
Birendra Nath Bera Vs State of West Bengal

M.A.T. No. 4120 of 1997

Court: Calcutta High Court

Date of Decision: March 20, 1998

Citation: (1999) 1 ILR (Cal) 6

Hon'ble Judges: Satyabrata Sinha, J; D.B. Dutta, J

Bench: Division Bench

Advocate: Pijush Dutta, Surdindu Samanta and Ramapada Bhakta, for the Appellant; Mrinal Kanti Das and Tapas Kr. Adak for Respondent No. 18 and A.K. Gayen, for the Respondent

Final Decision: Dismissed

Judgement

Satyabrata Sinha, J.

A judgment and order dated December 3, 1997 passed by a learned single Judge of this Court in C.R. No. 2548

(W) of 1985 since reported in 1998(1) C.L.J. 16 (Gopal Krishna Dikshit v. State of West Bengal and Ors.) is in question in this appeal.

2. The Appellant Birendra Nath Bera was Respondent No. 17 in the writ application. The said Respondent filed a writ application in this Court

questioning the validity of an order passed by the District Inspector of Schools (Secondary Education) Midnapore approving a panel wherein the

name of the Appellant was at Sl. No. 1 and his consequent appointment as an Assistant Teacher in Banamali Chatt High School, Midnapore.

3. In order to appreciate the rival contentions of the parties raised in this appeal the fact of the matter may be noticed. A prior permission was

granted for appointment of an Assistant Teacher in History by the District Inspector of Schools, pursuant whereunto the names of the 20 persons

including the Appellant and the writ Petitioner were sponsored by the Employment Exchange. Eleven persons appeared at the interview and the

selection committee prepared a panel consisting of three names, viz. (1) Birendra Nath Bera, (2) Gopal Krishna Dikshit and (3) Narayan Ch.

Sahu. The District Inspector of School did not approve the said panel on the ground that Birendra Nath Bera had crossed the prescribed age limit

for his first entry in teaching service as his date of birth was March 29, 1946. The writ Petitioner also made a representation before the

Respondent No. 2. The Respondent No. 2 relaxed the age of the Appellant. The writ petition was filed thereafter, inter alia, on the ground that the

decision of the Respondent No. 2 is violative of the mandatory provision of the recruitment rules.

4. The said writ petition came up for hearing before Sushanta Chatterjee, J. From the record of the learned trial Judge it appears that there is a

hand written judgment which was allegedly delivered by the said learned Judge but the same had not been signed. The said judgment has also been

scored through. The matter was placed before B. Panigrahi, J. and the learned Judge found an unsigned order dated February 11, 1990 which has

also been scored through was on record, and, therefore, a direction had been issued to the Registrar, Appellate Side to conduct an enquiry to find

out actually who was responsible for scoring through the said transcribed order. As an enquiry, pursuant to His Lordship's direction was in

progress, was directed to be released from the said bench.

5. On April 7, 1997, the then Acting Chief Justice assigned the matter before the learned trial Judge. The learned trial Judge directed service of

notice of hearing upon the Counsel for State and the Respondent. The matter was heard out on merits and the impugned judgment has been

delivered on December 3, 1997. The learned trial Judge held that the order of relaxation of age in favour of the Appellant is bad in law being

contrary to an order of the State Government dated April 25, 1983.

6. Mr. Pijush Kanti Dutta, the learned Senior Counsel appearing on behalf of the Appellant, firstly submitted that in view of Rule 53 of the writ

rules the provision of CPC are applicable to the writ proceedings and in that view of the matter keeping in view the provision of Order 20 Rule 2

read with Order 20 Rule 8 of the CPC the matter could not have been reopened. The learned Counsel has also brought to our notice one

subsequent order passed by the District Inspector of School showing that the said panel had been approved in view of the aforementioned

judgment of Susanta Chatterjee, J. It was submitted that the said judgment of Susanta Chatterjee, J. attained finality and the same could not have

been re-opened. Reliance in this connection may be made to Krishan Kumar v. Financial Commissioner, Taxation Pb. (1984) 2 R.C.J., Darayyas

Cawasji Balsara Vs. Shenaz Darayyas Balsara, and Hakikullah Haji Rahimutullah and Others Vs. The Maharashtra Housing and Area Development

Authority and Others, . The learned Counsel submits that assignment of the case by the learned Acting Chief Justice before another bench, keeping

in view the fact that the writ petition stood disposed of, was a nullity. It was further contended that the writ Petitioner cannot approbate and

reprobate as from the documents subsequent to the disposal of the said petition it would appear that he had accepted the said judgment and in

support of the aforementioned contention reliance has been placed on two documents one allegedly addressed by the learned Counsel appearing

on behalf of the writ Petitioner and a letter addressed by the writ Petitioner himself in terms whereof he intended to withdraw the writ petition.

7. On merit of the matter the learned Counsel submits that the learned trial Judge has erred in. so far as he failed to take into consideration the

provisions of para 2 of Rule 3 of the recruitment rules which was in force from 1981 to 1987, in terms whereof a teacher could be appointed upto

the age of 40 and the same was relaxable till he attains the age of 45. It has been submitted that the learned trial Judge committed an error in

relying upon the circular letter of State of West Bengal as the statutory rules will prevail over the circulars issued by the State and reliance in the

connection has been placed on Hazell v. Hammersmith and Fulham London Borough Council and Ors. 1991 (1) All. E.R. 545, S.M. Sajjad v.

The C.M.C. and Ors. 1995 (2) C.L.J. 235 and B.N. Nagarajan and Ors. v. State of Mysore and Ors. AIR 1996 S.C. 1942. 8. Mr. Mrinal Kanti

Das, the learned Counsel appearing on behalf of the writ Petitioner-Respondent, on the other hand, submitted that although a judgment was

dictated in open Court would be a judgment but there may be exceptional situation where the said judgment may not be acted upon. Reliance in

this connection has been placed on Vinod Kumar Singh Vs. Banaras Hindu University and Others, . The learned Counsel contends that from the

affidavit-in-opposition filed by the Appellant before the learned trial Judge it would appear that he had committed a fraud on the authorities of the

school by giving his date of birth as March 29, 1946 instead of March 29, 1943 and when the writ Petitioner-Respondent came to learn thereof,

he filed a supplementary affidavit annexing therewith a copy of the certificate issued in favour of the said Respondent and only at that stage, it was

stated:

At that time the Headmaster of the said Banamali Chatta High School gave me a copy of the certificate of my School Final Examination duly

attested by him (Sri Ajit Kr. Chowdhury) where my date of birth was mentioned as 29.3.46 instead of 29.3.43 and in view of my objection the

then Headmaster told me that for the benefit of school and students he had done it and for this I will not be liable in future for any consequences

and I believed him in good faith. The said certificate as attested was attested by the then Headmaster of the institution, Sri Asit Kr. Chowdhury.

9. The learned Counsel has drawn our attention also to the admission made by the Appellant in para 6 of his affidavit-in-opposition wherein he

admitted his date of birth to be March 29, 1943. It was also urged that from para 9 of affidavit-in-opposition it would appear that Appellant

himself has referred to the circular letter of the State Government dated April 25, 1983, and, thus, he cannot be permitted to question the validity

thereof.

10. The learned Counsel also placed before us the affidavit-in-opposition filed by the writ Petitioner to the application for stay wherein it is stated:

With reference to the statement made in paragraph 15 of the said application I state that the said matter came up for hearing on 11th December,

1990 before His Lordship the Hon^{ble} Justice Susanta Chatterjee (as His Lordship then was) and was pleased to pass an order without

considering the supplementary affidavit affirmed on 4th December, 1989 by the Petitioner when the same was on record at that relevant time. I

came to learn that at the time of signature His Lordship was pleased to consider the said supplementary affidavit and after considering the said

supplementary affidavit His Lordship did not sign the said order and His Lordship himself was pleased to score through the said order. As such on

11.12.90 no order was passed in the said Civil Rule by His Lordship the Hon^{ble} Justice Susanta Chatterjee (as His Lordship then was) in the eye

of law. I also state that His Lordship the Hon^{ble} Justice Susanta Chatterjee (as His Lordship then was) transferred after Puja Vacation in the year

1992.

11. It has been submitted that Sri Banerwar Bag, the learned Counsel appearing on behalf of the Petitioner expired and, thus, he could not collect

all the papers. The writ Petitioner appointed Sri Tapas Kumar Adak as his Advocate and came to learn that the records of the matter are not

traceable and as such the matter was referred to the Addl. Registrar, Appellate Side and thereafter Registrar, Appellate Side and only after a long

time the records could be traced out, whereafter Civil Rule came up for hearing before N.N. Bhattacharjee, J. As His Lordship retired, the matter

came up for hearing before B. Panigrahy J. dated December 5, 1996 a disciplinary proceeding was initiated against two Court Officers who were

present on December 11, 1990 when the judgment allegedly was pronounced, and in their answers to the show-cause notice they had stated that

when the said judgment was delivered, the Advocate on behalf of the Petitioner pointed out the statements made in the supplementary affidavit

wherein it was alleged that the Appellant had practised fraud by suppressing his actual date of birth and after perusing the said supplementary

affidavit His Lordship (Susanta Chatterjee) did not sign and scored through the same.

12. It is stated that as the matter had been pending "for a long time, a prayer was made by the learned Advocate of the writ Petitioner that the

hearing of the matter may not await the disposal of disciplinary proceedings and as necessary assignment was made by the then Acting Chief

Justice whereafter the impugned judgment has been passed. As regard the alleged letter of Sri Banerwar Bag and the letter of the Petitioner as

stated in paras 17 and 18 of the stay application, it has been stated that the said letters are forged and fabricated ones.

13. According to the learned Counsel as the District Inspector of Schools forwarded the records to the Director of School Education containing

the wrong date of birth of the Appellant, the order of relaxation has been passed as if the age of the Appellant at the relevant time was below 40. It

was further submitted that the age could not have been relaxed on the ground of higher qualification as the Appellant is merely holder of M.A.

Degree whereas the writ Petitioner is holder of B.A. (Hons.) Degree. On merit it was submitted that Rule 28(1) of the West Bengal Rules for

Management of Recognised Non-Government Institutions (Aided and Unaided) Rules, 1969 (hereinafter referred to as the Management Rules)

has been framed, inter alia, subject to any order or direction or guidelines issued by the State or the Director in connection therewith, the

aforementioned circular letter dated April 25, 1983 is valid in law.

14. In view of the rival contentions of the parties as noticed hereinbefore, the following questions arise for consideration before this Court:

1. Whether the judgment dated November 10, 1990 has attained finality and, thus, the impugned judgment is bad in law;

2. Whether in view of the subsequent event the writ petition has become infructuous and in any event, the writ Petitioner having accepted the

judgment cannot approbate and reprobate;

3. Whether para 2 or Rule 3 of the Recruitment Rules would be subject to the circular letter dated March 29, 1993 issued by the State

Government.

Re.: Question No. 1

In terms of Rule 53 of the writ rules framed by this Court in exercise of its jurisdiction under Article 225 of the Constitution of India the CPC has

been made shall applicable in relation to a writ proceeding. By reason of Article 225 of the Constitution of India the Court can only lay down the

procedure and, thus, the substantive procedure contained in the CPC could not have been and are not applicable in relation to a writ proceeding.

There cannot be any doubt whatsoever that as and when a judgment is delivered or pronounced in open Court but not signed, alterations or

modifications thereof is permissible only in exceptional circumstances. In this case Susanta Chatterjee, J. delivered judgment on December 11,

1990. This Court can take judicial notice of the fact that Susanta Chatterjee, J. was transferred from this Court in April, 1994. It is really a matter

of surprise that whatever be the actual position there was absolutely no reason as to why the matter had not been placed before His Lordship

either for signing of the judgment or for rehearing of the matter for a period of more than three years. We have examined the Lower Court records

and we find that the judgment has been scored through. It is also a matter of great concern that despite diligent searches the records were not

traced out for a long time and the matter was placed for further hearing before N.N. Bhattacharjee, J. We do not intend to express any opinion as

to who is responsible for such a conduct as a disciplinary proceedings against two of the officers of this Court are still pending but the incident must

be held to be an unfortunate one.

15. Neither Order 20 Rule 2 of the CPC nor Order 20 Rule 8 of the CPC has any application in the instant case. It is not a case where a judgment

had not been delivered or pronounced in open Court but was merely prepared. According to the learned Counsel for both the parties the judgment

was either pronounced or dictated in open Court whereas according to Mr. Dutta it was dictated and then transcribed, according to Mr. Dutta the

judgment was scored through by the learned Judge himself when his attention was drawn to the supplementary affidavit filed by the writ Petitioner.

16. The rules of procedure are hand maid of justice and justice should not only be done but manifestly seem to be done. If the contention of Mr.

Das is correct, the judgment scored through by the learned Judge himself would be no judgment and the matter required a fresh hearing inasmuch

as despite pronouncement of the judgment by scoring through the same the learned Judge must be held to have exercised inherent jurisdiction in

recalling the order although no order in respect thereof was passed. Unfortunately the learned Counsel of the writ Petitioner is dead. The writ

Petitioner had filed an affidavit as to what had transpired in the Court on December 11, 1990 upon having come to learn the same from the learned

Advocate. In none of the decisions relied upon by the learned Counsel for the parties the position was the same. The case at hand poses a unique

problem. As the judgment has been scored through, we keeping in view the pendency of the disciplinary proceedings, cannot ourselves enquire in

the matter and come to the conclusion as to who is responsible therefore. The procedures which are followed in such cases namely, either signing

by the Judge concerned on the pages of the judgment or writing out a separate order recalling the judgment or posting the case for further hearing

have not been followed. However, keeping in view the peculiar facts and circumstances of this case we are of the opinion that the matter was

rightly directed by the learned Acting Chief Justice to be heard out on merits afresh.

17. It is noteworthy that the point raised before this Court had not been raised before the learned trial Judge. The contention raised before us by

Mr. Dutta could have been raised before the learned trial Judge himself particularly when the matter was placed for hearing before three learned

Judges. Even the learned Acting Chief Justice could have been approached for not assigning the matter or after the said order was passed for

recalling of the same on the administrative side of this Court. From the order sheet maintained before the trial Court it does not appear that at any

point of time the Appellant had raised any objection as regard rehearing of the matter on the ground that the judgment of Susanta Chatterjee, J.

although unsigned had attained finality and, thus, the learned single Judge had no jurisdiction to hear out the matter afresh. Such a stand having not

been taken before the learned trial Judge, in our opinion, it would not be safe to allow the Appellant to succeed on a technical plea particular in

view of the fact that the Appellant allegedly had committed fraud on the school for obtaining appointment.

19. If the Appellant is guilty of commission of fraud we are of the view that as fraud vitiates all solemn orders, it would be unjust to allow the

Appellant to rip the benefit of his own wrong as also the mistake committed by this Court. Lex non cogit ad impossibilia is a well known principle.

Nobody should suffer because of the mistake of the Court. In a case where a fraud has been practised even the principles of natural justice need

not be complied with.

20. In State of Tamil Nadu and others Vs. A. Gurusamy, it was held:

It is a fraud played on the Constitution. A person who plays fraud and obtains a false certificate cannot plead estoppel. The principle of estoppel

arises only, when a lawful promise was made and acted upon to his detriment; the party making promise is estopped to resile from the promise. In

this case, the principle of estoppel is inapplicable because there is no promise made by the State that the State would protect perpetration of fraud

defeating the constitutional objective; no promise was made that his false certificate will be respected and accepted by the State, On the other

hand, he is liable for prosecution. The Courts would not lend assistance to perpetrate fraud on the Constitution and he cannot be allowed to get the

benefit of the fraudulent certificate obtained from the authorities.

21. In Kumari Madhuri Patil and Anr. v. Addl. Commissioner, Tribal Development and Ors. 1994 (5) S.L.R. 206 the law is stated in the following

terms:

In the case of Madhuri Laxman Patil, she did not approach the competent officer. She appears to have wrongly gone to an officer who had no

jurisdiction, obviously she has shown the order issued by the High Court in favour of her sister Suchita and secured the certificate and got the

admission. Though she is in midway of her study in B.D.S. in the end of second year, she cannot continue her studies with her social status as

Mahadeo Koli, a Scheduled Tribe and the concessions which she might have got on that account. If she was eligible for obtaining admission as a

general candidate she may continue her studies. Therefore, we uphold the cancellation and confiscation of her and of Suchita of social status as

Mahadeo Koli ordered by Scrutiny Committee and affirmed by the order of Appellate Authority and that of the High Court in that behalf.

22. In Damodar Ramnath Alve v. Gokuldas Ramnath Alve 1997 (3) I.C.C. 154 it is stated:

In reply to the submissions made by Mr. Usgaonkar, the learned Senior Counsel, Mr. Mulgaonkar, the learned Counsel for the Respondents 1, 3

and 4, on the first proposition regarding the Trial Court's powers to review its order if fraud is committed or the Court is misled, the Court which

passes the order is competent to review its order. Reliance placed on the case of Dadu Dayal Mahasabha v. Sukhdev Arya and Anr. reported in

1990 I SCC 189. According to the Code of Civil Procedure, the Court has inherent power u/s 151 and in exercise of that power, can vacate its

own order obtained by fraud or misrepresentation.

23. In the case of Basangowda Hanmantgowda Patil v. Churchigirigowda Yogangowda ILR 34 Bom. 408 : 12 Bom. L.R. 223 the Lordships

observed that:

It is the inherent power of every Court to correct its own proceedings when it has been misled. Similar was the view of the Calcutta High Court in

several decisions mentioned in Sadho Saran Rai and Others Vs. Anant Rai and Others, .

I find considerable force in the submission made by Mr. Mulgaondar, the learned Counsel for the Respondents and thereby, according to him, the

learned trial Judge has not committed any illegality while exercising his power to correct his original proceedings.

See also S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and Jay Laxmi Salt Works (P) Ltd. Vs. State of

Gujarat, .

24. in any event, this Court being a Court of appeal can hear the matter on merit and pass a judgment which should have been passed by the writ

Court.

25. In this view of the matter we are of the view that if it is found that the Appellant has committed fraud, he should not be granted any relief and

the technical plea of res judicata or estoppel or the doctrine of approbate and reprobate will not stand in this Court's way and particularly in view

of the fact that it is a larger bench which can consider the matter on its own merits.

Re.: Question No. 2

Certain documents had been filed to show that the writ Petitioner is estopped or has acquiescence in the matter. If a judgment passed by a Court

impugned in the writ application was a nullity, the same having been rendered without jurisdiction cannot be sustained on the ground of res judicata.

26. In Mohd. Nazimuddin and Anr. v. State of Bihar and Ors. (1990) 2 B.L.J.R. 843 it has been held;

Spencer-Bower and Turner in "The Doctrine of Res Judicata, stated the law in Article 114 thereof thus:

A Tribunal may exceed its jurisdiction either by embarking upon an enquiry outside its province, or, while confining its inquiry within the proper

limits, by making an order in excess of its powers. In either case the result will be to nullify the decision as a res judicata in the former case, by the

effect of the events, we have mentioned upon the declaratory part of the decision, and, in the second, by their effect upon its jussive or prohibitory

provisions.

27. Refusal to exercise jurisdiction on an erroneous view of the law is also a question of law touching the jurisdiction of the Court.

28. Further, if the order passed was a nullity being wholly without jurisdiction, the same will also not operate as res judicata. Reference in this

connection may be made to the case of Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, wherein the law was laid

down in the following terms:

If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction,

such a decision cannot be sustained merely by the doctrine of res judicata or estoppel, as urged in this case.

29. It is now well known that a decision on a pure question of law touching the jurisdiction of the Court does not operate as res judicata.

Reference in this connection may be made to Chitturi Subbanna Vs. Kudapa Subbanna and Others, and in Mathura Prasad Bajoo Jaiswal and

Others Vs. Dossibai N.B. Jeejeebhoy, .

30. The documents which had been filed with the stay applications were not placed before the learned trial Judge nor any application has been filed

before this Court seeking leave to adduce additional evidence. In this view of the matter this Court cannot look into such documents particularly in

view of the fact that genuineness thereof has been seriously questioned.

Re.: Question No. 3

The State of West Bengal enacted the Board of Secondary Education Act, 1963 to constitute the Board power and function of such board and to

provide for certain other matter connected therewith. The act read as a whole would show that despite constitution of the West Bengal Board of

Secondary Education, the State Government had reserved unto itself the power to grant approval in certain matters and to control and exercise of

such power by the Board.

31. We may note that Section 27(1) itself casts a duty upon the Board to advise the State Government on all matters relating to Secondary

Education referred to it by State Government. Sub-section (2) of Section 27 which enumerates the power of the Board is also subject to any

general or special orders of the State Government, the provisions of the Act and Rules made there under. Although the Board has been

empowered to make regulations in terms of Sub-section (4) of Section 27, the same requires an approval by the State and failure on the part of the

Board to obtain such approval will render such regulation invalid. The State Government, in terms of the aforementioned provision, has also been

empowered to make additions, alterations and modifications in such regulations.

32. Section 31 provides that annual report and budget estimate shall be forwarded to the State Government within one month of the presentation

thereof before the Annual Meeting of the Board and the State Government may within 2 months of the Budget estimate either accord its approval

to the same or return it to the Board with such comments and suggestions as it deems necessary if in its opinion that such estimate does not fulfil the

conditions enumerated therein.

33. In terms of Section 32, the State Government may make such annual or periodical grants upon considering the budget estimates, the accounts

of the board and such other reports as may be called for. The amount granted by the State Government is one of the sums which would be put in

the fund known as West Bengal Board of Secondary Education Fund.

34. Sub-Section (1) of Section 45 empowers the State Government to make rules for the purpose of carrying out the purpose of the Act. Clause

(d) of Sub-Section (2) of Section 45, inter alia, empowers the state to make rules as regard composition, powers and functions of Managing

Committees of Institutions. Pursuant to the said power the State Government has framed the management rules. Rule 28 enumerates the power of

the Managing Committee of an aided institution subject to the provision of any grant-in-aid Scheme or Pay Revision Scheme or any order or

direction or guidelines issued by the State Government or the Director in connection therewith. Pursuant to or in furtherance of the said power

conferred by of (i) and (ii) of Sub-Rule (1) and by of (i) of sub-Rule (4) of Rule 28 of the Management Rules as amended from time to time by the

Education Department the Director of Schools has issued directions for compliance by recognised non-Government Secondary Schools in

connection with the recruitment of teachers and non-teaching employees.

35. The word "Committee" has been defined in Rule 2(c) to mean Managing Committee as defined in Section 2(d) of the Act which in turn states

that Managing Committee used in reference to an institution includes the Governor or the Governing Body of such an institution. It is not necessary

to consider as to whether the Managing Committee is a statutory body or it has been created by or under a statute. But there cannot be any doubt

whatsoever that Managing Committees having been constituted in terms of the provisions of the Rules are bound to act within the four corners

thereof. The Managing Committee has no power to go beyond the said recruitment rules unless there exists a direction order or guideline issued by

the State Government or the Director as the case may be.

36. Paragraph 2 of Sub- Rule (3) of Recruitment Rules which were framed in the year 1981 and remained effective from August 1, 1981 to

August 30, 1981 was as follows:

The upper age limit for entry into service for a teacher or a non-teaching staff should ordinarily be 40 years. The age limit is relaxable upto 45 years

for an experienced and highly qualified candidate. For Headmasters/Headmistresses, the upper age limit for entry into service should ordinarily be

55 years. The upper age limit in all cases except in case of Headmasters/Headmistresses, is also relaxable by 5 years for a candidate belonging to

Scheduled Caste or Scheduled Tribe disabled defence personnel and physically handicapped persons and dependants of an employee dying in

harness.

37. The Government of West Bengal, Education Department, Secondary Branch, however, issued a circular Letter No. 454-Edn. (S) dated April

25, 1983 reads thus:

From: Shri S. Ghose,

Deputy Secretary to the Govt. of West Bengal

To: The Director of Secondary Education, West Bengal

Sub.: Recruitment of Asstt. Teachers, non-teaching staff and Headmasters/Headmistresses of Non-Govt. Secondary Schools.

Upper-age-limit for-

In continuation of this Department G.O. No. 530-Edn. (S) dated 2nd September, 1982, the undersigned is directed to say that after careful

consideration, the Government have decided that the upper-age-limit for first entry into service of Assistant teachers and non-teaching staff should

ordinarily be 35 years. The age limit is relaxable upto 40 years for experienced and highly qualified candidates and for candidates belonging to

Scheduled Caste and Scheduled Tribe, disabled defence personnel and physically handicapped candidates.

As regards appointment as Headmaster/Headmistresses it has been decided that there will be no restriction of age for the same if appointed before

superannuation, but other conditions remaining the same 10 years continuous teaching experience in recognised Secondary schools immediately

before the appointment shall be required in the case of appointment as Headmaster/Headmistress in non-Government secondary schools.

It may be noted in exceptional circumstances relaxation to these conditions may be made with previous approval from Government.

38. In terms of the recruitment rules a prior permission of the District Inspector of School is necessary in respect of a sanctioned post. Such

permission can be granted only when the school has no surplus teacher or non-teaching employee as the case may be in its staff. The Managing

Committee of the school may, thereafter send the intimation of the existing vacancy to the Employment Exchange whereafter, the names of eligible

candidates may be sponsored by it. A selection committee thereafter interviews the candidates and prepares a panel. The Managing Committee if

approves the panel shall forward the same with all relevant papers to the District Inspector of Schools for his approval. In the event such approval,

the Managing Committee may appoint a teacher from the approved panel but such appointment shall again require the approval of the District

Inspector of Schools.

39. There cannot, therefore, be any doubt that the Managing Committee is bound to act within the four corners of the aforementioned recruitment

rules unless any other direction is issued by the State Government or the Director. It has been accepted by the Appellant that in his application his

date of birth was recorded as March 29, 1946 although his actual date of birth as revealed from his certificate was March 29, 1943. If his date of

birth was March 29, 1946 his age was 38 years on the date of his application whereas it would be more than 40 years if his date of birth was

March 29, 1943. The Managing Committee despite alleged production of the certificates by the Appellant forwarded the panel showing the date

of birth of the Appellant to be March 29, 1946. The District Inspector of Schools also in his letter dated October 18, 1984 as contained in

Annexure "C to the writ application stated that the date of birth of Sri Bera is March 29, 1946 although in his earlier letter he stated that he had

crossed the prescribed age limit for first entry in teaching service. In such situation he obtained necessary instructions for disposal of the case

relating to the approval of the panel. The writ Petitioner in a letter addressed to the Director of Secondary Education dated November 12, 1984

stated:

I am drawing your kind attention that Birendra Nath Bera, who was made first position in the panel by the authority of the above school was not

eligible for being selected to the bar of age limit as prescribed by the prevailing laws.

It is apprehended that the matter has been done by a Special fascination with this gentleman.

40. The writ Petitioner also made a report to the District Inspector of School, Secondary Education, in terms of his letter dated January 22, 1985.

41. The submission of Mr. Dutta to the effect that rule shall prevail over the circular letter cannot be acceded to in as much as noticed

hereinbefore, Rule 28 is subject to any direction issued by the State Government. The State Government had issued such direction as would

appear from the letter dated April 25, 1983. It is a decision of the Government as regard upper age limit for first entry in the school service in the

Assistant Teacher which was earlier fixed at 35 years was communicated by the said letter. The age limit was relaxable upto 40 years in case of

past experience and having been highly qualified and for candidates belonging to scheduled castes and scheduled tribes, disabled person and

physically handicapped candidates. The age of the Appellant was relaxed only on the ground of having a higher qualification and not on the ground

that the same was done because of his experience or he was a highly qualified candidate. The decision of the State Government as regard the

upper age limit which reflects its policy shall, thus, prevail over the directions issued by the Director of School Education known as Recruitment

Rules. In fact as noticed hereinbefore the Appellant in his affidavit-in-opposition as also all the concerned authorities had proceeded on the basis of

the said circular letter. The initial age of entry was 35 years. The Appellant had crossed the same. The Appellant, in fact, at the relevant time had

crossed the age of 40 and therefore the question of relaxation of his age by the Director of School Education did not and could not arise. He was,

therefore, ineligible for appointment. In this view of the matter we are of the opinion that the decisions referred to by Sri Dutta cannot be said to

have any application in the instant case.

42. In *Hazell v. Hammersmith and Fulham London Borough Council and Ors.* 1991 (1) A.L.L. E.R. 545, the House of Lords held that a statutory

corporation which was created for a particular purpose and giving it powers therefore what it does not expressly or impliedly authorised is to be

taken to be prohibited. The said decision, therefore, runs counter to the submission of Mr. Dutta. As by reason of aforementioned circular letter

dated April 25, 1983 the Director had no power to relax the age beyond 40, he exceeded his jurisdiction and, thus, acted without jurisdiction. He

has also not exercised its jurisdiction taking into consideration the purposes for which such jurisdiction is to be exercised. He, therefore, posed

unto himself a wrong question for acquainting himself with the correct state of affairs and, thus, misdirected himself in law.

43. In *B.N. Nagarajan and Others Vs. State of Mysore and Others*, , the Apex Court was concerned with a case of regularisation. The Apex

Court held that for the purpose of recruitment it is not obligatory under proviso to of Article 309 of the Constitution of India to make rules as the

State Government has an executive power in relation to all such matters. The Apex Court held that by reason of executive order the Rule cannot

be supplanted as it is a settled law that by executive orders rules can be supplemented and not supplanted.

44. In *S.M. Sajjad v. The C.M.C. and Ors.* 1995 (2) C.L.J. 234, while dealing with a case under Calcutta Municipal Corporation Act. I have

held that a statutory authority must exercise its jurisdiction within four corners of the statute. This Court referred to the decisions in *Mainuddin v.*

The Chairman of the Municipal Commissioner, Dacca 40 C.W.N. 17, *Scott (P) Ltd. v. Corporation of Calcutta* 77 C.W.N. 883, *Sasanka Sekhar*

Panda Vs. State of West Bengal and Others, and *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, , wherein it has been held that

an action of a statutory corporation would be ultra vires when it is exercised beyond the purview thereof. It was further held that when a statute

confers an expressed power, the power consistent with that of expressly cannot be impliedly.

45. In *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, , the Apex Court held that where as power is

given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily

forbidden. This aspect of the matter has also been considered by me in *Bipadtaran Patra v. State of West Bengal* 1994 (2) C.L.J. 450.

46. It appears that on January 9, 1990 the Petitioner has filed a supplementary affidavit annexing document to show that he had made an enquiry

as regard the actual date of birth of the Appellant and the Headmaster of Kajligarh High School had issued a certificate wherein the Appellant"s

date of birth has been stated to be April 29, 1943. The writ Petitioner had also annexed other documents with the supplementary affidavit. In the

affidavit-in-opposition the Appellant who was Respondent No. 17 before the learned trial Judge filed on June 11, 1990 annexed the

aforementioned documents, whereafter he has no other option but to accept his date of birth.

47. The said decision in fact assist the writ Petitioner and not the Appellant. Although the Appellant would suffer great hardship but in our

considered view the learned trial Judge has rightly held that the appointment of the Petitioner being in violation of the provisions of the said circular

was illegal. We also hold that the Appellant was also guilty of committing fraud and it cannot reap any benefit therefrom.

48. From his affidavit-in-opposition on his own showing, the Headmaster of the school was supporting his cause evidently for extraneous

consideration. The Apex Court times without number has held that a judicial notice can be taken of the fact that back-door appointments are made

for extraneous consideration including money considerations. The High Court cannot encourage such acts on the part of the school authorities or

for that matter by any other authority.

49. For the reasons aforementioned, the appeal has to be dismissed and the judgment and order passed by the learned trial Judge be upheld.

However, in our opinion, the cost awarded by the learned trial Judge and the liberty given to the Petitioner to proceed against the parties for the

alleged fraud cannot think in the Appellant and the then Headmaster needs interference. If law permits the writ Petitioner could proceed against the

Appellant and/or any other person wherefore he may take recourse to law and for that purpose no liberty need be given. We are further of the

view that the cost awarded against the Appellant being excessive, the same should be reduced to 100 Gms.

D.B. Dutta, J.

I agree.