
AIR 2001 Cal 68 : 105 CWN 1032

Calcutta High Court

Case No: Writ Petition No. 16727 (W) of 1997

The Chairman, Bolpur
Municipal Corporation
and Others

APPELLANT

Vs

The Chairman, Ad hoc
Committee, Bolpur
District Primary School
Council and Others

RESPONDENT

Date of Decision: Feb. 8, 2001

Acts Referred:

Constitution of India, 1950 " Article 31, 31(2)#West Bengal Primary Education Act, 1973 " Section 64, 65, 66

Citation: AIR 2001 Cal 68 : 105 CWN 1032

Hon'ble Judges: Ashim Kumar Banerjee, J

Bench: Single Bench

Advocate: S.C. Bose and Indrani Pal, for the Appellant;Amal Baran Chartterjee and S. Sanyal and L.P. Gupta, Amicus curie for Respondent-Council, for the Respondent

Final Decision: Partly Allowed

Judgement

@JUDGMENTTAG-ORDER

Ashim Kumar Banerjee, J.

Subject matter of challenge herein is a notification dated April 15, 1992 issued u/s 66 of the West Bengal

Primary Education Act, 1973 (hereinafter called as Act of 1973) and a consequential order passed by the authority on June 12, 1997. The vires of

Section 64, 65 and 66 of the said Act of 1973 is also under challenge. This Court initially directed notice to be served on the Advocate General of

the State as the vires of the State statute is involved herein. However, the Advocate General did not appear. This Court directed Mr. L.K. Gupta,

learned senior Advocate to assist this Court as amicus curiae.

2. Mr. Somendra Chandra Bose, learned senior advocate appearing for the writ petitioner, has submitted as follows :--

1. Sections 64,65 and 66 of the said act are ultra vires the Constitution since the same empower the State to acquire property without payment of compensation.

2. According to Mr. Bose, Article 19(1)(f) and Article 31(2) were in force in the year 1973 when the said act was enacted. Hence, by virtue of

the said two articles the said three sections should be declared ultra vires the Constitution. Mr. Bose in support of his contention has cited the case

reported in Waman Rao and Others Vs. Union of India (UOI) and Others, .

3. The notification was attacked by Mr. Bose principally on the two grounds viz. the said notification can not be issued by virtue of the provisions

of the said three sections which according to him are ultra vires the Constitution as the same did not contemplate any payment of compensation in

respect of the landed properties which are sought to be taken and consequently assuming the said sections are properly enacted, the case of the

schools run by the municipality comes u/s 65 and not u/s 66 wherein the Government is to consult the concerned Municipality before taking over of

the said schools and as such the said notification issued u/s 66 is bad in law and is liable to be set aside.

3. Mr. Pabitra Kumar Bose appearing for the State has contended, inter alia, as follows :--

1. Although the said Act had been enacted in the year 1973 the same was given effect to in the year 1990, by this time Article 31C has come into force.

According to Mr. Bose the said Act is a piece of social welfare legislation where the State thought it fit to provide compulsory primary education in

the State to implement part IV of the Constitution.

2. According to Mr. Bose, 1973 Act came into force to serve the directive principles providing free and compulsory primary education. Under the

constitution, according to him, such action on the part of the State is immune from Challenge because of introduction of Article 31C. Reliance has

been placed by Shri Bose in this regard on the decision reported in Assam Sillimanite Ltd. and another Vs. Union of India and others, and

Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, . Mr. Bose has also relied upon the case of Rashtriya Mill Mazdoor Sangh Vs.

State of Maharashtra and Others, and the case of Maharastra State Electricity Board Vs. Thane Electric Supply Co. and others, .

3. Relying upon the aforesaid decision, Mr. Bose has submitted that the validity of the said three sections are immune from challenge by virtue of

the well settled principles of law laid down by the Apex Court.

4. Mr. Subir Sanyal, led by Sri Arun Prakash Sarkar, Senior Advocate appearing for the District Primary School Council, adopted the submission

of Mr. P.K. Bose.

5. On a composite reading of the said three sections being 64, 65 and 66 it appears that the State wanted to bring all primary school under one

single unit so that it could control the system of primary education in the State. Such action on the part of the State is permissible under chapter IV

of the Constitution as this is obligatory on the part of the State to provide free and compulsory education at least at the primary level to the illiterate

mass of the State. It is true that the said three sections did not contemplate any payment of Compensation to the properties of the school

administration who are so long running the school prior to the enactment of the said Act. It is also true that the said three sections empower the

Government to take control of all the primary schools in the State whether it is run by the private management or under any local self government.

Legislators however thought it fit to set apart the municipal schools by incorporating a separate provision for the same being Section 65 wherein a

negotiation is necessary with the municipal authority before taking over of the properties belonging to the said Municipal schools.

6. The right to property is no more preserved as a fundamental right. Article 31(2) was repealed by the said 44th Amendment. Now the question

remains whether at the time of enactment i.e. in the year 1973 those sections being 64, 65 and 66 were properly enacted or not. Since the said Act

1973 was given effect to in 1990 the said three sections should be judged on the basis of the prevailing law in the year 1990. As by 44th

amendment Article 31(2) was repealed and 31C was introduced the said three sections are immune from challenge. In the case of State of Orissa

Vs. Chandrasekhar Singh Bhoi, etc., the Apex Court was of the view that a law can not be said to be in force unless it is brought into operation by

legislative enactment or by the exercise of authority by the deligate empowered to bring into operation. In the instant case, although the said Act of

1973 was enacted before 44th Amendment the said Act came into operation in 1990. Hence, the challenge to the said Act or any section thereof

must be judged treating the said Act as of 1990 and not of 1973. In that view of the matter I hold that Article 31(2) has no application in the

instant case as the same was deleted before July 2, 1990 when the subject Act came into force.

7. As I have just now held that the said Act is immune from challenge because of deletion of Article 31(2) and inclusion of 31C, I have no

hesitation to accept the contention of Mr. P.K. Bose in this regard.

8. In the result I hold that the said three section being 64, 65 and 66 of the said Act of 1973 are immune from challenge and the writ petition fails

on the said score.

9. Mr. Gupta, however, has drawn my attention to the said three sections wherein, according to him, ipso facto vesting of properties have not been

provided for in the said Act. Taking over of the properties have been left to the executive. According to Mr. Gupta, even if the said three sections

are held intra vires the action on the part of the executive while issuing notifications is not immune from challenge under Article 31C. However, I do

not wish to deliberate on the said scope as this Court has not been approached by the writ petitioner from the said angle and I keep this issue open

to be decided in an appropriate proceedings if brought by any concerned party.

10. With regard to the impugned notification I have no hesitation to hold that the same has been issued under a wrong section being Section 66, the

schools sought to be taken over by the impugned notification are admittedly under control and management of the municipalities. The legislature

thought it fit to provide negotiation prior to taking over of the school run by the local self government. The authority concerned should have adopted

the mode prescribed u/s 65 of the said Act prior to issuance of the said notification.

11. Hence the writ petition succeeds in part. The notification dated April 15, 1992 and the consequential notification dated June 12, 1997 are

quashed and set aside. This order of quashing will, however, not preclude the authority concerned to issue notification afresh by proper exercise of

power under the said Act, 1973 upon due process of law prescribed under the said statute.

12. Writ petition is thus disposed of without any order for costs.

13. In deference to the desire of this Court, Mr. Gupta has made valuable contribution in disposing of the instant case. This Court records its

appreciation in this regard.

14. Urgent xerox certified copy, if applied for, be supplied on usual undertakings.

15. Later :

Mr. Sanyal, appearing for the Primary School Council, prays for stay of operation of this order. Such prayer is not opposed by any of the

appearing parties.

Hence, operation of this order is stayed for two weeks from date.