

(2004) 07 CAL CK 0004

Calcutta High Court

Case No: Writ Petition No. 10040 (W) of 2004

Sujit Kumar Banerjee and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

---

**Date of Decision:** July 12, 2004**Acts Referred:**

- Constitution of India, 1950 - Article 12, 21A, 226

**Citation:** (2004) 4 CHN 612**Hon'ble Judges:** Kalyan Jyoti Sengupta, J**Bench:** Single Bench

**Advocate:** Haradhan Banerjee and Amitava Pain, for the Appellant; Saptangsu Bose and Ayan Banerjee for respondent Nos. 5 and 6, Nandadulal Banerjee and Sukumar Bhattacharya and Anima Chakraborty, for the Respondent

---

### Judgement

Kalyan Jyoti Sengupta, J.

By this application 23 guardians for and on behalf of their respective wards have approached this Court for the relief of admission to Class-V without any admission test in the institution. Each and every ward was the student of Shibpur Hindu Girls' Primary School (hereinafter referred to as the primary school) and they have passed in Class IV examination held in the primary school. In this building according to the petitioners there are two streams, namely one is primary and another is secondary. The management of the secondary stream has refused to admit those students who have come out successfully in primary section as a matter of course. Instead they held the admission test to select the suitable candidates for admission to the secondary stream. The petitioners and each of them seemingly have got inspiration of judicial pronouncement rendered in scale of [Debasish Kar Gupta and Another Vs. State of West Bengal and Others](#), since affirmed by Appeal Court reported in [Brahmo Balika Shikshalaya and Another Vs. Debasish Kar Gupta and Another](#), and by the Supreme Court by the judgment dated 18th September, 2002, for moving this matter.

2. Mr. Haradhan Banerjee learned Advocate appearing in support of this application contends that both the primary and secondary streams are housed by the same building. As a matter of fact, the primary section of this school was set up as early as 1867, thereafter the local inhabitants felt the need of secondary stream for imparting high education to the girls and set up the secondary stream subsequently. Both the streams are integral to one another and the people at large always accept and think so. The integrality and in severability will appear from emblem, logo, name and the pattern of uniform of the students in both the streams. The primary section is totally financed and controlled and managed under the appropriate laws, similarly the secondary stream is also managed and controlled under the appropriate law.

3. He contends further that as a matter of course and rule without any departure the students who came out successful in Class IV standard got admission automatically to Class V course. For the last few years the management of the secondary stream however, has been refusing to admit the successful student in the same school without any admission test. This is not legally permissible as has been declared by the aforesaid judicial pronouncement. Right to get education up to the age of 14 years has now become part and parcel of fundamental right with the insertion of Article 21A in the Constitution of India. The management of the secondary stream having instrumentality of the state has infringed the aforesaid right of the students by this process. He urges that it is true the wards of his clients have appeared in the admission test accepting this screening system but this cannot operate as an estoppel for the simple reason that principle of estoppel or waiver does not apply as against the fundamental right as guaranteed in the Constitution of India.

4. Mr. Saptangsu Basu learned Counsel appearing for the authority of the high school submits that the aforesaid primary section is not part and parcel of the high school. It is, independent of and distinct from the high school. It is true both the schools are housed in the same building and having same infrastructure. But actually the Shibpur Hindu Girls' High School has allowed the primary school to use the building and other infrastructural facility upon payment of rent and electric charges. The management of both the schools are separate and there is no relation and/or connection with each other. He submits further that in each and every year the said high school held admission test, for selecting suitable candidates for admission to Class V. The high school in its wisdom has laid down its own procedure for admission and this cannot be interfered by the Court. The judicial pronouncement as above cannot be applicable in this case and the same are distinguishable on fact, in as much the cases reported were recorded. On the effectual premise that primary and secondary stream are controlled and managed by the same authorities and there was identity and integrality of both the streams.

5. Having heard the learned lawyers for the parties and having examined the material produced before me the question which has fallen for consideration in this case is firstly, whether the wards of the petitioners have been denied their fundamental right to get education as guaranteed under Article 21A by the management of the high school by reason of the fact that each of the wards has not completed 14 years of age. Secondly whether they are otherwise legally entitled to get admission to high school without any admission test. Right to get education up to the age of 14 years was not a fundamental right before and this has been lately inserted by way of amendment in the Constitution. In order to understand properly the said provision is set out hereunder.

"Article 21. Right to education.-The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

6. I find the nature of the right guaranteed by this new Article is that the children falling within the age bracket of six to fourteen years can get free and compulsory education but they cannot have any choice to any particular institution till the State may by law, determine. No such law has yet been made by the State. The definition of "State" in Article 12 of widest amplitude is not applicable here, because all other authorities having instrumentality of State may not necessarily have power to make laws. In this Article, I think, the "State" is intended to mean the bodies having power to make laws in the field of education. Therefore, I think that the aforesaid Article at present does not help the wards of the petitioners to get admission as a matter of course.

7. Now on the facts and circumstances of this case and on the strength of the judicial pronouncement whether the petitioners' wards have any right to get admission in the school being run and housed in the same building as a matter of course or not. The aforesaid reported cases have laid down, amongst others, that when all the streams of a same school are run by the same management or in the same building the students from lower level can get admission if they come out successful in class test, as a matter of course and without being subjected to further admission test of the next higher classes in the same school. The learned Single Judge held this is permissible as he found that all the streams of the schools in that case were run, managed and controlled by the same administration and this concept has been approved by the Appeal Court. The Supreme Court while deciding the appeal against the judgment and order of the learned Single Judge and Division Bench has not only affirmed the above judgments but also proceeded one-step further observing :

"It is true that preliminary section is fully controlled by the Government of West Bengal under the relevant structure but were not concerned with the control of the Government over the management of the institution. The question whether a entrance test should be held for the purpose of admission to a school arises only

when a student of an institution seeks admission into another. It is certainly not necessary when a student of the same institution seeks admission from one class to other of the same institution."

8. From the ratio of the aforesaid decision it appears to me that if primary section is housed in the same building and is run along with the secondary or higher secondary stream with the same name then it is quite reasonable that the pupils from the lower level should be accommodated after their successful completion in the primary course without being subjected to the entrance test for the secondary stream. For this, identity of the management or control of both the streams is not necessary. Under the present system of the law both the streams cannot be controlled and managed by the same management.

9. Admittedly, in this case both the streams are housed in the same building and with same name with slight distinction because of courses. The people at large since time immemorial know that both the streams are part and parcel of one and identical and inseparable body. So, it is quite obvious that the student of primary section can justifiably think of their reasonable expectation to get admission in secondary stream as a matter of course and without being subjected to further admission test. But this right is not indefeasible one.

10. But in this case factually the petitioners after having been unsuccessful in the admission test approached this Court, so they took a chance. As a matter of fact some of the petitioners' wards have been accommodated in sequel to the said admission test. Therefore, they have accepted this system instead of objecting thereto, before the test being held. It is not that for the first time admission test has been conducted and it was with the knowledge of each of the petitioners beforehand, that their wards must be subjected to admission test at the admission stage of Class V. As I have already observed that to get admission in a chosen or reported school is not guaranteed by the aforesaid Article. All that is guaranteed is that the students of six to fourteen years can get free and compulsory education as per law to be made by the State. This piece of fundamental right is now inchoate. Therefore it cannot be held that the petitioners' fundamental right has been infringed by the refusal of the school authority. Accordingly, I hold that question of estoppel will apply in this case, under settled principle of law that waiver, estoppel, acquiescence as against constitutional provision, and law do not apply.

11. The wards of the petitioners and each of them cannot get admission in this case because they have participated in the process thereby, they waived their right to object to the system rather they have accepted by taking benefit of the same.

12. It appears that there are sixteen number of seats available and a good number of candidates are in the waiting list for admission.

13. Therefore, I direct the school authority to admit wait-listed candidates if they want to be admitted and the balance number of seats shall be filled from and out of

the ward of the petitioners who have not been accommodated, in accordance with their merit position in admission test. The school authority shall have to write to the District Inspector of Schools as a special case to accommodate the rest of the wards of the petitioners who cannot be accommodated in existing strength, within seven days from the date of receipt of this order. The D.I. concerned shall as special case without treating as precedent make endeavour to increase number strength for this year within seven days from date of communication of this order. On and from next year the secondary stream of the school concerned shall not hold test for admission of students who have come out successful in Annual Class Test in Class IV to be held by primary section and, want admission. The management of the primary section shall lay down types or standard of subjects, assessment of the student in such annual test, in. consultation and/or co-ordination with management of secondary stream.

14. Thus the petition is disposed of without awarding any cost.