the Board being over aged. Paragraph Nos. 19 to 23 of the aforesaid

judgment is specific direction how the Board is to proceed in the matter of alleged over age students. Paras 19 to 23 are quoted below:-

¶19. I also direct that for the purpose of determining the dispute/controversy as to whether all or some of the students of the School had fudged

their age, a Medical Board shall be constituted for examining the students of the School, who were examinees of 2017 matriculation examination. Such

Medical Board shall be constituted by the District Magistrate, Vaishali on a request made by the Chairman of the Board. The Board for the said

purpose shall issue a public notice fixing date and venue for the said enquiry by the Medical Board in coordination with the District Magistrate,

Vaishali when and where the examinees of the School shall be required to present themselves.

20. The Medical Board shall give its opinion on the question of respective age of the examinees. If it is found by the Board that there is substantial

difference (of two years or more) between the minimum possible age determined by the Medical Board and the age declared by such students and

recorded in the school register, the Board after giving such students an opportunity of hearing by seeking explanation, shall take a final decision.

21. The students/examinees, who fail to present themselves before the Medical Board in pursuance of public notice to be issued by the Board in the light of the present order shall be treated to be having no case on the point of their age and in that case the Bihar School Examination Board shall be free to take decision in accordance with law.

22. If the Board is of the view that action of the petitioner's school in taking admission of the students on the basis of their self declaration, without transfer certificates in Class VIII was in breach of any statutory provision, guideline or instructions framed or issued by any competent authority, the Board shall be free to take decision but after giving the petitioner's school an opportunity to explain by way of notice and by passing a reasoned order.

23. It is made clear that the Board shall be at liberty to initiate criminal action against any person, including functionaries of the petitioner-school, who are found to have committed any offence, in this process.

5. Mr. Abhinav Srivastava, learned counsel for the petitioner submits that notwithstanding the specific direction issued by this Court to refer the matter of age determination to the Medical Board, no step was taken by the Board for referring the students, who were alleged to be over age, to the Medical Board and allowing them to appear from the school in question. After the order of this Court, the Director (Academy) issued letter dated

16.4.2018. The letter dated 16.4.2018 intimating the decision of the Board, impugned in this writ petition, is quoted below for ready reference:-

“ - 00- 2721/18

(00),

o

,

,

,

-- ,

, ,

- CWJC NO.- 2845/2018 with MJC No. 216/2018 in

CWJC NO. 7943/2017 with MJC No. 3574/2017 in

CWJC NO-7943/2017 ,

- 13.03.18

,

, CWJC NO-7943/2017 - 13-03- 2018 "It is made clear that the Bihar

School Examination Board shall be at liberty to proceed for cancellation of affiliation of the School in question if, in the opinion of the Bihar School

Examination Board, such situation exists, but strictly in accordance with the provisions under the Bihar School Examination Board Act and the

Rules/Regulations framed there under. "

0 0 0 , , -0 0-1348, -17.04.13

- 0 0-198, -16.10.14

-53708

0 0 2017 -5343 (0 0 0 ,)

,

552/ 02.03.2017

2017

2017

"

1.

2017

2. 2000 2002 ,

25-30

3. -

-(0 0)

4. -

o

5. ,

6. ,

○ 2011 - 15

- 3 ()

○

0/-

, â€

6. Mr. Abhinav Srivastava, during the course of argument, submitted that the entire exercise of the Board is totally without jurisdiction and it is nullity

being a decision in teeth of the direction issued by the Writ Court in CWJC No. 7943 of 2017, inasmuch as the Board has not referred the case of any

candidate before the Medical Board to establish the allegation against the institution that the institution admitted and allowed the over aged students.

7. Mr. Satyabir Bharti, learned counsel appearing on behalf of the Examination Board submitted a fact-sheet to highlight the events of this case. The

fact-sheet of the Examination Board is quoted below:-

â€œTHE SEQUENTIAL LIST OF EVENTS IN CWJC NO. 15217/2018 (Pt. Ujjawal Kumar Mishra V.Bihar School Examination Board)

Date (s) Fact-sheet

1.17.03.2013 Petitionerâ€™s institution issued affiliation letter from Boardâ€™s office.

2. 21.04.2017 Fraudulent & illegal act of the institution was detected & reported by District Magistrate, Vaishali alleging that over aged students i.e.

aged between 25-30 years, showing them to be born after 2000-2001, has been allowed to appear in the matriculation exam.

3. 27.04.2017 Enquiry Committee reported that all students are shown to have admitted without transfer certificate, on the basis of self-declaration.

Thus, students allowed to appear are not bonafide students.

4. 11.07.2017 The Honâ€™ble High Court was pleased to pass an order in CWJCNo. 7343/2017, holding that decision to declare students being over-

aged, on the assessment of the Committee cannot be sustained.

Liberty granted to the Board to proceed against the institution, if the impugned act of the institution is in breach of statutory provision. (Civil Review

No. 135/2018, arising out of the order is pending)

5.05.01.2018 Petitioner was directed to submit a show-cause directing to submit explanation as to why affiliation be not cancelled. In the meantime, the affiliation was suspended.

6.15.02.2018 Impugned order recalled.

7.13.03.2018 CWJC No. 2845/2018 disposed, while granting liberty to the Board to proceed with cancellation, if situation exists.

8. 16.04.2018 Show cause cum suspension order.

9.13.12.2018 Affiliation cancelled.â€

8. Mr. Satyavir Bharti, learned counsel for the Board has submitted that in the decision making process the Board has examined the case of the

petitioner-institution and held out that the petitioner-institute has committed mischief in allowing the over aged students from the institution. His first

limb of argument is that the Right of Children to Free and Compulsory Education Act, 2009 and the Rules, 2011 framed thereunder are binding on the

Board and the action of the Board in passing the order contained in Annexure-5 is in tune with the Bihar Education Code, the Right of Children to free

and Compulsory Education Act, 2009 as well as the Rule 2011 framed thereunder. On the query of the Court Mr. Bharti admitted that the Board has

not framed any Regulation regulating admission or prescribing any mode of admission in any institution affiliated to the Board. Mr. Bharti also admitted

the fact that Rules framed under the Right of Children to Free and Compulsory Education Act has not been adopted by the Board but he submitted

that the Act and the Rules framed thereunder are binding in the decision making process. In particular, Mr. Bharti has placed reliance on Sections 5,14

and 18 of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as â€˜the Actâ€™™). For ready reference,

Sections 5,14 and 18 are quoted below:-

â€œ5. -(1) ,

, 2 () (iii) (iv)

(2)

, , 2 () (iii) (iv)

(3) ,

,

,

,

14. -(1) , ,

, 1886 (1886 6)

, ,

(2) ,

18. -(1)

, ,

,

,

(2) (1) , ,

, ,

19

(3) ,

,

,

, ,

(4) , (3)

(5)

, ,

, ,

, â€

9. The Rules, 2011 was framed in purported exercise of power under Section 38 of the Act. Section 38 of the Act is quoted below:-

â€œ38. -(1) , ,

(2) ° ,

, -

() 4 - ;
() 6 ;
() 9 () ;
() 12 (2) ;
(.) 14 (1) ;
() 15
;
() , , 18 (1)
;
() 18 (2) , , ;
() 18 (3) ;
() 21 (2) () ;
() 22 (1) ;
() 23 (3) ;
() 24 (1) () ;
() 24 (3) ;
() 30 (2) ;
() 31 (3) , ;
() 33 (3) ;
() 34 (3) ;
(3) 20
23 , ,
,
(4)
- â€

10. Reading in between the line of Section 38, it is evidently clear that the rule making power enables the State Government to frame rules for the implementation of the Act. Clause 5 of sub-section (2) of Section 38 is the relevant provision for rule making for determination of the age in terms of

Section 14 Sub-Section (1) of the Act.

11. Mr. Bharti referring to the Rule 2011 particularly Rules 9 and 11 would submit that modalities have been prescribed for the purpose of accepting the date of birth at the time of admission and rule 18 talks about the recognition by three-men Committee constituted in each District by the State Government.

12. Mr. Satyabir Bharti next contended that as per Bihar Education Code admission is only permissible at the level of Class-

7. It is to be noted here that the whole education system has undergone a change since framing of Education Code.

It is to be noted here that the Bihar Education Code is not statutory rule as held out by the Constitutional Bench of the Apex Court in the case of

Dwarikanath Tiwary Vs. The State of Bihar & Ors: AIR 1959 SC 24.9 The Board has framed its own Regulation and Rules for the purpose of giving

effect to the provisions of the Bihar School Examination Board Act and the Rules framed thereunder as well as Affiliation Regulation. When specific

provisions have been framed under the Bihar School Examination Board Act and the Rules and Regulations have been framed thereunder either for

the purpose of giving effect to the scheme of the Act or for the purpose of affiliation, then general regulation or general provision is not attracted in the

decision making process.

13. The Court on scrutiny of the materials available on the record comes to the conclusion that the Board has acted beyond its jurisdiction in taking

decision against this institution. Firstly, the Board has placed reliance on the Right of Children to Free and Compulsory Education Act and the Rules

framed thereunder without adopting such rules for the purpose of transaction of its business. Secondly, from the show cause notice it appears that the

Board has inferred hanky-panky only because the admission in the school was based not on Transfer Certificate but on self declaration which is one

of the admissible mode for determining age at the time of entry in the school as per Rule 9 of the Rules, 2011 framed under the Right of Children to

Free and Compulsory Education Act.

14. From perusal of the show cause notice the Court comes to the conclusion that the entire decision of the Board is based on suspicion. It is now well

settled that suspicion howsoever strong cannot partake the character of proof and only on the basis of suspicion the Examination Board has taken

decision to condemn the institution. Therefore, the decision of the Board dated 19.12.2018, which has been placed on record by way of counter

affidavit, Annexure-B and challenged by the petitioner in I.A. No. 1 of 2019 is not sustainable. The Secretary of the Board has taken decision in

purported exercise of Regulation 15(3)(IX) of the 2011 Affiliation Regulation. In the decision dated 19.12.2018 reasons have been found alien to the

show cause notice. For instance, for the first time the Board in paragraph-9 of the order dated 19.12.2018 has noted that the power to grant affiliation

is vested with the Board but no decision to approve affiliation to the institution was taken by the Board which was not subject-matter of the show

cause notice. The aforesaid instance is indicative of the bias in the decision making process by the Board. The Board's decision which was

quashed by this Court was, in fact, reiterated by the Board in the impugned order dated 19.12.2018.

15. It is to be noted here that after the order of the Writ Court in CWJC No. 7943 of 2017 and MJC No. 3572 of 2017, the Board suspended the

affiliation notwithstanding the fact that there was no provision for suspension of affiliation.

16. On consideration of the entire material facts and circumstances as discussed hereinabove, the Court has no hesitation in holding that the entire

action of the respondent-Board is illegal and arbitrary exercise of power. Such decision cannot sustain. Accordingly, the order dated 19.12.2018 as

contained in Memo No. 3450, Annexure-B to the counter affidavit is quashed. The effect of the quashing of the order would entitle the petitioner-

institution to allow the students of the institution to appear in the examination subject to verification of their age by a duly constituted Medical Board by

the Examination Board/ authority within a period of 15 days from the date of receipt/production of a copy of this order failing which the Board shall

not be allowed to question the issue of over age of the candidates of the school in question for the purpose of registration and appearance in the

examination conducted by the Board.

17. Since the matter was pending before this Court, the Court directs the Board to accept the fees and forms of the students of the institution in

question notwithstanding the last date fixed.

18. For the reasons stated above, the writ petition is allowed and disposed of in the manner as indicated above.