

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.19290 of 2016

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Managing Committee of Madrasa Darul Hoda, Sikrona P.S.-Kadwa, District-Katihar through its Secretary Dr. A. Ali, Son of Late Rayazuddin At Sikrona P.S. Kadwa District Katihar.

... .. Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Department of Education, Govt. of Bihar, Patna.
3. The Special Director, Secondary Education, Department of Education, Govt. of Bihar, Patna.
4. The Joint Director, Secondary Education, Department of Education, Govt. of Bihar, Patna.
5. District Education Officer, Katihar, District Katihar.
6. Dr. Vijay Kumar Pandey, Joint Director, Secondary Education, Government of Bihar Patna.
7. The Bihar State Madrasa Education Board, Patna through its Secretary.
8. The Chairman, Bihar State Madrasa Education Board Patna.
9. The Secretary, Bihar State Madrasa Education Board, Patna.
- Nos. 7 to 8 are 5, R/o Vidyapati Marg, P.S. Kotwali, District Patna.
10. The Outgoing Managing Committee of the Madrasa Darul Hoda Sikrona P.S. Kadwa District Katihar through its Secretary Ajaz Ahmad, Son of Late Abdul Mannan At Kadwa District-Katihar.



... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. P.K. Shahi, Sr. Adv.
Mr. Raj Nandan Prasad, Adv.
For the State : Mr. Madhaw Pd. Yadav, GP-23
Mrs. Meera Singh, AC to GP-23
For the Respondent No. 10 : Mr. Y.V. Giri, Sr. Adv.
Mr. Abdul Mannan Khan, Adv.
Mr. Najmul Hoda, Adv.
For the Madarsa Board : Mr. Md. Rashid Alam, Adv.

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

ORAL JUDGMENT & ORDER

Date : 21-08-2017

Two questions have emerged in the present proceeding. Firstly, whether Section 5 of the Limitation Act shall have application to an appeal preferred under Section 28 of the Bihar State Madarsa Education Board, Act, 1981 (*hereinafter referred to as the 'Act'*), since the said provision, though provides for the period within which an appeal can be filed, it does not confer specifically jurisdiction on the appellate authority to condone delay. The second question, which needs to be considered in the



present proceeding, is as to whether the officer, who has passed the impugned order, as an appellate authority, can be said to be having jurisdiction of the appellate authority, since admittedly he has not been appointed appellate authority by the State Government through a notification published in official gazette, as contemplated under Rule 3 of Bihar State Madarsa Education Board Control (Appeal) Rules, 1983 (*hereinafter referred to as the 'Rules'*). The officer, who has passed the impugned order, appears to have been authorized to act as an appellate authority by a departmental order, issued by the Director (Administration)-cum-Additional Secretary, Directorate of Secondary Education, Govt. of Bihar.

2. I have heard Mr. P.K. Shahi, learned Senior Counsel, appearing on behalf of the petitioner and Mr. Y.V. Giri, learned Senior Counsel, appearing on behalf of private respondent No. 10. Also heard Mr. Md. Rashid Alam, learned Counsel representing the Madarsa Board and Mr. Madhaw Pd. Yadav, learned Government Pleader No. 23, appearing on behalf of the State.

3. The petitioner is the Managing Committee of Madarsa Darul Hoda, Sikrona, in the district of Katihar, which has approached this Court through its Secretary, Dr. Ali, assailing an order, dated 17.11.2016, passed in Appeal No. 17 of 2014 and



Appeal No. 1 of 2013, by Mr. Vijay Kumar Pandey, the Joint Director, Secondary Education, Govt. of Bihar, Patna, whereby, he has set-aside the orders contained in letter No. 3010-13, dated 11.08.2011, and letter No. 7187-95, dated 01.11.2013, passed by the Bihar State Madarsa Education Board, Patna (*hereinafter referred to as the 'Board'*). The impugned order has been passed by the appellate authority on remand made by this Court by judgment and order, dated 16.09.2016, passed in CWJC No. 13337 of 2015 (*Managing Committee of Madrasa Darul Hoda Sikrona Vs. The State of Bihar & Ors.*).

4. The petitioner had filed the aforesaid CWJC No. 13337 of 2015, questioning an order, dated 07.07.2015, passed by the Joint Director, Secondary Education, Govt. of Bihar, Patna, in Appeal No. 17 of 2014 and Appeal No. 1 of 2013. The main attack to the said impugned order, dated 07.07.2015, on behalf of the petitioner before this Court, in CWJC No. 13337 of 2015, was that the appellate authority had allowed the appeal without taking into account the delay in preferring the appeal and without condoning such delay. This Court sustained the said attack and allowed the writ application with following observation made in paragraph 9 of the judgment and order, dated 16.09.2016 :

*“9. There cannot be any dispute
on the legal aspect of the matter that*



the appeal is creature of a Statute and the power to file appeal is provided under Section 28 of the Bihar State Madarsa Education Board Act, 1981. If a period of limitation of 60 days has been provided therein, then, either the prescribed period has to be adhered to or else the appeal can only be entertained, if a bona fide valid reason and explanation is offered for the delay, which in the opinion of the Court prevented a litigant from approaching the forum. In this case, the appeal 17 of 2014 has been admittedly filed after more than 10 months of delay. Surprisingly on a reading of the entirety of the impugned order, the Court does not find any remotest mention on the question of delay or that the Appellate Authority had condoned the delay while entertaining the appeal on merit.”

5. The Court, while remanding the matter back for fresh consideration by the appellate authority, cast an obligation on the appellate authority to first deal with the objection of delay and pass an order thereon, either way. It is in compliance of the said judgment and order, dated 16.09.2016, passed by this Court in



CWJC No. 13337 of 2015, that the impugned order, dated 17.11.2016, has been passed.

6. This time, the said officer, exercising appellate power, has condoned the delay and allowed the appeal. The impugned order, dated 17.11.2016, is now being assailed by the same petitioner, on the ground that the Act does not confer any jurisdiction to the appellate authority to condone delay in preferring appeal and, therefore, the appellate authority could have condoned the delay.

7. Mr. P.K. Shahi, learned Senior Counsel, appearing on behalf of the petitioner, in support of his contention has relied on a recent decision of this Court in case of ***Bihar State Industrial Development Corporation Vs. Employees Provident Fund Organization & Anr.***, reported in ***2017 (2) PLJR 551***, in which various Supreme Court's decisions, on this point, have been taken into consideration. According to him, since there is no provision of condonation of delay, under the Act, the appellate authority ought not to have condoned the delay. On the question of jurisdiction of the officer, who passed the impugned order, it is the plea of the petitioner that Section 28 of the Act allows any person or Managing Committee, aggrieved with the decision of the Board or the Chairman, to prefer an appeal to the State Government. It is the petitioner's plea that the officer, who passed the impugned



order, cannot be said to be the State Government and even in terms of the Rules of Executive Business, such power could have been exercised by the Principal Secretary of the Department. He has next submitted that since it is an admitted fact that appointment of the officer, who passed the impugned order, as an appellate authority, was not notified in gazette, as required under Section 28 of the Act read with Bihar & Orissa General Clauses Act, 1917, the said officer cannot be said to be lawfully appointed to discharge the functions of the appellate authority. This is, accordingly, his plea that the impugned order is a nullity, having been passed by an officer not lawfully authorized to pass such order as an appellate authority.

8. Mr. Y.V. Giri, learned Senior Counsel, appearing on behalf of the private respondent No. 10, has relied on Section 29 of the Limitation Act and has submitted that since there is no express exclusion of applicability of Limitation Act for an appeal, under Section 28 of the Act, Section 5 of the Limitation Act, shall have application. He has relied on Supreme Court's decisions, in cases of *Gopal Sardar Vs. Karuna Sardar*, reported in (2004) 4 SCC 252, *Lila Dhar Vs. State of Rajasthan & Ors.*, reported in (1981) 4 SCC 158 and *Krishna Kumar Choudhary Vs. Alliance Agro Industries Ltd. & Ors.*, reported in 1991 (1) PLJR (SC) 3. He has



also submitted that since, at no point of time, the petitioner took any objection either before this Court or before the appellate authority in respect of non-applicability of Section 5 of the Limitation Act, he is estopped from taking such plea in the present proceeding after having taken a chance before the appellate authority. He has also submitted that by his conduct, the petitioner submitted himself to the jurisdiction of appellate authority by not raising any objection over his jurisdiction to entertain the appeal and, therefore, he should be treated to have waved his right to take such objection of jurisdiction. He has also submitted that the order, which was under challenge before the appellate authority, is apparently illegal and if this Court interferes with the order passed by the appellate authority, it will amount to reviving an illegal order, which may not be done by this Court, exercising equitable writ jurisdiction under Article 226 of the Constitution of India. He has invoked *de facto* doctrine to advance his submission that the officer, who passed the impugned order, was discharging the functions of an appellate authority under *bona fide* belief that he was duly appointed by the competent officer and, therefore, only on the ground that there is some procedural lapse in notifying his appointment, which is highly technical in nature, the Court may not interfere with the impugned order. He, in order to buttress his



contention, has relied on Supreme Court's decision, in case of *M/s Beopar Sahayak (P) Ltd. & Ors. Vs. Vishwa Nath & Ors.*, reported in (1987) 3 SCC 693, and a Division Bench decision of this Court, in case of *Vinay Kumar "Pappu" @ Binay Kumar "Pappu" Vs. The State of Bihar & Ors.*, reported in 2010 (3) PLJR 259.

9. To consider the first point taken on behalf of the petitioner, on the question of limitation, I must take note of Section 28 of the Act first, which allows sixty (60) days time for filing an appeal to the State Government. Section 28 of the Act reads thus:-

"28. Appeal against the orders of the Board.-Any person or managing committee aggrieved with the decision of the Board or Chairman may file an appeal for final hearing within 60 days of the passing of the orders, to the State Government."

10. Before I proceed further, I must notice this aspect that there is no provision anywhere, under the Act, in respect of any other proceeding or for any other matter, which prescribes period of limitation and provides for condonation of delay. At the same time, it is noteworthy that there is no provision, under the Act, which excludes applicability of Limitation Act. Keeping this



aspect in mind, I may take note of Section 29(2) of the Limitation Act, which requires that where any special or local law prescribes for a suit, appeal or application, period of limitation different from period prescribed by the Schedule, provisions of Section 3 of the Limitation Act shall apply, as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, provisions contained in Sections 4 to 24 (inclusive), of the Act shall apply only insofar as, and *'to the extent of which, they are not expressly excluded by such special or local law'*.

11. A plain reading of Section 29 of the Limitation Act makes it clear that Section 5 of the Limitation Act shall have application, where any special or local law prescribes for any appeal and prescribes period of limitation, different from the period prescribed by the Schedule, under the provisions of Section 3 of the Limitation Act. Evidently, in the present case, Section 28 of the Act, which is a special and a local law, prescribes period of sixty (60) days for the purpose of preferring an appeal, which is different from the period prescribed by the Schedule, under the Limitation Act. As has already been noticed, applicability of Section 5 of the Limitation Act has not been expressly excluded by



the Act. A simple reading of Section 29 of the Limitation Act leads me to irresistible conclusion that Section 5 of the Limitation Act shall have application in respect of appeal under Section 28 of the Act.

12. Mr. Y.V. Giri, learned Senior Counsel, has rightly placed reliance on Supreme Court's decision in case of **Gopal Sardar** (*supra*), wherein, the Supreme Court in most unambiguous terms held that application of Section 5 of the Limitation Act stands excluded only when it is expressly excluded by the special law or local law.

13. Coming to the next question, that is, the manner in which the officer, who has passed the impugned order, has been authorized to function as an appellate authority, I find some force in the submission so made on behalf of the petitioner. Mr. P.K. Shahi, learned Senior Counsel, submits, while relying on Section 28 of the Act, that appeal can be entertained by the State Government by operation of provisions of Rules of Executive Business by the Secretary of the Department. The State Government has framed Rules under Section 27 of the Act, laying down procedure for disposal of appeal under Section 28 of the Act. Rule 3 of the said Rules contemplates that a person, aggrieved with an order of the Board, can prefer appeal within sixty (60)



days before such officer, who has been authorized by the State Government by notification. Mr. Shahi is correct in his contention that the notification, as contemplated under Rule 3 of the Rules, means notification published in official gazette, within the meaning of Section 4(37) of the Bihar & Orissa General Clauses Act, 1917.

14. The State-respondents have brought on record the authorization in favour of the officer, who has passed the impugned order, which is by way of departmental order, dated 20.04.2015, passed by the Director (Administration)-cum-Additional Secretary (Annexure-A to the counter affidavit filed on behalf of respondent No. 3). It appears from Annexure-A that there is no order of the State Government, authorizing Mr. Vijay Kumar Pandey as the Joint Director, Secondary Education, to hear appeals under Section 28 of the Act. Absence of notification in official gazette is not at all in dispute.

15. In such circumstance, I am of the view that the appointment of Mr. Vijay Kumar Pandey, as Joint Director, Secondary Education, has not been notified in the official gazette, the officer, who authorized him to function as an appellate authority, did not have the jurisdiction to pass such order. Mr. Shahi, learned Senior Counsel, is correct in his submission that if



any statutory provision requires something to be done in a particular manner, it should be done in that manner alone or not at all. The decision of the Supreme Court in case of *M/s Beopar Sahayak (supra)*, upon which reliance has been placed by Mr. Y.V. Giri, learned Senior Counsel, representing private respondent No. 10, is apparently distinguishable on facts. In said decision of *M/s Beopar Sahayak (supra)*, the Supreme Court, while sustaining the plea of *de facto* doctrine, was considering a case where the officer was found to be discharging his duties by virtue of his holding a particular post, which post was earlier held by another officer, who was appointed as prescribed officer by a competent authority. This is not the case here. An officer, namely, Director (Administration)-cum-Additional Secretary, who did not have the power to authorize a person to function as an appellate authority, authorized Mr. Vijay Kumar Pandey to act as such. Even the officer, who authorized Mr. Vijay Kumar Pandey, himself could not have exercised the power of an appellate authority in the absence of statutory authorization by the State Government, by publication in official gazette. The impugned order, therefore, in my view, cannot be sustained, having been passed by a person not legally authorized to pass the order.

16. The impugned order is, accordingly, set-aside.



17. I direct the Principal Secretary, Education Department, Govt. of Bihar, to notify an appellate authority, under Rule 3 of the Rules, for exercising power under Section 28 of the Act, within a period of two (2) weeks from the date of receipt/production of a copy of this order, by publication of notification in an official gazette. Once an officer is authorized to discharge functions of appellate authority, under Section 28 of the Act read with Rule 3 of the Rules, the said appellate authority will be required to consider afresh Appeal No. 14 of 2017 and Appeal No. 1 of 2013. The appeal, aforementioned, must be disposed of within a period of three (3) months from the date of first appearance of the parties before the appellate authority.

18. This application is, accordingly, allowed to the extent as indicated above.

(Chakradhari Sharan Singh, J)

Praveen-II/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	30.08.2017
Transmission Date	N/A

