

(2002) 04 CAL CK 0026

Calcutta High Court

Case No: Writ Petition No. 17425 (W) of 1999

Arya Pratinidhi Sabha and
Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: April 8, 2002

Acts Referred:

- Constitution of India, 1950 - Article 14, 166, 166(1), 21, 226
- General Clauses Act, 1897 - Section 3(60)

Citation: (2003) 2 CALLT 94 : (2002) 1 ILR (Cal) 550

Hon'ble Judges: Pratap Kumar Ray, J

Bench: Single Bench

Advocate: Arun Prokash Sircar, Nandalal Nayak, S.N. Roy and B.B. Giri, for the Appellant; Bhudeb Bhattacharya, for the Respondent

Final Decision: Allowed

Judgement

P.K. Ray, J.

In this writ application, the petitioners, Arya Pratinidhi Sabha, Bengal and its General Secretary have challenged the guidelines for recruitment of teachers, including Headmaster/Headmistress and Assistant Headmaster/Assistant Headmistress of the recognised Non-Government aided Secondary Institutions running on special rules allotted by the appropriate authority and for the secondary institutions which receive D.A. from the respective District Inspector of Schools in the State as issued by the Director of School Education, West Bengal under Memo No. 1267/ 1(21)/SA dated 26.11.98 being annexure A at page 19 of the writ petition as well as procedure for recruitment of teaching and non-teaching staff including Headmaster/Headmistress/Assistant Headmaster/Assistant Headmistress in non-Government Aided Secondary Schools which Department of School Education, Government of West Bengal accepts to have been established and administered by minority issued by the Director of School Education, West Bengal, under Memo No.

1439(21) dated 28.8.99 being annexure "SA" at page 16 of the supplementary affidavit to the writ application which was issued in supersession of all previous orders in that regard whereby and whereunder provisions have been made for appointment of teaching staff as well as non-teaching staff so far as schools established and administered by minority as well as schools enjoying special rules.

2. It is submitted by the learned advocate for the petitioners that all the schools controlled, maintained and regulated by Arya Pratinidhi Sabha, Bengal and Assam are controlled by special rules in terms of notification No. 404-Edn(S) dated 19.3.73, a notification which was issued by the Hon"ble Governor in exercise of the power conferred upon him under Rule 33 of the Management of Recognised Non-Government Institutions (Aided and Unaided) Rules, 1969 (hereinafter referred to as the Management Rules, 1969 for brevity). Relying upon the said notification it is submitted that since the schools under the petitioner No. 1 are controlled and guided under the said special rules in terms ,of the aforesaid notification (which hereinafter referred to as the notification dated 19.3.73), the guidelines as issued by the Director of School Education, West Bengal regulating the appointment procedures of teaching and non-teaching staff in the schools controlled and managed by the petitioner No. 1 has no applicability. Strong reliance has been placed by the learned advocate of the petitioners to Rule 7 of the said Special Rules contending, inter alia, that the petitioner No. 1 got the authority to appoint employees, both permanent and temporary, salaried or honorary, only subject to any general or special orders issued by the State Government putting an embargo regarding such exercise of the power under Rule 7 of the Special Rules. It is further contended that the Director of School Education, by his communication dated 13.5.86 accepted that the schools controlled and guided by petitioner No. 1 since were enjoying special rules, the procedure for appointment of teaching and non-teaching staff issued by the Director of School Education under Memo No. 1464 dated 28.8.81 has no applicability.

3. However, this application has been opposed by the learned advocate for the State respondents without filing any affidavit. It is submitted by the learned advocate for the State respondents that the Director of School Education, West Bengal has the competency to issue such guidelines. It is further contended that the school is not a minority school in view of the observation made in the judgment of the Apex Court wherein the State Government's right for not considering the schools controlled and guided by the petitioner No. 1 as minority schools, was not prejudiced. Reliance has been placed to the judgment of the Apex Court dated 22.7.96 passed in the case of Arya Pratinidhi Sabha and Anr. v. State of West Bengal and Ors., under CMP 25311 of 1998 in Transfer Case (Civil) No. 26 of 1990.

4. Considering the rival contentions of the parties, the only point which is to be considered is as to whether in terms of the special rules as enjoyed by the petitioner No. 1 for managing the affairs of their schools, would be controlled and guided by

the recruitment rules issued by the Director of School Education, West Bengal and/or guidelines for such recruitment issued by the Director of School Education so far as the appointment of teaching and non-teaching staff is concerned.

5. For effective adjudication of the matter, the relevant rules are required to be quoted. Rule 33 of the Management Rules, 1969 reads as follows:

"33. Power of the State Government to frame further rules for certain institutions.

Nothing in these rules shall affect the power of the State Government to frame on the application of any institution or class of institutions to which the provisions of Article 26 or Article 30 of the Constitution of India may apply, further or other rules for the composition, powers, functions of the Managing Committee or Committees of such institution or class of institutions."

6. In terms of the aforesaid Rule 33, notification was issued under the seal of the Hon'ble Governor of the State of West Bengal, being No. 404-Edn.(S) dated 19.3.73 which became a statutory rule, whereby and whereunder special rules for management of secondary schools established and run by the petitioner No. 1 and another organisation Gurukul Vidyalaya Trust was accepted by formulating the said rule as notified in the said notification. The procedure for appointment of teaching and non-teaching staff appears under Rule 7 and 7(a) of the said notification dated 19.3.73 which reads as follows:

"Powers of the school committee.-- The school committee of any institution run by Arya Pratinidhi Sabha of the State through its local unit of Arya Samaj and/or Gurukul Vidyalaya Trust, as the case may be, and receiving financial assistance in any form from the State Government shall, subject to any general or special orders of the State Government, exercise their powers in respect of the following matter namely:

(a) appointment of employees, both permanent and temporary, salaried, or honorary, suspension or dismissal or otherwise termination of their services."

7. On a bare perusal of Rule 7(a), it appears that the school committee of any institution run by Arya Pratinidhi Sabha of the State of West Bengal through its local unit of Arya Samaj and/or Gurukul Vidyalaya Trust, as the case may be, were empowered to appoint employees both permanent and temporary subject to general or special orders of the State Government to that effect. Hence, the only question for consideration now is as to whether there is any general or special order of the State Government controlling the appointment procedure in terms of Rule 7 of the Special Rules and whether the Director of School Education, West Bengal would be deemed and considered as State Government.

8. From the aforesaid Rule 7 of Special Rule in terms of the notification issued by the State of West Bengal, it appears that any order of direction of the State Government also to be looked into while giving appointment of teaching and non-teaching staff

of the schools guided under the said Special Rule. The word "State Government" as appearing in the aforesaid statutory rule to be Incorporated with the aid of the General Clauses Act as has been decided by the Apex Court in the case [The State of Bihar Vs. Rani Sonabati Kumari](#), and in the case of [Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another](#), . The General Clauses Act, 1897 defines the State Government to mean a Governor, Section 3(60) of the said General Clauses, Act, reads as follows:

""State Government",-

(a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province in a Part B State, the authority or person authorised at the relevant date to exercise executive Government in the corresponding acceding State and in a Part C State, the Central Government;

(b) as respects anything done after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A State, the Governor, in a Part B State, the Rajpramukh, and in a Part C State, the Central Government;

(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government; and shall, in relation to functions entrusted under Article 258A of the Constitution of the Government of India, include the Central Government acting within the scope of the authority given to it under the Article; ".

9. Hence, a statutory function of the State Government thus becomes a function of the Governor and the business of the State Government under Article 166(3) of the Constitution of India includes such statutory business. Conduct of Government business is enumerated under Article 166 of the Constitution of India which reads as follows:

"166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution to act in his discretion.

(4) Inserted by the Constitution (42nd Amendment) Act, 1976, and omitted by the (44th Amendment) Act, 1978)."

10. In terms of the aforesaid constitutional provision, it requires that all executive action of a State Government shall be expressed to be taken in the name of the Governor. However, there is no provision in the Constitution, particular formal of words for due compliance with provisions of names under Article 166(1) aforesaid but while testing the issue any order and/or direction whether was issued by the State Government, the Court is required to consider the substance of his requirements as has been complied with. It has been settled by the several judgments of the Apex Court about consideration of such tests on due compliance of substance of the requirements in terms of Article 166(1) of the Constitution of India. It has been deciding the case [The State of Bombay Vs. Purushottam Jog Naik](#), that a notification is signed by a Secretary with the endorsement "by order of the Governor", the substance of requirements in terms of the constitutional provisions would be considered as complied with. In the case [P. Joseph John Vs. The State of Travancore-Cochin](#), it is held by the Apex Court that an order signed by the Chief Secretary "on behalf of the Government" would be considered as substantial compliance with Article 166, even though by expressly it was not made in the name of the Governor. Further the said cases John (supra) it is held that an order made in the name of the "Governor" and signed by an Assistant Secretary "for the Secretary to the Government of Bombay", there was substantial compliance with Article 166(1) of the Constitution of India. On the reflections of the aforesaid judgment of the Apex Court now the guidelines impugned herein as issued by the Director of School Education, West Bengal to be decided as to whether the same would be deemed as general or special orders of State Government in terms of Rule 7 of the Special Rule aforesaid as framed and constituted in terms of the Rule 33 of the Management Rules 1969. The guidelines impugned in this application being annexure-A of the writ application, nowhere it is mentioned that the said guideline was issued by the Director of School Education, West Bengal under Circular No. 1267/1(21)/SA dated 26th November 1998 was not at all any general or special order of the State Government. The impugned Circular Letter of supplementary affidavit issued by the Director of School Education, West Bengal being annexure-SG on the same analogy cannot be said as general or special order of the State Government, in exercise of the executive function of the Government being Memo No. 1736(21)GA dated 1st November, 1999. Hence, applying the aforesaid test it is explicitly clear that the aforesaid impugned directions regarding appointment of teaching and non-teaching staff issued by the Director of School Education, West Bengal was not at all any general or special order of State Government in terms of Rule 7 of the aforesaid special rule which is applicable in respect of the schools controlled and managed by the petitioner No. 1.

11. Learned advocate of the State Government further fail to satisfy this Court that the functions or duties of issuance of any general or special order of the State

Government was allocated to any other authority in terms of the rules of business of Article 156(3) of the Constitution of India. On the contrary, it has been frankly submitted by the learned advocate of the State Government Mr. Bhudeb Bhattacharya that the impugned directions of Director of School Education was not at all any order" general or special of the State Government. Even in terms of Article 154 of the Constitution of India, the executive power and the State Government vests to the Governor and it can be exercised through officers, sub-ordinate to him in accordance with the Constitution. The relevant provision aforesaid reads as follows:

"154. (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers sub-ordinate to him in accordance with this Constitution.

(2) Nothing in this article shall-

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor."

12. It has been decided by the Apex Court in the case State of A.P. v. Narendra, reported in AIR 1971 SC 2569, in the case [R. Chitralekha and Another Vs. State of Mysore and Others](#), that when a Government runs a college, its executive power extends to the making of rules for admission into such college, subject, of course, to any statutory or constitutional provisions. In the instant case, learned advocate for the State Government also fail to satisfy the Court that in exercise of the executive power of the State Government in terms of Article 154 of the Constitution of India, the guidelines were issued by the Director of School Education, West Bengal. In that view of the matter, it is explicitly clear that there is no general or special order of the State Government relating procedures of appointment of teaching and non-teaching staff of the schools under the control of petitioner No. 1 who enjoys the special rule in terms of Rule 33 of the Management Rules, 1969. The Director of School Education, West Bengal was not vested with the execution power of the State Government to deal with such procedural law is also explicitly proved from the statutory rules regarding appointment of teaching and non-teaching staff who are controlled and guided under Rule 28 of Management Rules, 1969, Rule 28 is quoted herein below:-

28. Powers of Committee. (1) In an aided institution the committee shall, subject institution the committee shall, subject to the provisions of any Grant-in-aid Scheme or Pay Revision Scheme or any order or direction or guidelines issued by the State Government or the Direction and in force for the time being, have the power....."

13. In terms of the aforesaid Rule 28 of the Management Rules, 1969, it is ex facie clear that the Director of School Education is not State Government. Under the said Rule 28 of Management Rules, 1969, accordingly it is provided that appointment issue and other matters regarding the aided institutions, would be subject to the provision of order or direction or guidelines issued by the State Government or the Director in connection therewith. Had it been the position of law that the Director of School Education would be deemed as State Government, there surely would not have been any necessity of incorporating the words "or Director", after the words "State Government" as appearing in Rule 28 of Management Rules, 1969. Hence, from the Management Rules, 1969, itself it appears that the Director of School Education has not been considered as State Government, besides the settled legal position about the meaning of the State Government as already discussed earlier. The notification containing special rules, as aforesaid, accordingly was issued in terms of the power as exercised by the Hon'ble Governor of the State of West Bengal. Under the special rules, as aforesaid, which is applicable in respect of the schools of the petitioner No. 1 under Rule 7, there is no provision that save and except the State Government other officers and/or authority under the State Government would pass any direction as would be binding upon the schools controlled and guided under the Special Rules. In view of such, it is ex facie clear that the Director of School Education, West Bengal, had no authority and jurisdiction to control the appointment procedure of teaching and non-teaching staff in respect of the schools as are controlled and guided under the special rules as framed and constituted by the State Government in exercise of the power under Rule 33 of the Management Rules, 1969.

14. Having regard to the views expressed by the Apex Court and the constitutional provisions as laid down under Article 154 read with 166 of the Constitution of India. I am of the view that directions and/or guidelines as are impugned in this writ application as issued by the Director of School Education, West Bengal cannot be said and/or termed as general or special order issued by the State Government. In that view of the matter, direction and/or procedure of appointment impugned herein has no applicability so far as appointment procedure of teaching and non-teaching staff of schools managed, controlled and guided under special rules as set up by the petitioner No. 1. However, the learned advocate of the respondents fairly concedes that the Director of School Education cannot be termed as State Government. Having regard to the provisions of law, hence, the impugned guideline and the recruitment procedure of appointment of teaching and non-teaching staff are not legally sustainable as the Director of School Education, West Bengal, had no power/authority and jurisdiction to frame such guideline or recruitment procedure in terms of Rule 7 of the Special Rules, as aforesaid. It is a settled law under the field of Administrative Law that a statutory body is empowered only to act in terms of the statute. It is settled legal proposition that statutory body is only empowered to do those acts as are provided and prescribed under the statute and cannot do anything

contrary to that or in addition to that as are not specified, whereas an individual can do all works or do everything save and except as are not prohibited under law. There is a limitation of exercise of power by the statutory authorities. The Director of School Education is a statutory authority in terms of the statute. West Bengal Board of Secondary Education Act, 1963 read with Management Rules, 1969, and in that view of the matter, the Director of School Education had no jurisdiction to pass any direction, orders or guidelines so far as appointment procedure of teaching and non-teaching staff relating to the schools of the petitioner No. 1, which are controlled under special rules. In this context, reliance may be placed on the limitation of powers by the statutory authorities in Crawford Interpretation of Statutes, which reads as follows:

"If the statute directs that certain acts shall be done in a specified manner, or by certain persons, their performance in any other manner than that specified, or by any other person than one of those named, is impliedly prohibited."

15. Reliance may be placed to the judgments of this Court reported in the case of Maniruddin Bepari v. The Chairman of the Municipal Commissioners, Dacca, reported in 40 CWN 17, [Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others](#), , [Panchanan Mondal and others Vs. West Bengal Board of Secondary Education and others](#), , a Division Bench judgment of this Court and a judgment of the Apex Court in the case [S.R. Tewari Vs. District Board Agra and Another](#), .

16. Having regard to the aforesaid judgments, it is ex facie clear that the Director of School Education acted without jurisdiction. Hence, the impugned guideline and/or recruitment procedure being annexure "A" to the writ application and annexure "SA" to the supplementary affidavit are hereby set aside and quashed.

17. However, before parting with the matter, a point is required to be answered which has been raised upon placing the judgment of the Apex Court, wherein the Apex Court in the case of Arya Pratinidhi Sabha and Anr. (supra) passed the following order:-

"Mr. H.K. Puri, learned counsel for the State of West Bengal says that the State would have no objection to the petitioner appointing a Managing Committee to run the affairs of the Institution but without prejudice to the rights of the State in maintaining that the petitioner is not a minority institution. CMP is disposed of accordingly."

18. From the aforesaid order, it appears that the notification of the State Government granting special rules and framing of Rule 7, as aforesaid, regarding appointment procedure of teaching and non-teaching staff therein were not at all placed before the Apex Court, and in that view of the matter, the Apex Court passed the order with the rider "without prejudice to the rights of the State in maintaining that the petitioner is not a minority institution." However, for adjudication of this

case, the question whether the school is a minority school or not at all relevant, since the State Government has issued a notification dated 19.3.73 as already referred to under No. 404-Edn.(S) whereby and whereunder special rules have been framed for management of the affairs of the schools of the petitioner No. 1 upon framing Rule 7 under the heading "powers of the school committee", whereby appointment of teaching and non-teaching staff has been controlled and guided by the decision of the school committee, however, subject to any general or special order of the State Government. That notification as yet has not been withdrawn or cancelled by the State Government and accordingly it is binding upon them irrespective of the submissions as made before the Apex Court.

19. The learned advocate for the respondents, however, prays that an observation is to be made by this Court to this effect that since the learned advocate for the respondents has filed no affidavit all the allegations made in the writ application to deemed to be denied. Such contention is not accepted by this Court and the same is refused by applying the doctrine of non traverse. It will be deemed that the respondents have accepted all the contentions as made in the writ application. Reliance may be placed to the judgments in the cases of [Controller of Court of Ward, Kolhapur and Another Vs. G.N. Ghorpade and Others](#), , Gobinda Ch. Das v. State of West Bengal and Ors., reported in 1989 (2) CLT HC 63 and C.S. Rowjee represented by Power of Attorney holder [C.S. Rowjee and Others Vs. Andhra Pradesh State Road Transport Corporation](#), . In the instant case, from the order it appears that long back on 15.3.2000, direction was given for filing affidavits and despite the same, no affidavit has been filed by the respondents. In that view of the matter, the said doctrine has full application and as such, the contention of the respondents is rejected.

This writ application is allowed to the extent indicated above.

Urgent xerox certified copy of the order be supplied expeditiously.