

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (C) No.1209 of 2018

Master Vatsal Khakhariya, S/o Dr. Anil Khakhariya, aged about 14 years, Minor, Through His Mother, Nanda Khakhariya, W/o Dr. Anil Khakhariya, R/o C-80/2, Devendra Nagar, Raipur (C.G.)

---- Petitioner

Versus

1. State of Chhattisgarh, Through Secretary, Department of School Education, Mantralaya, Capital Complex, Naya Raipur (C.G.)
2. District Education Officer, Durg, District Durg (C.G.)
3. Delhi Public School, Through its Principal, Junwani, Durg, District Durg (C.G.)
4. Chhattisgarh Children Welfare Commission, Raigarh-bada, Raipur, District Raipur (C.G.)

---- Respondents

For Petitioner:	Mr. Abhishek Vinod Deshmukh, Advocate.
For Respondents No.1 and 2/State: -	Mr. Dilman Rati Minj, Deputy Govt. Advocate.
For Respondent No.3:	Mr. Dharmesh Shrivastava, Advocate.
<i>Amicus Curiae:</i>	Mr. Varun Sharma, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

06/07/2018

1. The petitioner was a student of Class-VIII in Delhi Public School, Durg for the academic year 2017-18. He was not allowed to appear in the examination of said class by the school authorities, but on the order of the District Education Officer, Durg, on 9-4-2018, he was allowed to appear in the examination, however, he only appeared in four papers and he remained absent in two papers namely Sanskrit and Mathematics. His result was declared on 28-3-2018, but he was not promoted to Class-IX leading to filing

of writ petition stating inter alia that right to education up to the age of 14 years is a fundamental right guaranteed under Article 21A of the Constitution of India and by virtue of the provisions contained in Section 16 of the Right of Children to Free and Compulsory Education Act, 2009 (for short, 'the Act of 2009'), no child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education. Since the petitioner was a student of Class-VIII which also comes within the meaning of elementary education, therefore, the respondent School is not justified in holding back the petitioner and not promoting him to Class-IX and as such, an appropriate writ be issued directing the respondent School to promote the petitioner to Class-IX.

2. Return has been filed by respondent No.3 Delhi Public School (DPS) opposing the petition stating inter alia that the petitioner has appeared in class only for 11 days out of 207 school days, therefore, he has not been promoted to Class-IX as such, the writ petition deserves to be dismissed.
3. Mr. Abhishek Vinod Deshmukh, learned counsel appearing for the petitioner, would submit that the petitioner has regularly appeared in the class, but noticeably his appearance has not been marked for the reasons best known to respondent No.3 and he was not allowed to appear in the examination, but on the intervention of the District Education Officer on 9-4-2018, he was allowed to appear in the said examination, however, in two papers namely Sanskrit and Mathematics, he was not allowed to appear as such, by virtue of Section 9 read with Section 16 of the Act of 2009, the respondent

School cannot hold back the petitioner and he has to be promoted to the next class, as the responsibility to ensure attendance is the responsibility of the school by virtue of the provisions contained in Section 8(f) of the Act of 2009, therefore, appropriate writ be issued directing respondent No.3 to promote the petitioner on Class-IX.

4. Mr. Dharmesh Shrivastava, learned counsel appearing for respondent No.3 DPS, would submit that the petitioner has been a chronic absentee during the entire educational year and he only attended for 11 days out of 207 school days, therefore, he was not allowed to appear in the examination, but upon the order of the District Education Officer, he was allowed to appear, but he appeared only in four papers and did not appear in Sanskrit and Mathematics, therefore, the petitioner is not entitled to be promoted to Class-IX.
5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
6. The Parliament has amended the Constitution of India by inserting Article 21A by the Constitution (86th Amendment) Act, 2002 on the basis of the law declared by the Supreme Court in the matter of **J.P. Unnikrishnan v. State of Andhra Pradesh**¹ holding that the right to education up to the age of 14 is a fundamental right to every citizen under Article 21 of the Constitution of India pursuant to which the children up to the age of 14 are guaranteed to get free and compulsory education. Article 21A of the Constitution of India

¹ (1993) 1 SCC 645

states as under: -

“21-A. 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.”

7. In order to give effect to the provisions contained in Article 21A of the Constitution of India, the Right of Children to Free and Compulsory Education Act, 2009 was enacted as an Act to provide for free and compulsory education to all children of the age of six to fourteen years. Consequently, the Right of Children to Free and Compulsory Education Bill, 2008, proposed to be enacted which seeks to provide,—

(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards;

(b) 'compulsory education' casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education;

(c) 'free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education;

(d) the duties and responsibilities of the appropriate Governments, local authorities, parents, schools and teachers in providing free and compulsory education; and

(e) a system for protection of the right of children and a decentralized grievance redressal mechanism.

8. In order to appreciate the point in dispute, it would be appropriate to notice the definition of “child” and the definition of “elementary education” enumerated in clauses 2(c) and 2(f) of the Act of 2009 which read as follows: -

“(c) “child” means a male or female child of the age of six to fourteen years;

(f) “elementary education” means the education from first class to eighth class;”

9. Section 8 of the Act of 2009 provides for duties of appropriate Government, clause (f) of which is relevant and is extracted herein-below for the sake of convenience: -

“8. Duties of appropriate Government.—The appropriate Government shall—

(f) ensure and monitor admission, attendance and completion of elementary education by every child;”

10. Thus, the above-stated provision casts an obligation upon the State Government not only to provide free and compulsory education to every child, but also to ensure his attendance and completion of elementary education. So attendance of a child in the school is also an obligation of the State. The Supreme Court in the matter of **Environmental & Consumer Protection Foundation v. Delhi Admn.**² has laid down obligation and duty of States/UTs in light of the Act of 2009. Thereafter, in Chapter IV of the Act of 2009, responsibilities of schools and teachers has been provided. Section 16 of the Act of 2009 provides for prohibition of holding back and expulsion which states as under: -

² (2011) 13 SCC 1

“16. Prohibition of holding back and expulsion.—No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.”

11. Section 38 of the Act of 2009 enables the appropriate Government to make rules for carrying out the provisions of the Act.

12. A focused perusal of Section 16 of the Act of 2009 mandates and prohibits school to hold back any child in any class or expel from school till the completion of elementary education, as such, there is a statutory prohibition for failing a student or retaining him in the same standard for any reason, including the reason that the student has scored very low marks in the examinations conducted, either in the class examinations or in Term examinations including final examinations and as such, promotion to higher class is automatic. The Madras High Court in the matter of Ka. Kalaikottuthayam v. The State of Tamil Nadu and others³

considering Section 16 of the Act of 2009 held as under: -

“23. Thus, there is a statutory prohibition for failing a student and retaining in the same standard for any reason, including the reason that the student has scored very low marks in the examinations conducted, either in the class examinations or in Term examinations including final examinations. When the Central Act prohibits holding back of any child in any class in the age group of 6 to 14, who will normally be undergoing classes in standards 1 to 8 as per the definition mentioned above, I am of the view that the first respondent Department or any other officer is not competent to issue any norms for giving promotion to students of standards 1 to 8, as the promotion to higher class is automatic. Even though the conduct of examination is not prohibited under Section 16, getting pass marks in number of subjects is not required for giving promotion to higher class. The object behind the said provisions is that no student should leave the school within the age group of 6 to 14 for any reason, i.e., due to non-payment of fee, not passing the

3 MANU/TN/0804/2010

examination, etc. When right to education up to the age of 14 is guaranteed as a fundamental right under Article 21A of the Constitution of India, and right to free and compulsory education also has now been declared as a statutory right apart from fundamental right as per Act 35 of 2009 with effect from 1.4.2010, as rightly contended by the learned Counsel for the petitioner the department cannot issue any circular giving direction to the third respondent or any other school authority to give promotion by fixing any norms to students of standards 1 to 8.”

13. The principle of law laid down by the Madras High Court in Ka. Kalaikottuthayam (supra) has been followed with approval by the Calcutta High Court in the matter of Master Arkaprava Basu and another v. Patha Bhavan and others⁴ by holding as under: -

“The applicability of the said Act to the petitioner’s school and availability of the protection guaranteed under Article 21A of the [Constitution of India](#) as well as under the aforesaid Act to the petitioner no.1 cannot be doubted in view of the provisions contained in the said Act. In this regard reliance may also be made to the unreported decision of Madras High Court delivered on 08/06/2010 in the case of W.P. No. 11168 of 2010; *Ka Kalaikottuthayam vs. the State of Tamil Nadu*, wherein it was held that the object behind Section 16 of the said Act is that no student should leave the school within the age group of 6 to 14 years for any reason i.e. due to non-payment of fees, not passing the examination etc. It was further held therein that when the right to education upto the age of 16 years is guaranteed as a fundamental right under Article 21A of the [Constitution of India](#) and right to free and compulsory education also has now been declared as a statutory right apart from fundamental right as per Act 35 of 2009 with effect from 1st April, 2010, the State respondent cannot issue any circular giving direction to the school authorities to give promotion by fixing any norm to the students of standard 1 to 8.”

14. After noticing the constitutional provisions enumerated in Article 21A of the Constitution of India read with Sections 16 and 8(f) of the Act of 2009, it is quite vivid that the petitioner was admitted to Class-VIII by respondent No.3 School for the academic year 2017-

4 2011 SCC OnLine Cal 2264

18 and he was allowed to appear in the 8th Class examination with the intervention of the District Education Officer, though he has appeared only in four papers and could not appear in two papers, but by virtue of legislative injunction contained in Section 16 of the Act of 2009, the petitioner cannot be held back for promotion to the next class. Even the order of the District Education Officer dated 9-4-2018 was not subjected to challenge by the respondent School. However, after allowing the petitioner to appear in the examination, he was issued mark-sheet leaving the column of promoted to next class "NIL". Now, a stand has been taken by the respondent School that the petitioner only appeared in class for 11 days out of 209 days, therefore, he was not entitled to be promoted to next class.

15. In the considered opinion of this Court, it was the duty of the respondent School to ensure the attendance of the student(s) / petitioner, if any, as provided in Section 8(f) of the Act of 2009 and after permitting him to appear in the examination and allowing the order of the District Education Officer to go unchallenged, no such ground can be allowed to be permitted not to promote the petitioner to Class-IX, as he has completed elementary education now. It is true that if the petitioner has not attended the classes, it is likely to have the adverse effect on the learning of the petitioner / child who has not attended the school, but Section 16 of the Act of 2009 does not allow holding back of children in any class till the completion of elementary education for any reason whatsoever it may. In this regard, the Right of Children to Free and Compulsory Education (Second Amendment) Bill, 2017 has already been proposed and it

has been tabled to the Rajya Sabha on 9th February, 2018, which is under consideration. This Bill has been proposed to substitute Section 16 of the Act of 2009 so as to empower the appropriate Government to take a decision as to whether to hold back a child in the fifth class or in the eighth class or in both classes, or not to hold back a child in any class, till the completion of elementary education.

16. Be that as it may, since Section 16 of the Act of 2009, as it stands today, statutorily prohibits the school to hold back a child in any class till the completion of elementary education, the act of respondent No.3 DPS in holding back the petitioner and not promoting him to the next class i.e. promotion to Class-IX is held to be arbitrary and not in accordance with Section 16 of the Act of 2009. Accordingly, respondent No.3 DPS is directed to award a certificate as provided in Section 30 of the Act of 2009 to the petitioner in such a manner as prescribed certifying that he has completed his elementary education and necessary report card be issued to him within a week from the date of receipt of a certified copy of this order.

17. The writ petition is allowed to the extent outlined herein above leaving the parties to bear their own costs.

18. This Court appreciates the valuable assistance rendered by Mr. Varun Sharma, Advocate, who in short notice addressed the Court on the point in issue.

Sd/-
(Sanjay K. Agrawal)
Judge

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Versus

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Head Note

Right to education up to the age of 14 years is guaranteed as fundamental right under Article 21A of the Constitution of India and a student cannot be failed up to 8th Class.

14 वर्ष की आयु तक शिक्षा का अधिकार भारतीय संविधान के अनुच्छेद 21क के अन्तर्गत मौलिक अधिकार के तौर पर प्रदत्त है तथा किसी विद्यार्थी को कक्षा 8वीं तक अनुत्तीर्ण नहीं किया जा सकता।