

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side
IA GA No. 4 of 2021
IA GA No. 6 of 2023
IA GA No. 7 of 2023
With
APO 83 of 2020

Mr. Anil Rajkumar Mukerji & Ors.
Vs.
RT. REV Paritosh Canning & Ors.

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

For the Appellants : Mr. Jishnu Saha, Sr. Adv.
Mr. Sourajit Dasgupta, Adv.
Mr. A. K. Awasthi, Adv.

For the Respondent : Mr. Suman Dutt, Adv.
Nos. 1 & 2 : Mr. Paritosh Sinha, Adv.
Ms. Shrayashee Das, Adv.
Mr. Domingo Gomes, Adv.
Mr. B. P Tewari, Adv.
Mr. Sankalp Narain, Adv.

For the Respondent : Mr. Priyankar Saha, Adv.
No. 7 : Mr. Rohit Amit Sathlekar, Adv.

For the Respondent : Mr. Ranjan Bachawat, Sr. Adv.
No. 8 : Mr. Sayan Roy Choudhury, Adv.
Mr. Satyaki Mukherjee, Adv.

For RIO-ALMA : Mr. Ratnanko Banerji, Sr. Adv.
Mr. D. N. Sharma, Adv.
Mr. Kanishk Kejriwal, Adv.
Mr. Ramendu Agarwal, Adv.
Ms. Surbhi Dhanuka, Adv.

Hearing concluded on : July 6, 2023
Judgment on : July 13, 2023

DEBANGSU BASAK, J. :-

1. Appellants have assailed an order dated August 18, 2020 passed by the learned Trial Judge clarifying an order dated July 12, 2019 in the present appeal.
2. Respondent Nos 1 and 2 in the appeal have questioned the maintainability of the appeal by way of an interim application being IA GA No. 4 of 2021. An application being IA GA No. 6 of 2023 has been filed seeking permission of the Court to address the Court in the virtual platform. Another application being IA GA No. 7 has been filed for framing a scheme for management and administration.
3. Since, an issue of maintainability of the appeal had been raised at the behest of the respondent nos 1 and 2 they were allowed to address the Court first. The respondent no. 7 has supported the respondent nos. 1 and 2 in the appeal and they were heard immediately after the respondent nos. 1 and 2. Thereafter, the appellant, the respondent no. 8 and the added respondent no. 10 had addressed the Court. All the parties had addressed the Court on the point of maintainability as also on the merits of the case.

4. Learned advocate appearing for the respondent nos. 1 and 2 has submitted that, the suit filed by the plaintiffs primarily challenged wrong termination of the four plaintiffs, and challenged the appointment of the defendant nos. 3 to 6. The plaintiffs had also prayed for framing a scheme for the administration of the institution run by the Public Charitable Trust. He has pointed out that, an ad interim order dated July 12, 2019 was passed by the learned Trial Judge restraining the Board of Governors of the school not to take any decision regarding the management of the school till the disposal of the interim application. The Ex-officio Governors had been restrained from appointing any Additional Governors. The Appeal Court had by an order dated July 25, 2019 appointed administrator over the board of Ex-officio Governors. Two sets of appeal had been filed before the Hon'ble Supreme Court. Such appeals before the Hon'ble Supreme Court had been withdrawn as it was agreed that the interim arrangement put in place by the order dated July 12, 2019 stood restored. An application for effecting of the order dated July 12, 2019 had been made in which an order dated August 19, 2020 was passed. The Trial

Court had observed by the impugned order dated August 18, 2020 that the order dated July 12, 2019 needs to be clarified. The order dated July 12, 2019 was not intended to overrun into the next term. In the appeal from the order dated August 20, 2020, the Appeal Court passed an interim order dated October 8, 2020 which was clarified by the Hon'ble Supreme Court. The Hon'ble Supreme Court had observed by the order dated November 27, 2020 that the order dated October 8, 2020 sets out the contours of the disputes and that it did not take away the right of the defendants to contend that such issues need not be decided in the appeal.

- 5.** Learned advocate appearing for the respondent nos. 1 and 2 has submitted that, the application being GA No. 1517 of 2019 in which, the initial order of injunction dated July 12, 2019 was passed does not contain any prayer inviting the Court to frame any interim scheme of management. In any event, formulation or modification of the existing scheme, if at all, is required to be made, that should be decided at the final hearing of the suit. The parties have to be given an opportunity to lead evidence with regard to such an issue. At

the final hearing, the Court has to examine as to whether, there were breach of trust as claimed or whether the plaintiffs were not suing to vindicate their personal or individual rights or whether there was any case of breach of trust made out. In support of such contentions, he has relied upon ***AIR 1974 Supreme Court 2141 (Swami Paramatmanda Saraswati & Anr. Vs. Ramji Tripathi and Anr.)*** and ***2008 Volume 4 Supreme Court Cases 115 (Vidyodaya Trust vs. Mohan Prasad R and Ors.)***.

6. Learned advocate appearing for the respondent nos. 1 and 2 has submitted that, the suit was filed after obtaining leave under Section 92 of the Code of Civil Procedure, 1908. The leave had been obtained ex-parte. Leave under Section 92 of the Code of Civil Procedure, 1908 granted had been revoked subsequently. Against such order of revocation an appeal had been preferred. The Appeal Court had observed that, the maintainability of the Civil Suit is required to be decided as a preliminary issue. He has relied upon ***2022 Volume 7 Supreme Court Cases 644 (Satyanath and Anr. Vs. Sarojamani)***, in support of his contention that, till such time the issue of leave is decided, Court should not exercise

any power under Section 92 of the Code of Civil Procedure, 1908.

- 7.** Learned advocate appearing for the respondent nos. 1 and 2 has submitted that, there was no pleading in the plaint warranting the Court to frame a scheme. Moreover, the schools concerned are minority institutions. Management and administration of a minority institution is within the exclusive domain and fundamental right of the institution. There is no allegation of mis-management affecting the interest of the students. No ground under Section 92 of the Code of Civil Procedure, 1908 has been made out in the plaint.
- 8.** Learned advocate appearing for the respondent nos. 1 and 2 has submitted that the Will of late Major General Claude Martin provides for setting up of educational institution by the Supreme Court. Article 24 of the Will of late Major General Claude Martin has given the name of the school and makes provisions of children of Christian community of any class to be taken care of by the school. The Supreme Court by its decree dated October 22, 1832 had constituted the school. He has drawn the attention of the Court to the

contents of the decree dated October 22, 1832 and submitted that, directions for appointment of Ex-officio Governors, Additional Governors and Secretary for the purpose of management of the school were given. The decree has also directed the school to recruit students among Christian population of Kolkata and every children of Christian community to receive education upon payment of fees. He has referred to the order dated June 6, 1944 which was passed on the petition of the then Advocate General of Bengal where it was expressly provided that no person other than Christian can be appointed as Governors.

9. Learned advocate appearing for the respondents nos. 1 and 2 has contended that the decree as well as the constitution establishes that no person other than a Christian is eligible to be appointed as an Ex-officio Governor of the school. He has interpreted the clause “for the time being” in the order dated June 6, 1944 to mean that, if the office of the Ex-officio Governor is not occupied by a person professing Christian religion he cannot be appointed and other Ex-officio Governors will take that position.

- 10.** Learned advocate appearing for the respondent nos. 1 and 2 has submitted that, there were attempts earlier to interpret the decree and the constitution to mean that non-Christian can be appointed as Ex-officio Governor and that such attempts failed. In this regard he has referred to the orders dated February 1, 1968, the order dated July 12, 1966 and the order dated March 1, 2000 passed by the Division Bench. Relying upon **1992 Volume 1 SCC 558 (St. Stephen's College vs. University of Delhi)**, **1974 SCC 717 (Ahmedabad St. Xavier's College Society & Anr. Vs. State of Gujarat)**, **2002 Volume 8 Supreme Court Cases 481 (T.M. Pai Foundation vs. State of Karnataka)**, learned advocate appearing for the respondent nos. 1 and 2 has contended that, since the school is a minority institution it is not permissible for the Court to interfere in its administration.
- 11.** Respondent no. 7 has supported the contentions raised by respondent Nos. 1 and 2. Learned advocate appearing for the respondent no. 7 has contended that, Court should not interfere in the management of a minority institution. In addition to the authorities relied upon by the respondent

nos. 1 and 2, learned advocate appearing for the respondent 7 has relied upon **2020 Volume 6 Supreme Court Cases 689 (S.K. Mohd. Rafique Vs. Contai Rahamania High Madrasah)** and **2020 Volume 8 Supreme Court Cases 705 (Christian Medical College Vellore Assn. Vs. Union of India)** in such context.

12. With regard to the quorum specified in the modified decree, learned advocate for the respondent no. 7 has contended that such quorum is limited to the valid eligible members and since only two of the 12 ex-officio members profess Christian faith the quorum should be calculated from amongst those two members. Learned advocate appearing for the respondent no. 2 has relied upon **2016 Volume 6 Supreme Court Cases 126 (Arobindo Ashram Trust & Ors. Vs. R. Ramaathan & Ors.)** in support of his contention that plaintiffs cannot seek vindication of personal or private rights in a suit under Section 92 of the Code of Civil Procedure, 1908.

13. Relying upon **2012 Volume 8 Supreme Court 148 (Union of India Vs. Ibrahim Uddin & Another)**, **2001 Volume 3 Supreme Court Cases 68 (Ritona Consultancy Pvt. Ltd.**

& Ors. Vs. Lohia Jute Press & Ors.), 1999 Volume 2 Supreme Court Cases 377 (Sree Jain Swetambar Terapanthi Vid(s) vs. Phundan Singh & Ors.), 2015 Volume 2 Supreme Court 156 (Meena Chaudhary Vs. Commr. Delhi Police) and 1983 Volume 4 Supreme Court Cases 625 (Cottan Corpn. of India Ltd. Vs. United Industrial Bank Ltd.) learned advocate appearing for the respondent no. 7 has contended that no relief should be granted beyond the pleadings. He has relied upon **2017 Volume 13 Supreme Court Cases 542 (Ayan Chatterjee Vs. Future Technology Foundation Inc.)** to contend that a suit is required to be decided on the basis of pleading and evidence adduced and not by way of interlocutory application.

14. Learned advocate appearing for the respondent no. 7 has submitted that, the plaintiffs obtained benefit of being appointed as members of the Board of Governors. Having obtained such benefits they cannot challenge the same instrument by virtue of which they are benefited. In support of such contention he has relied upon **1992 Volume 4 Supreme Court Cases 683 (R. N. Gosain vs. Yashpal**

Dhir)* and *2020 Volume 6 Supreme Court Cases 387 (Bhagwat Sharan Vs. Purushottam).

15. Learned advocate appearing for the respondent nos. 7 has drawn the attention of the Court to the earlier orders passed by the High Court in the two previous proceedings and submitted that, the appellants are not entitled to any reliefs.
16. Learned senior advocate appearing for the appellants has submitted that, two schools one for boys' and one for girls' were established as a public charitable institution under the Will of Major General Claude Martin. He has drawn the attention of the contents of the will and contended that pursuant to the charitable objects the schools were established by the Supreme Court of Judicature at Fort William in Bengal in old equity suit of 1832. This Hon'ble Court has inherited the old equity suit in which the decree of 1832 was passed and as such is the guardian of the schools at Kolkata and consequently exercises parens patriae jurisdiction over the 2 schools.
17. Referring to ***1999 Volume 3 Supreme Court Cases 115 (Executive Officer Arthanareswarar Temple Vs. R. Sathyamoorthy & Ors.), 2011 Volume 4 Supreme Court***

Cases 454 (Aruna Ramchandra Shanbaug Vs. Union of India & Ors.) and **2011 Volume 4 Kolkata Law Times 226 (Mrigan Maity & Ors. Vs. Daridra Bandhab Bhandar & Anr.)**, learned Senior Advocate appearing for the appellants has submitted that, Courts have a parens patriae jurisdiction over the Trusts for charitable and religious purposes and can always act in public interest in respect of thereof.

- 18.** Learned Senior Advocate appearing for the appellants has submitted that, the decree dated October 22, 1832 as modified on June 6, 1944 provided that the schools must be administered by a Board of 12 Ex-officio Governors which would, in turn, be entitled to appoint four Additional Governors every year. Admittedly, according to him most of these Ex-officio posts have ceased to exist since such Ex-officio post are manned by persons who are not Christian. As a result it is only the Bishop of Kolkata and a Minister of St. Andrews Church in Kolkata which are now running the schools. The Minister of St. Andrews Church in Kolkata is nominated by the Bishop of Kolkata and as such the school

is essentially being run by way of one Ex-officio Governor that is the Bishop of Kolkata.

- 19.** Learned Senior Advocate appearing for the appellants has submitted that, the constitution of the La Martiniere School at Kolkata makes it clear while it refers to the Board of Governors that it is a composition of 12 Ex-officio Governors and the 4 Additional Governors to be elected only in terms thereof and are collectively referred to as the Board of Acting Governors. He has referred to Article 7 of the Constitution which provides for the quoram. According to him the present Board of Governors has been acting and continuing to act without a quoram. All decision of the Board of Governors without the requisite quoram of at least four Ex-officio Governors have been and are illegal and wrongful. That, by itself, according to him, has constituted the breach of the express trusts created by the decree dated 1832 modified in 1944 for which Section 92 of the Code of Civil Procedure, 1908 can be invoked. He has contended that, this Hon'ble Court is entitled to and should settle a scheme of the trusts particularly when the whole scheme is no longer workable and grant such relief as required.

- 20.** Learned Senior Advocate appearing for the appellants has contended that, the opposition of the respondent nos. 1 and 2 on one post and the respondent no. 7 on the other, are strange. He has contended that, such respondents did not explain why the scheme should not be moulded to ensure participation of 12 Ex-officio Governors for the administration of the school. Opposition of such respondents has shown that they were interested only in perpetuating the wrongful control over the schools.
- 21.** Learned Senior Advocate appearing for the appellants has referred to the pleadings of the plaint and have submitted that the first paragraph along with various other pleadings of the plaint establishes that the suit was under Section 92 of the Code of Civil Procedure, 1908. He has distinguished the authorities cited on behalf of the respondent nos. 1, 2 and 7 with regard to the maintainability of the suit.
- 22.** Learned senior advocate appearing for the appellants has relied upon **1997 Volume 3 Supreme Court Cases 443 (Tayabbhai M. Bagasarwalla and Another)**, **2021 Volume 15 Supreme Court Cases 338 (Rama Narang Vs. Ramesh Narang And Others)** and **2006 Volume 5 Supreme Court**

Cases 638 (*Ramesh V. Desai & Ors. Vs. Bipin Vadilal Mehta and Ors.*) in support of the contention that interim relief can be granted pending decision of a preliminary issue at the trial of a suit.

23. Learned Senior Advocate appearing for the appellants has submitted that, the Division Bench in the appeal have passed an order dated October 8, 2020 observing that it is necessary to revisit the of the composition of the Board of Governors of the school. The Division Bench had directed all the respondents to indicate how the new constitution of the Board of Governors of the school should be made. An appeal had been preferred against such order which was disposed of by the Hon'ble Supreme Court by its order dated November 27, 2020 without interfering with the order dated October 28, 2020.

24. Learned Senior Advocate appearing for the appellants has contended that, the schools were not established as minority institutions. He has contended that, neither the Will of Major General Claude Martin nor the decree dated October 22, 1832 specify that the school was to be administered by Christians only. The decree had been modified on June 6,

1944 which provided that the Ex-officio Governors of the school must profess the Christian faith. The school has obtained a minority certificate in the year 2010 which does not however show that the same is a religion based minority institution.

25. Learned Senior Advocate appearing for the appellants has submitted that, the modified decree dated June 6, 1944 provided that Ex-officio Governors would be of Christian faith for the time being. He had submitted that, the Court has retained the jurisdiction to modify the decree from time to time, as the occasion arises. Since out of 12 Ex-officio members to the Board of Governors, most are no longer Christians, particularly in view of the quorum provided by the Constitution, it would be appropriate that some arrangement was made for the purpose of constitution of a valid Ex-officio Board of Governors of the school.

26. Referring to the order dated February 1, 1968 and the order dated March 1, 2001 by a Division Bench latter of which was passed in a suit questioning the acts of the Board of Governors in leasing out a portion of the school ground, learned Senior Advocate appearing for the appellants has

contended that such order did not take into account the fact that the Board of Governors were without a quorum. In any event, the same was an interlocutory order.

- 27.** Learned Senior Advocate appearing for the respondent no. 8 has supported the contentions of the appellants. He has submitted that his client is an ex-student of the school and is a beneficiary under the Will of Major General Claude Martin. He has referred to the Will of Major General Claude Martin and contended that, Late Major General Claude Martin was an army man and not a missionary. Though born as a Roman Catholic he had respected all religions. He had desired to do charity for the people of all faith, Apart from other bequests for other charitable works mentioned in the will a bequest was made to the town of Kolkata under the protection of the Government or the Supreme Court to devise an institution most necessary for public good or establishing a school to be named La Martiniere. As Major General Claude Martin was unable to establish a management for the institution, he had hoped that the Government or the Supreme Court would devise the best institution for public good as per his desire.

28. Learned senior advocate for the respondent no. 8 has contended that the intention of the founder was not to sponsor a missionary school or to have a school exclusively for the benefit of Christians or to be run exclusively by them. On the contrary Major General Claude had envisaged a school for the public good for the town of Kolkata and it was to be under the protection of the Government or the Supreme Court without any restrictions on the religion of the managers.

29. Learned Senior advocate appearing for the respondent no. 8 has referred to the decree dated October 22, 1832 and contended that the intention of the settlor was retained and the composition of the Board of Governors was secular and not restricted to Christians alone. Further, the Court had retained full authority to alter the scheme for better management and administration. He has submitted that, the decree dated May 23, 1946 amended the decree dated October 22, 1832. He has contended that, the power and authority of the Court to appeal the scheme for better management of the school continues to remain.

30. Learned Senior Advocate appearing for the respondent no. 8 has contended that, the judgement and order dated February 1, 1968 does not change the position with regard to the composition of the Board of Directors. He has contended that, such judgement and order is not an authority for the proposition that the nature of the school cannot be changed. In fact, it has held that the Additional Governors can be non-Christians and left the issue with regard to the modification of the management of the school at the final hearing of the suit.

31. Learned Senior advocate appearing for the respondent No. 8 has referred to the judgement and order dated July 12, 1996 and March 1, 2000 passed in the old equity suit and contended that, the observation by the Division Bench with regard to the Christian character of the school was without jurisdiction. In support of such contention, he has relied upon **1999 Volume 6 Supreme Court Cases 632 (T.K. Lathika Vs. Seth Karsandas Jamnadas)**. He has contended that, supervening circumstances justify the alteration of the scheme and that the bar of res judicata will not apply. In support of such contention he has relied upon

AIR 1964 Supreme Court 107 (Ahmad Adam Sait and others vs. M. E. Makhri and others).

32. Emphasizing upon the necessity for the Court to intervene learned Senior Advocate for respondent no. 8 has contended that, changed circumstances have created a vacuum in Board of Governors of the school. Out of 12 Ex-officio members to the Board of Governors only 2 are occupied. This has resulted in requisite quorum to be absent. These two Ex-officio Governors, who do not constitute the quorum are holding meetings and are appointing Additional Governors and removing the same at their whims which they are not entitled to. None of the respondent No. 1 and 2 are eligible to be the Ex-officio Members of the Board of Governors. Presently, the Board of the Ex-officio Board of Governors of the schools are comprised of Church of North India Nominees who are neither independent nor a representative body of 12 eminent persons from different fields as has been contemplated by the founder and this Hon'ble Court.

33. Relying upon ***AIR 1956 Supreme Court 382 (Vikrama Das Mahant vs. Daulat Ram Asthana And Others)*** learned

Senior Advocate appearing for the respondent no. 8 has contended that, the Court retained the power to pass necessary orders. In view of the Court being the guardian of the school and the suit being in respect of a public trust it was the duty of the Court to safeguard the beneficiary and act for the benefit of the trust.

34. Relying upon *2021 Volume 15 Supreme Court Cases 338*

(Rama Narang Vs. Ramesh Narang And Others) learned Senior Advocate appearing for the respondent no. 1 has contended that objections with regard to jurisdiction do not prevent the Court from passing interim orders.

35. Learned Senior Advocate appearing for the respondent no. 10, has submitted that even though the appeal was against the order dated August 18, 2020 the appeal Court has the powers to grant the reliefs sought for in the appeal. The Court can mould the relief considering the change of circumstances to do complete justice. In support of such contention reliance has been placed on *2009 Volume 10 Supreme Court Cases 197(Jai Prakash Gupta Vs. Riyaz Ahamad And Another)* and *2014 Volume 8 Supreme Court Cases 294 (Gaiw Dinshaw Irani And Others Vs.*

Tehmtan Irani And Others). He has referred to the provisions of Order 41 Rule 33 of the Code of Civil Procedure, 1908 for the proposition that the Court can grant such relief.

- 36.** Learned Senior Advocate appearing for the respondent no. 10 has submitted that the interlocutory application being GA 1517 of 2019 was being considered along with GA 1532 of 2019. Such application had the necessary pleadings to grant reliefs regarding mismanagement of the schools. He has contended that in the event this Hon'ble Court refuses to pass any order despite considering the complete failure of the present scheme serious prejudice would be caused to the students of the school. This Hon'ble Court then would be condoning and perpetuating express illegality of the Board of Governors. Two Division Benches had passed orders for the constitution of the Board of Governors. He has contended that in absence of specific prayer for devising a scheme does not prevent the Court from exercising its inherent powers. He has relied upon ***AIR 1959 Andhra Pradesh 126 (Jangam Pampaiah vs. H. Hanumantha Reddi)*** learned Senior Advocate appearing for the respondent No. 10 had

submitted that, this Court has jurisdiction and power to regulate and modify the scheme of management of the schools. He has contended that the order dated March 1, 2020 passed in the Old Equity Suit does not operate as res judicata. The existing scheme of management is archaic and non-workable. The contention of the respondent nos. 1, 2 and 7 that the Court should not interfere with the scheme is fallacious. The judgements relied upon by the respondent nos. 1, 2 and 7 are non-applicable to the facts of the present case.

37. The appeal has arisen out of an order dated August 18, 2020 passed by the learned Trial Judge in an interlocutory application of the plaintiffs. The appellants as plaintiffs had filed a suit alleging mismanagement in the administration of two schools, and claiming reliefs relating to appointments to the additional Board of Governors of the two schools and framing a scheme for the administration and management of the two schools.

38. Late Major General Claude Martin had left behind a will dated January 11, 1800 where he had bequeathed various assets for the purpose, inter alia, of setting up two schools in

Kolkata. Clause 24 of such will has relevance and the same is as follows: –

“Article Twenty Four (24) - I give and bequeath the sum of two hundred thousand Sicca Rupees to the Town of Calcutta for to be put at interest in Government papers or the most secure mode possible and this principal interest to be put under the protection of Government or the Supreme Court that they may devise an institution the most necessary for the pubic good of the Town of the Calcutta or cestablishing a School for to educate a certain number of children of any sex to a certain age and to have them put apprentice to some profession at the conclusion of their school and to have them married when at age and I also wish that every year a premium of few Rupees or other thing and a medal be given to the most deserving or virtuous boy or Girl or to both , to such that have come out of that School , or that are still in it and this to be done on the same day in the month died , that day those that are to be married are to be married and to have a sermon preached at the Church to the Boy and Girl of the School afterwards a public Dinner for the whole and a toast to be drunk in memorandum of the Fouundator this Institution is to bear the Title of La Martinier and to have an inseription either on stone or marble in large character to be fixed on any part of the school on it wrote instituted by Major General Martin Burn the 6th January , 1935 at Lyon who died the day month and year mentioning The day month and year and buried at mentioning the place and as I am little able to make any management for such on institution I am in hope government or the Supreme Court will devise the best institution for the public good and to have it as I said

above mentioned, the name of the institutor. After every Article of my or this will and Testament is carefully settled and every artiolo provided and paid for the several pension or other gift, donation institution and other any sum remaining may be made to serve first to buy or bulled a house for the institution as that it may be made permanent and perpetual by socuring the interest by government paper either in India or Europe that the interest annually may support the institution for this reason I give and bequeath one hundred and fifty thousand sicca Rupees more according the proportion that may remain after every Article of this Testament is fulfilled then this sum to be added for the permancy of the institution making the sum of three hundred and fifty thousand sicca Rupees.”

39. The Supreme Court of Judicature at Calcutta had dealt with the will of late Major General Claude Martin in Old Equity Suit. The Supreme Court of Judicature at Calcutta had passed a decree dated October 22, 1832 in the Old Equity Suit directing inter alia: –

- i. a school called and distinguished by the name of La Martiniere be established
- ii. the following persons (their consent having first been obtained) shall be ex-officio Governors of the school namely
 - a. the Governor General

- b. the members of Council of Judges of the
Supreme Court
- c. the Bishop of Calcutta
- d. the Advocate General

provided always that if any of such person shall not consent to become a governor of the school, an application shall be made to the Supreme Court to appoint some other person in view of every person so refusing

- iii. the ex-officio governors had been empowered to annually elect and nominate four Additional Governors, who shall, during the year for which they shall be so nominated and elected, have equal power and authority with the Ex-officio Governors of the school in the management and direction thereof and in all matters relating thereto
- iv. there shall be a paid secretary who shall be nominated and appointed by the governors of the school

40. In terms of the decree dated October 22, 1832, the Advocate General of Bengal had applied for amendment of such decree which was allowed by a decree dated May 23, 1946. The amendment to the decree dated October 22, 1832 had been made by this Hon'ble Court in the Old Equity Suit. By the

amendment, the Viceroy and Governor General of India was made the visitor of the school. It had directed that, there shall be 12 ex-officio governors in substitution for the Board of Governors appointed by the decree dated October 22, 1832 being: –

- i. Governor of Bengal
- ii. the Chief Justice of Bengal
- iii. Bishop of Calcutta
- iv. member of Viceroy's council in charge of education
- v. one of the members of the executive Council of the Governor of Bengal to be nominated from time to time by the Governor
- vi. one of the puisne judges of this Hon'ble Court to be nominated from time to time by the Chief Justice
- vii. the Advocate General of Bengal
- viii. the General Officer in command of the presidency.
- ix. The Director of Public Instruction, Bengal
- x. the chairman of the Corporation of Calcutta
- xi. the Minister of St Andrews Church of the Church of Scotland in Calcutta
- xii. the president of Bengal Chambers of Commerce

provided always that no person for the time being holding or officiating in any of such offices who does not profess the Christian religion shall exercise or perform the powers or duties of an Ex-officio Governor

- 41.** In respect of the affairs of the school, a suit being Suit No. 2602 of 1967 had been filed in this Hon'ble Court where an interlocutory order dated February 1, 1968 was passed. This Court has been informed that, such suit was struck off from the register of suits in 1969. The judgement and order dated February 1, 1968 therefore has lost significance in view of the suit in which it was passed no longer remaining.
- 42.** The then existing Board of Governors had applied to the High Court in the Old Equity Suit seeking sanction of this Court to enter into an agreement for development of a portion of the land situated at the boys school in order to augment the income for the better administration and management of the school. Such applications had been disposed of by a judgement and order dated July 12, 1996. The Court had noticed the composition of the Board of Governors as stipulated by the decree dated May 23, 1946

and observed that most of the posts were non-existent. The Court had reworked the composition of the Board of Governors of the school.

43. An appeal had been carried from such judgement and order dated July 12, 1996. The appellate Court had, by the judgement and order dated March 1, 2000, set aside the direction of re-working of the Board of Governors and appointment of new Board of Governors.

44. This Court had retained the jurisdiction to pass orders in the Old Equity Suit while passing the initial decree and the amendment thereof. Jurisdiction of this court had been invoked earlier in the old equity suit relating to the management and affairs of the 2 schools. Independent of the pendency of the Old Equity Suit, approach had been made to this Hon'ble Court relating to the management and administration of the two schools in 1967 by way of a suit, which suit was subsequently struck off the register.

45. In the present suit, the plaintiffs had obtained leave under Section 92 of the Code of Civil Procedure, 1908 ex parte. Such leave had been revoked. On appeal from the order revoking the leave, the appellate Court had directed that the

issue of maintainability of the suit under Section 92 of the Code of Civil Procedure, 1908 would be decided at the trial of the suit. This court has been informed that, although the writ of summons had been served upon the defendants, they did not file written statement. The suit has not been set down for trial. The issue of Section 92 of the Code of Civil Procedure, 1908 is yet to be finally decided.

46. *Swami Paramatmanand Saraswati (supra)* has held that, even if all other ingredients of a suit under Section 92 of the Code of Civil Procedure, 1908 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92.

47. *Swami Paramatmanand Saraswati (supra)* has been noted in ***Vidyodaya Trust (supra)*** and in the facts of that case, the suit was found to be not maintainable as the same was for settling private or personal disputes.

48. The above two authorities had been noted in ***Aurobindo Ashram Trust and others (supra)*** and it was held that, the suit was not maintainable in the facts of that case.

49. *Sathyanath (supra)* had set aside an order directing framing of a preliminary issue with regard to the plea of res judicata and directed all the issues to be heard and decided by the trial court.

50. In ***Ahmad Adam Sait and Others (supra)*** the Supreme Court while dealing with a suit instituted under Section 92 of the Code of Civil Procedure, 1908 observed that, even after a scheme was framed for a suit property instituted under Section 92, if supervening consideration justified its alteration or modification, the bar of res judicata cannot be pleaded against such alteration or modification. It has held that, a subsequent suit under Section 92 of the Code of Civil Procedure, 1908 despite, an earlier suit under such provisions being decreed was still maintainable.

51. *Vikrama Das Mahant (supra)* has considered the issue whether a decree in an earlier Section 92 suit entitle the plaintiff thereon to sue. It has held that, where public trusts are concerned, Courts have a duty to see that their interest

and interest of those for whose benefit the trust exist are safeguarded. Therefore, Courts possess power to sustain proper proceedings and grant relief in the interests of and for the express benefit of the trust, imposing such conditions as may be called for.

52. As has been noted above, the issue with regard to Section 92 of the Code of Civil Procedure, 1908 is yet to be finally decided in the suit. Therefore, it would be premature to say that, the suit is essentially one for the purpose of vindicating individual or personal rights. The contentions of the respondent No. 1 and 2 and 7 are not in the realm of an Order 7 Rule 11 scenario with regard to Section 92 of the Code of Civil Procedure, 1908. In any event, a subsequent suit under Section 92 of the Code of Civil Procedure, 1908 is maintainable if the facts justify it.

53. The appellants as plaintiffs had applied for interim reliefs before the learned Trial Judge. The interlocutory application of the appellants before the Trial Court has revolved around offices held by the appellants and with regard to appointment of Additional Board of Governors, without praying for any relief regarding the composition of the Board

of Governors by altering the existing scheme. As has been noted hereinabove, the issue of Section 92 of the Code of Civil Procedure, 1908, is yet to be finally decided. The question therefore, is, whether, pending decision of the maintainability of the suit can interim reliefs be granted to the plaintiffs.

54. In ***T.K. Lathika (supra)*** the Supreme Court has considered a bar under Kerala Building Lease and Rent Control Act, 1965 on a transferee land lord from filing a suit of eviction within one year of the transfer. In such context, it had held that, the issue of maintainability of the suit needs to be decided first before any relief being granted.

55. The Supreme Court in ***Rama Narang (supra)*** has noticed ***Tayabbhai M. Bagasarwalla and Another (supra)*** and held that, where the objection of jurisdiction is taken, the Court should decide such question first. However, that does not mean that pending the decision on the question of jurisdiction, the Court has no jurisdiction to pass interim orders as may be called for in the facts and circumstances of the case. Mere objection to jurisdiction does not instantly

disable the Court from passing any interim orders. It can pass appropriate orders.

56. In ***Ramesh V. Desai & Ors. (supra)*** the Supreme Court has held that, the question of limitation is a mixed question of fact and law. Code of Civil Procedure, 1908 confers no jurisdiction to Court to decide a mixed question of fact and law, as a preliminary issue unless the facts are clear from the plaint itself and the mixed question of fact and law can be determined on the principles of demurer.

57. Provisions of Order 41 Rule 33 of the Code of Civil Procedure, 1908 have been considered in ***Jai Prakash Gupta (supra)*** and ***Gaiv Dinshaw Irani and Others (supra)*** where it has been held that, Appellate Court has power to grant reliefs taking into consideration the subsequent events having direct bearing on the reliefs claimed or on the entire purpose of the suit. In the facts of the present case, the basis for seeking reconstitution of the Board of Governors and framing a scheme is not on the subsequent events but on events which had happened prior to the institution of the suit.

58. The Supreme Court in ***R. N. Gosain (supra)*** has held that, a party to a proceedings after electing to accept a transaction as valid and taking advantage of such transaction cannot be permitted to challenge the validity of such transaction. In the facts of that case, the tenant filed an undertaking to vacate the premises. In the facts of that case, it was held that by furnishing the undertaking the tenant had elected to avail the protection from eviction of the premises and enjoy such protection. Having done so, the tenant cannot be permitted to assail the order by which, he availed of the benefit.

59. In ***Bhagwat Saran (supra)***, the Supreme Court has observed as follows :-

“26.It is trite law that a party cannot be permitted to approbate and reprobate at the same time. This principle is based on the principle of doctrine of election. In respect of wills, this doctrine has been held to mean that a person who takes benefit of a portion of the will cannot challenge the remaining portion of the will. In *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.* [*Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.*, (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153 : AIR 2013 SC 1241] , this Court made an observation that a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and

reprobate". Where one party knowingly accepts the benefits of a contract or conveyance or an order, it is estopped to deny the validity or binding effect on him of such contract or conveyance or order.

27. The doctrine of election is a facet of law of estoppel. A party cannot blow hot and blow cold at the same time. Any party which takes advantage of any instrument must accept all that is mentioned in the said document. It would be apposite to refer to the treatise Equity—A Course of Lectures by F.W. Maitland, Cambridge University, 1947, wherein the learned author succinctly described principle of election in the following terms:

"The doctrine of election may be thus stated : that he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it...."

This view has been accepted to be the correct view in Karam Kapahi v. Lal Chand Public Charitable Trust [Karam Kapahi v. Lal Chand Public Charitable Trust, (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262] . The plaintiff having elected to accept the will of Hari Ram, by filing a suit for eviction of the tenant by claiming that the property had been bequeathed to him by Hari Ram, cannot now turn around and say that the averments made by Hari Ram that the property was his personal property, is incorrect."

- 60.** According to the respondent nos. 1, 2 and 7 the appellants, as plaintiffs having taken advantage of their respective appointments as Additional Board of Governors pursuant to

the modified decree of 1944, they should not be allowed to challenge such decree on the ground that the appellants as plaintiffs, cannot be allowed to approbate and reprobate.

- 61.** With respect, we are unable to agree with such contentions of the respondent nos. 1, 2 and 7. The appellants/plaintiffs had been appointed Additional Governors pursuant to the decree dated June 6, 1944. The appellants as plaintiffs may not obtain any relief at the final hearing of suit if it is held that their appointments were bad but that does not preclude them to raise issues with regard to the compositions of the Board of Governors or the requirement to have the same by amending the decree. The appellants as plaintiffs having accepted their appointments from persons who are in wrongful control of a public trust, does not denude the Court from considering whether, the public trust was in the control of persons who were directed to be in control thereof by the decree of the Court or not. In the facts of the present case, the Court had retained the jurisdiction to look into and rework the composition of the Board of Governors, modify the scheme and issue necessary directions with regard thereto if the occasion so arises. The jurisdiction of the Court

to look into the composition of the Board of Governors by virtue of individual actions of such certain plaintiffs in a suit cannot be ousted. This appeal is held to be maintainable.

- 62.** In the present suit, the issue as to whether, the educational institutions concerned are minority educational institutions or not or whether, their rights as minority educational institutions are sought to be affected does not arise. The Court had passed a decree directing the composition of the Board of Directors and retained the jurisdiction to recompose the same. This jurisdiction of the Court cannot be ousted on the plea that the institutions concerned are a minority educational institutions. In any event, a minority educational institution cannot be held to be outside the judicial scrutiny of a Court in a suit instituted under Section 92 of the Code of Civil Procedure, 1908. Plea of the institution being a minority institution, does not affect the rights of the parties and the jurisdiction of the Court under Section 92 of the Code of Civil Procedure, 1908. Consequently, the authorities cited at the bar in respect of minority rights, need not be discussed at length.

- 63.** It is trite law as has been observed in ***Ibrahim Uddin & Another (supra)*** that, relief not founded on pleadings cannot be granted. All material facts has to be pleaded and a party cannot be allowed to travel beyond the pleadings. The other authorities cited on the point that, a party must not travel beyond the pleadings and therefore all material facts has to be pleaded are not discussed at length here.
- 64.** The learned Trial Judge had considered GA No. 1517 of 2019 while passing the order dated July 12, 2019 which was subsequently clarified by the impugned order. The learned Trial Judge had noted the rival contentions of the parties while passing the order dated July 12, 2019. The learned Trial Judge had taken into consideration the contents of the Will of late Major General Claude Martin. The learned Trial Judge had taken into consideration letters dated March 22, 2019 on election and nomination of the four Additional Governors. The learned Trial Judge had noted that such letters contained the signature of the then two ex officio Governors. The learned Trial Judge had also taken into consideration the letters dated June 19, 2019 which spoke about a meeting of the Ex-officio Board of Governors dated

June 18, 2019. The learned Trial Judge had recorded the fact that the Court perused two documents bearing signature of continuing Ex-officio Governor. The learned Trial Judge had to note that persons who can officiate as Ex-officio Governors have been described in the decree and the amendment order. The learned Trial Judge had recorded that the one of such person had signed two documents, contents of which contradict each other. The learned Trial Judge had refrained from making further comment. In such circumstances, the learned Trial Judge had returned a finding that the plaintiffs were entitled to an interim order. The learned Trial Judge had proceeded to grant interim orders in favour of the plaintiffs/appellants. The interim order that had been granted was as follows: –

“The Board of Governors of the schools will not take any decision regarding management of the school’s untill disposal of this application. The Ex Officio Governors will not, in that time, appoint any person as Additional Governors.”

- 65.** The learned Trial Judge after having been satisfied that a case for granting interim order was made out by the plaintiffs/appellants, had proceeded to clarify through the

impugned order that, such order was limited for a period of one year.

66. In the facts and circumstances of the present case, it would be appropriate to hold that, the pleadings of the appellants/plaintiffs had made out a prima facie case. The balance of convenience and inconvenience was also in favour of the appellants/plaintiffs in granting interim reliefs.

67. The interim order initially granted on July 12, 2019 had proceeded on the basis of a person who can officiate as Ex-officio Governor signing two documents, contexts of which contradict each other. The interim order granted was not in relation to the appointment of the plaintiffs/appellants as Additional Governors but related to the management of administration of the affairs of the two schools. Management and the administration of the two schools are not limited to the time period of the office of the plaintiffs/appellants particularly in view of the fact that, the suit was under Section 92 of the Code of Civil Procedure, 1908.

68. The plaintiffs/appellants have raised serious issues with regard to the composition of the Board of Governors of the two schools. Interest of the public including the students

studying in the two schools have to be taken into consideration. Prima facie, there is an urgent need for the Court to revisit the composition of the Board of Governors. As on date, there are only two members of the Board of Governors. The requisite quorum as prescribed by the constitution of the two schools are not available in the present Board of Governors of the two schools. Therefore, there is a serious issue as to whether, the present Board of Governors can function at all without requisite quorum being present.

69. However, those issues have to be taken into consideration in an appropriate proceedings. The scope of the appeal being limited, we refrain ourselves from embarking on such route despite the order dated October 8, 2020.

70. In such circumstances, it would be appropriate to direct that the Board of Governors of the two schools will not take any decisions regarding the management of the two schools till the disposal of the interlocutory applications. The Ex-officio Governors will not, till the disposal of the interlocutory applications, appoint any person as Additional Governors. All decisions taken by the Board of Governors after the

institution of the suit or after the passing of the initial order therein, on July 12, 2019, be not given effect to, except those pertaining to the day to day administration and functioning of the two schools. No decision pertaining to any new school should be given effect to or any steps taken in pursuance thereof till the interlocutory applications are decided.

- 71.** The learned Judge before whom the matters are pending is requested to dispose of all the pending interlocutory applications as expeditiously as possible and preferably within a period of four weeks from date.
- 72.** During the pendency of the appeal, an application being GA 7 of 2023 has been filed seeking framing of a scheme for the management and administration of the two schools. In view of ***Meena Chaudhary (supra)*** since the scope of GA 7 of 2023 is greater than the scope of the main appeal such prayer is not considered by us. It would however not prevent the parties to the suit from seeking appropriate relief before the Trial Court. All points with regard thereto are left open.
- 73.** In view of the discussions above GA 4 of 2021 is disposed of by holding that the appeal is maintainable. GA 6 of 2023 has lost its force in view of the fact that, every learned counsel

who wanted to address the Court on the virtual platform was allowed to do so.

74. APO 83 of 2020 with all other connected applications are disposed of without any order as to costs.

[DEBANGSU BASAK, J.]

75. I agree.

[MD. SHABBAR RASHIDI, J]