

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Aniruddha Roy

WPA 18852 of 2019

With

I.A. No. CAN 1 of 2023

**Dayanand Anglo-Vedic Higher Secondary School,
represented by the Secretary of the Managing Committee, Swami
Birjanand Bhawan, Asansol & Ors.**

Vs.

The State of West Bengal & Ors.

With

WPA 18856 of 2019

With

I.A. No. CAN 1 of 2023

**Dayanand Vidyalaya (HS), represented by the Secretary of the
Managing Committee, Maharshi Dayanand Bhawan, Asansol & Ors.**

Vs.

The State of West Bengal & Ors.

With

WPA 18857 of 2019

With

I.A. No. CAN 1 of 2023

**Arya Kanya Uchcha Vidyalaya (HS), represented by the Secretary of
the Managing Committee, Swami Shraddhanand Bhawan, Asansol &
Ors.**

Vs.

The State of West Bengal & Ors.

For the petitioners:

**Mr. Sandip Kr. De, Adv.,
Mr. Abhijit Sarkar, Adv.**

For the State:

**Mr. Rudranil De, Adv.,
Mr. Gourav Das, Adv.**

Reserved on:

05.03.2024

Judgment on:

11.03.2024

ANIRUDDHA ROY:

1. The parties have agreed for the consolidated and analogous hearing of these three writ petitions. The reliefs claimed in all three writ petitions are identical and the legal issues are same. The parties, therefore, agreed to proceed principally in **WPA 18852 of 2019** on the basis of its records. However, depending upon the requirement the parties have referred to the records of the other two writ petitions also. All three writ petitions are disposed of by this composite judgment, accordingly.

Facts:

2. **Dayanand Anglo-Vedic Higher Secondary School** (hereinafter referred to as the Dayanand School) is a minority Educational Institution which was established and then being run and managed by Arya Samaj, Asansol. Dayanand School had been recognized as a **Minority Educational Institution** (for short, the Minority Institution) by the State under **Notification No. 404 Edn (S), dated March 19, 1973** (for short, the said 1973 Rules), **Annexure P-1** at **page 21** to the writ petition. The school is being run, managed and

administered by its managing committee, of which the petitioner no.2 is the Secretary. The petitioner no.3 is the teacher-in-charge of the school.

3. The schedule to the said 1973 Rules contains the names of the Educational Institutions/Schools which are covered under the provisions of the said 1973 Rules. **Serial No.1** to the said schedule features the name of the Dayanand School. Dayanand School at all material time was recognized as a minority Educational Institution by the State since the said 1973 Rules was promulgated.
4. As a minority Educational Institution Dayanand School is entitle to recruit its own staffs and employees both teaching and non-teaching in adherence to the provisions laid down under the said 1973 Rules.
5. By a memo bearing no. 672-LS dated June 20, 2006, the then Director of School Education, presently the Commissioner of School Education, West Bengal directed the Dayanand School to follow the recruitment rules prepared for the Christian Minority Educational Institution in terms to **G.O. No. 1314-SE(S)/4AA-35/2002 dated September 17, 2002, Annexure P-2 at page 28** to the writ petition, and directed the respondent no.3 and 4 to act accordingly.
6. Although the school is a minority institution within the meaning of the said 1973 Rules, however, the school for the purpose of obtaining minority status certificate from the Minor Affairs and Madrasah Education Department of the State, filed a writ petition being W.P. 3647 (W) of 2016. In the said writ petition a Coordinate Bench by its order dated August 23, 2016 directed the School Education Department to decide the issue. By its decision dated **February 22,**

2017 the Joint Secretary of the School Education Department, Government of West Bengal refused to issue no objection certificate for obtaining minority status certificate by Dayanand School from the Minority Affairs and Madrasah Education Department, **Annexure P-5** at **page 44** to the writ petition.

7. Meanwhile Dayanand School was in requirement of recruitment for teaching and non-teaching staffs. Dayanand School submitted all its necessary papers in this regard before the relevant State authority, **Annexure P-8** at **page 52** to the writ petition.
8. Dayanand School then received an impugned communication dated **September 13, 2019, Annexure P-9** at **page 92** to the writ petition, issued by the respondent no.3 in which on the strength of the said decision of the Joint Secretary, School Education Department dated March 03, 2017, the respondent no.3 informed the school not to proceed with the recruitment process for the teaching and non-teaching staffs.
9. Being aggrieved by the said decision of the respondent no.3 dated September 13, 2019, the petitioners filed the instant writ petition praying for the following reliefs:-

“a) A writ of Mandamus directing the respondents esp., the respondent No.3 to act according to law and withdraw and/or rescind and/or cancel the letter having Memo No.807/PB(SE) dated 13th September, 2019 being Annexure P9 hereto forthwith;

b) A writ of Mandamus directing the respondents esp., respondent No.3 to permit and/or allow the petitioners to proceed further in the selection process for the purpose of recruitment of teachers and staff of the petitioner school in terms of the intimation for recruitment dated 19th August, 2019 being Annexure P8 hereto forthwith.

c) A writ of Certiorari calling upon the respondents and each of them to certify and transmit the records relating to the selection process in terms of the intimation for recruitment dated 19th August, 2019 being Annexure P8 hereto and all relevant records related thereto to this Hon'ble Court so that conscionable justice may be done by quashing and/or setting aside the letter No.807/PB(SE) having Memo dated 13th September, 2019 issued by the respondent No.3 being Annexure P9 hereto and by passing appropriate orders;

d) A writ prohibiting of Prohibition the respondents, esp., the respondent No.3 from restraining the petitioner school from proceeding with the selection process in terms of the intimation for recruitment dated 19th August, 2019 being Annexure P8 hereto any further;

e) Interim order restraining the respondents, esp., the respondent No.3 from sending recommendations for the vacant sanctioned posts of the petitioner school in respect of its teaching and non-teaching staff to the concerned Regional School Service Commission till the disposal of the writ petition;

f) Ad-interim order in terms of prayer (e) above;

g) Rule Nisi in terms of prayer (a) to (f) above;

h) Such further or other order or orders as Your Lordship may deem fit and proper”.

10. The petitioners also filed an interlocutory application being CAN 1 of 2023 in this writ petition to bring certain subsequent developments on record.
11. The note of registry dated February 28, 2020 shows that despite their being direction by a Coordinate Bench on January 13, 2020, no affidavits-in-opposition were filed by the respondents. The learned State Counsel appeared in the matter, on instruction submits that since a pure question of law is involved, no affidavit-in-opposition is required to be filed at this belated stage. The learned counsel for the parties argued on the basis of the existing records.

Submissions:

12. Mr. Sandip Kumar De Learned Counsel appearing for the petitioners referring to the said 1973 Rules submits that, the rule is a self-contend rule. Referring to the schedule to the act, he submits that the name of Dayanand School appears therein. The school is, therefore, recognized by the statute as a minority institution with its minority status. The status of the school was never withdrawn in any manner whatsoever.
13. Learned counsel for the petitioner submits that in 1976 by way of an executive instruction the said 1973 Rule was sought to be repealed and/or withdrawn. However, it is an admitted position that such 1976 executive instruction was never brought into existence by way of any gazette publication and as such the same did not acquire any statutory flavour. He then submits that, in 1983 by way of another gazette notification published on April 28, 1983 an amendment was carried out in the said 1973 Rules, which was effected and acted upon. The moment the 1983 amendment was notified in the gazette it had acquired the statutory flavour causing an amendment to the said 1973 Rules. By way of such amendment the original Rule 33 of the 1973 Rule was repealed and/or substituted by the amended Rule 32 containing an identical provision as that of Rule 33 of the original 1973 Rules.
14. Mr. Sandip Kumar De learned counsel for the petitioner then submits that several litigations were carried out touching the 1973 Rules including challenging the validity and vires thereof. In one such litigation, the issue travelled up to the Hon'ble Supreme Court. The Hon'ble Supreme Court

remitted the matter back before this Court for considering the validity and vires of the said 1973 Rules.

15. Learned counsel for the petitioner submits that challenging an order of dismissal from his employment an employee of the Dayanand School filed a writ petition being WPA No. 15031 of 2022. The sole contention of the writ petitioner therein was that the disciplinary proceeding initiated by Dayanand School was bad in law and without jurisdiction, since the same was initiated and conducted under the said 1973 Rules and the petitioner therein contended that the same ought to have been governed under the West Bengal Board of Secondary Education (Appointment, Confirmation, Conduct and Discipline of Teachers and Non-teaching staffs) Rules, 2018 (for short, the said 2018 Rules) framed under the provisions of the West Bengal Board of Secondary Education Act, 1963 (for short, the 1963 Act). A Coordinate Bench negated the contention of the writ petitioner therein and dismissed the writ petition, inter alia, holding that Dayanand School is governed by the said 1973 Rules and not by the said 2018 Rules. In support, he has placed reliance upon the judgment of the Coordinate Bench dated September 20, 2022 ***In the matter: Arnav Bandyopadhyay vs. The State of West Bengal & Ors., rendered in WPA No. 15031 of 2022, Annexure-B at page 15 to CAN 1 of 2023.***

16. Learned counsel for the petitioner then submits that, pursuant to the direction for remand made by the Hon'ble Supreme Court as stated above, a Coordinate Bench held, inter alia, the said 1973 Rules is valid and intra vires. In support, he has placed reliance upon a decision of the Coordinate Bench dated

February 12, 2024 In the matter of: Anand Kumar Singh vs. State of West Bengal & Ors., rendered in WPA 23438 of 2005 reported at 2024 SCC OnLine Cal 1397.

17. In the light of the above submissions, it was contended on behalf of the petitioners that since the law is well settled that Dayanand School is governed by the 1973 Rules and the said Rule being held not to be ultra vires and held to be valid in law, the recruitment process sought to be undertaken by the Dayanand School in terms of the said 1973 Rules should have been directed to be carried out by the respondent no.3 and accordingly he prays for quashing of the said impugned decision of the respondent no.3 dated September 13, 2019 and further prays for necessary direction for carrying out the recruitment process of Dayanand School.
18. Per contra, Mr. Rudranil De learned State Counsel appearing for the State authorities submits that once the Joint Secretary, Secondary Branch School Education Department, Government of West Bengal by its reasoned decision dated **February 22, 2017** at **page 44** to the writ petition refused to grant minority status to Dayanand School, it cannot be construed and contended that the school enjoys minority status within the meaning of the said 1973 Rules and, therefore, no recruitment process can be held under the said 1973 Rules. Therefore, the decision of the respondent no.3 dated **September 13, 2019** is just, lawful and valid.
19. Referring to the definition of the expression **“Minority”** as defined under **Sub-Section (c) to Section 2 of the West Bengal Minorities Commission Act,**

1996 (for short, the Minority Commission Act), he submits that minority means a community based on religion as defined therein. He submits that Arya Samaj does not come within the meaning and purview of the expression used thereunder. Hence, Dayanand School cannot be termed as a minority a school or institution established for or run by the minority community.

20. Mr. Rudranil De then submits that in an identical situation Arya Samaj of Kolkata along with an employee of one school situated similarly filed a writ petition, which was dismissed by a Coordinate Bench, inter alia, holding that such school is not entitled to enjoy the minority status under the said 1973 Rules. In support, he relied upon a decision of a Coordinate Bench dated March 01, 2011, inter alia, ***In the matter of: Arya Samaj Kolkata & Ors. vs. State of West Bengal & Ors., rendered in WP No. 1163 of 2008*** along with another writ petition.
21. Mr. Dey Learned State Counsel has placed much reliance upon the 1976 executive instruction. He submits that, by virtue of the said 1976 executive instruction the 1973 Rule was repealed and/or withdrawn. He submits that, in view of the said 1976 withdrawal of 1973 Rules no further amendment could have been introduced in 1983.
22. In the light of the above, Learned State Counsel submits that, so long the said decision of the Joint Secretary, Education Department dated February 22, 2017 remains the Dayanand School cannot claim any minority status. He further submits that no relief has been asked for by the petitioner for quashing

the said decision of the Joint Secretary, Education Department dated February 22, 2017.

23. Hence, he submits that this writ petition is liable to be dismissed.

Decision:

24. After considering the rival contentions of the parties and on perusal of the materials on record, it appears to this Court that, the said 1973 Rule was framed in exercise of power conferred under Rule 33 of the Management of Recognised Non-Government Institutions (Aided and unaided) Rules, 1969 (for short the said 1969 Rules). 1973 Rule was notified in the relevant Gazette on March 19, 1973. On a schematic reading of the said 1973 Rules, this Court is of the view that, the same is a comprehensive and a self-content rule. The **schedule** to the said rule against its serial No. 1 contains the name of Dayanand School along with others. The preamble of the rule suggests that the said 1973 Rule was called as a **Special Rule** for the management of the secondary schools established and run by Arya Samaj and/or Gurukul Vidyalaya Trust under the Aegis of Arya Pratinidhi Sabha of the State (Representative body of Arya Samaj). Rule 7 of the said 1973 Rules deals with the Powers of the School Committee which inter alia provides for appointment of employees, both permanent and temporary as well as suspension, dismissal or termination of their services. Rule 7 of the said 1973 Rule is, therefore, an integral part of the said 1973 Rule.
25. Dayanand School was required to hold a selection process for recruitment of its employees. The petitioners applied for prior permission before the respondent

No. 3 for the recruitment which was rejected by the impugned communication of the respondent No. 3 dated **September 13, 2019, Annexure P-9** at **page 92** to the writ petition, on the plea and the school was asked not to proceed of the said employment process, since, the Joint Secretary, School Education Department by its reasoned order dated **February 22, 2017** at **page 44** to the writ petition, had refused to issue no objection certificate in favour of Dayanand School for the purpose of obtaining minority status. Mr. Rudranil Dey, Learned State Counsel in course of his argument placed much thrust on the provisions of the Minority Commission Act. He submits that the Joint Secretary had passed his reasoned order in view of the provisions laid down under the said Minority Commission Act read with provisions under the National Commission for Minorities Act, 1992.

26. On a plain reading of the preamble of the Minority Commission Act it appears to this Court that the Act was promulgated ***“to constitute a Minorities’ Commission to study and suggest additional social, economic, educational and cultural requirements of religious and linguistic minorities of West Bengal with a view to equipping them to preserve secular traditions of West Bengal and to promote national integration”***.

The Commission under the said Minorities Commission Act is constituted under Section 3 of the said Act with its function to be performed as defined under Section 4 thereunder. The expression **“Minority”** under the said Minorities Commission Act means a community based on religion such as Muslim, Christian, Sikh, Buddhist, Zoroastrian (Parsee), and other minority as

a Central Government may notified under Clause (c) of the Section 2 of the National Commission for Minorities Act, 1992 and such other minority based on language within the purview of Article 29 of the Constitution of India, as defined under Sub Section (c) to Section 2 of the Minority Commission Act. The definition Minority as defined thereunder does not include the Arya Samaj. ***The preamble of the 1973 Rules states that the same was framed for the management of secondary schools established and run by Arya Samaj and/or Gurukul Vidyalaya Trust, under the aegis of Arya Pratinidhi Sabha of the State (representative body of Arya Samajes in the State)***

27. Therefore, on a comparative and schematic reading of the 1973 Rules and the said Minority Commission Act, it is clear that both of them operate in their respective fields without having any conflict with each other. They are independent in their respective operational field. 1973 Rules has its own statutory flavour and the schedule thereunder contains the name of Dayanand School against serial no. 1. Therefore, Dayanand School is included within the scope and ambit of the said 1973 Rules. The admitted position is that the executive instruction of 1976 seeking to repeal or withdraw the said 1973 Rules was not notified. A notified Rule, as the said 1973 Rules, can only be repealed by way of another repealing notification. An executive instruction until is notified in the Gazette does not and cannot acquire any statutory flavour by which an existing statute or rule can be repealed or withdrawn or altered. The Minority Rule of 1983 was duly notified in the Gazette whereby the said 1973 Rules was amended to the extent repealing Rule 33 of original 1973 Rules with

the insertion of Rule 32 with the identical provisions under the said repealed Rule 33. Thus, the amendment caused in 1983 in the original 1973 Rules was a valid change in the 1973 Rules. The name of Dayanand School is still featuring in the schedule to the said 1973 Rules against serial no.1. It is, therefore, incorrect to contend on behalf of the State that Dayanand School is not covered under the said 1973 Rules as a minority Institution.

28. ***In the matter of: Arnav Bandyopadhyay (supra)*** a Coordinate Bench had observed as under:

"1. The petitioner by preferring this writ petition has challenged the order of dismissal from service served upon him by the respondent No.7, the Secretary, Managing Committee, Dayanand Vidyalaya, Asansol, Paschim Bardhaman. The petitioner states that he completed his B.SC (Honours) degree from the University of Burdwan in 1995. Thereafter, he completed his Bachelor of Library & Information Science (B.Lib. & I.Sc) from Mats University vide Roll No. 9111311500 and mark-sheet No. 001780/12-13 in June-July, 2013. Having requisite qualification to be appointed as Librarian, the petitioner applied for appointment to the post of the Librarian of Dayanand Vidyalaya to its Managing Committee. He participated in the selection process and being successful he was appointed as a Librarian in H.S. Section of the school on probation for a period of one year on a salary of Rs.7100/- as basic pay per month in the scale of PB-3, Rs.710037600 + Grade pay Rs.3900/- plus allowances as admissible under the Government Rules subject to the terms and condition laid down in the school code applicable to aided schools. The Additional District Inspector of Schools (S.E) approved the appointment of the petitioner and passed order of retention.

6. The petitioner contends that after the West Bengal Board of Secondary Education (Appointment, Confirmation, Conduct and Discipline of Teachers and Non-Teaching staff) Rules, 2018 came into force vide notification dated 8th March, 2018, the West Bengal Board of Secondary Education is now the appropriate authority to start disciplinary proceeding against a teacher and non-teaching staff and dismiss him from service. The Managing

Committee of the said school is not authorised either to initiate disciplinary proceedings or to inflict order of dismissal upon the petitioner.

9. In their affidavit-in-opposition the respondent Nos. 6,7 and 8 state that Dayanand Vidyalaya is a school governed by the Special Rules published vide notification No. 404-Edn.(S).- 19th March, 1973. The school published an advertisement for recruitment of a Librarian in the school on 27th February, 2014 in a Hindi daily 'Sanmarg' and invited applications from the suitable candidates for the post. By the advertisement it was instructed that all the suitable candidates would submit their applications within fifteen days from the advertisement i.e. by 14th March, 2014.

13. The respondent No. 3, District Inspector of Schools (S.E), Paschim Bardhaman in the report in the form of affidavit states that Dayanand Vidyalaya has been running under the Special Rules of 1973. The Government has no role in selection process and/or administrative process. Reiterating the facts as disclosed in the affidavit-in-opposition of the respondent Nos. 6,7 and 8, the respondent No.3 states that since the petitioner submitted fake testimonials of Bachelor degree of Library and Information Science, an FIR was lodged by the school authority at the concerned police station. This respondent says that the school authority has dismissed the petitioner from service being empowered by the Special Rules of 1973 and the Government has no role in this regard. On such grounds, this respondent also submits that the writ petition is liable to be dismissed.

23. To turn to other point, it appears that Dayanand Vidyalaya is governed by the Special Rules, 1973 for the management of secondary schools established and run by Arya Samaj and/or Gurukul Vidyalaya Trust, under the aegis of Arya Pratinidhi Sabha of the State (Representative Body of Arya Samaj in the State) published in the Calcutta Gazette vide notification No. 404.EDN.(S).-19th March, 1973. A co-ordinate Single Bench by order dated 16th August, 2017 passed in W.P. 15526 (W) of 2017

has held that the Rules of 1973 are still in operation and it has not lost its force.

25. The Rules of 1973 as quoted above is a statutory document. In order to repeal or rescind this statutory document, another statutory document is required. It is the well settled principle of law that an executive fiat having no statutory force cannot take away the right conferred by a statutory document.

26. In view of the above, I am of the opinion that Dayanand Vidyalaya is governed by the Special Rules of 1973 and not by the West Bengal Board of Secondary Education (Appointment, Confirmation, Conduct and Discipline of Teachers and Non-Teaching Staffs) Rules, 2018.

27. As Rule 12 of the Special Rules, 1973 enjoins, the management of Dayanand Vidyalaya is authorised to dismiss or terminate any employee of the school. Therefore, the action taken by the school authority to dismiss the petitioner from service on his furnishing fake or forged educational testimony is warranted by law.

29. In the result, the writ petition merits dismissal”.

(Emphasis supplied)

29. **In the matter of: Anand Kumar Singh (supra)** another Coordinate Bench had observed as under:

“4. Specific stand taken by the State in the affidavit-in-opposition and additional affidavit-in-opposition is that the Special Rules is still in force and some of the Hon'ble Coordinate Benches of this Court have held that the Special Rules is still in operation and the school which is ran by Arya Samaj and/or Gurukul Vidyalaya Trust under the aegis of Arya Pratinidhi Sabha of the State still enjoys the benefits of the Special Rules. It was averred that the school is governed by the Special Rules and the Special Rules has empowered the Managing Committee of the school to appoint its teachers, initiate disciplinary proceedings against its teacher and even to dismiss its teachers in accordance with the procedure

envisaged in the Special Rules. It was contended in unequivocal terms that the petitioner obtained diploma in work education undergoing training for six months in an institution namely, 'Siksha Samsad' which is not recognised by the Government. Accordingly, the petitioner did not possess requisite qualification for being appointed in the post and his appointment was illegal. Consequently, the school authority had rightly dismissed him from service in accordance with law.

9. Mr. Sumon Dey, learned advocate appearing for the State vociferously contends that the Special Rules is still in operation and the notification dated November 10, 1976 has never been published in the Official Gazette. He also contends that had there been no Special Rules, there was no requirement of publication of the amendment of the Special Rules in 1983. He argues that the petitioner had no requisite qualification for being appointed in the post and hence, the school authority has rightly dismissed the petitioner from service. He contends that the proceeding was initiated in 2003 and concluded in 2005. He submits that petitioner was appointed following the provisions of the Special Rules but when the school authority initiated disciplinary proceeding as per the provisions of the Special Rules, then the petitioner started claiming that the school authority cannot initiate such proceeding as per the provision of the Special Rules. According to him, the petitioner cannot be allowed to approbate and reprobate at the same time. To buttress his argument, Mr, Dey places reliance upon the judgment delivered in cases of Kushadhwaj Mondal v. State of West Bengal, (2008) 1 Cal LJ 167 (Cal) and he refers a decision rendered by a Hon'ble Coordinate Bench of this Court in W.P. no. 8624(W) of 2011 (Shilpa Ghosh v. State of West Bengal).

20. The petitioner's main contention is that the Special Rules is ultra vires to the Rules 28(8), 32 and 33 of the Management Rules, 1969. For the sake of argument, if it is assumed that the Special Rules was framed in exercise of the power of the Rule 33 of the Management Rules, 1969 but it cannot be stated that Management Rules is parent or plenary rule in respect of the Special Rules. The Special Rules applies to different institutions to which the provision of Article 30 of the Constitution of India applies. From the discussion made hereinabove, it has become crystal clear that the Management Rules, 1969 does not apply to minority institution and the Management Rules, 1969 cannot have any application to the respondent school also and from the

discussion made hereinabove, it can be inferred that the Management Rules, 1969 is not plenary Rules in so far as the Special Rules is concerned. Hence, it can never be claimed that due to non-compliance of any provision of the Management Rules, 1969, the Special Rules can be stated to be ultra vires to any Rule of Management Rules.

24. The word 'notification' implies the widest publication to people generally. It means a public notice. In order to be valid and proper, it should be made in pursuance of the power conferred upon the authority by the particular statute and also should be published in the Official Gazette and such notification takes effect only on the date of its publication it is be kept in mind that object of publication of a notification in the Gazette is not merely to give information to public. Official Gazette is official document, Publication of notification is official confirmation of the making such onder or rule. The version printed in the Gazette is final and date of publication is the date of giving effect thereto Section 83 of the Evidence Act, 1872 says that the Court shall presume the genuineness of the Gazette. Court shall take judicial notice of what is published therein. Hence, publication of notification is mandatory (See, the judgment of ITC Bhadrachalam Paper Boards (supra). Section 45 of the Act of 1963 is a repository power of the State Government to make rules for the purpose of carrying out the purpose of the Act but precondition for exercising such power to make rule was prior publication of such delegated and/or subordinate legislation. If parent statute prescribes the mode of publication of subordinate legislation, such requirement is mandatory. Even if there is no prescription of publication of notification, yet it will take effect only when it is published through the customarily recognised official channel namely, the Official Gazette etc. (See, ITC Bhadrachalam Paper Boards (supra)). In Section 24 of the Bengal General Clauses Act, 1899, it was laid down that if by any West Bengal Act, power to make rule or bye-law is expressly given subject to the condition of the rule or bye-laws being made after previous publication, then the authority having such power must publish such rule or bye-laws in the Official Gazette and previous publication shall be conclusive proof that the rule or bye-laws has been duly made. At the cost of reiteration, it may be said that Section 45 of the Act of 1963 prescribes previous publication of such rule as pre-condition to make rule.

26. Consequently, for the reasons that the notification date November 10, 1976 has never been published in any recognised official channel or official Gazette and it is not known on which date it took effect. The State itself has stated on oath that such notification dated November 10, 1976 has not been given effect to. In 2017 and 2022, two different coordinate Benches of this Court have decided that the Special Rules has not been rescinded. Had the Special Rules been rescinded by the notification dated November 10, 1976, there was no requirement of amendment of the Special Rules in 1983 by a notification vide. no. 465-Edn(S) dated 28th April, 1983. Hence, for the reasons stated above, I have no qualm to hold that the Special Rules has not been rescinded.

37. Taking stock of the chronological events and resume, the inferences which can be drawn that both the Rules, namely, the Management Rules, 1969 and the Special Rules are valid. The Special Rules cannot be claimed to be ultra vires to any provision of any Rule of -the Management Rules, 1969 or to the provisions of Article 14 and 16 of the Constitution of India. There is no material to infer that the Special Rules has been rescinded by the Government of West Bengal and the same is still in operation. The school authority initiated, conducted and concluded the disciplinary proceeding in terms of the Rule 12(2) of the Special Rules and there is no illegality and/or irregularity in decision making process. Consequently, no interference is called for in the writ petition”.

(Emphasis supplied)

30. Upon reading both the above judgments delivered by the two esteemed Coordinate Benches, I am also in respectful agreement with the reasons and findings in the said two judgments.

31. Insofar as **Arya Samaj, Kolkata & Ors. (supra)** it appears, as submitted on behalf of the petitioner that, an appeal MAT 602 of 2011, APOT 184 of 2011 was carried out from the said judgment of the Coordinate Bench, when the Hon’ble Division Bench disposed of the appeal with the following observations:

“To be precise, in fact His Lordship at the Hon'ble Trial Court also expressed helplessness “.....in the absence of any determination in respect of minority status by the competent authority in terms of the relevant laws, it would be improper for the Court of Writ to give any decision as adjudicator of the first instance”. In our opinion, after keeping in mind the entire facts of the present case leading to the filing of the Appeal we feel it would be appropriate that the Principal Secretary, Higher Education looks into the entire issue in the light of the situation that has fallen for consideration in the eyes of the conflicting Gazette notification and the grey area between the time the Special Regulations 1973 was rescinded in 10/11/1976 till such time it was sought to be amended in 1983 in the fashion that we have seen.

Very rightly, the Hon'ble Trial Court felt it difficult as a Court of first Instance to adjudicate on the issue. We, in the second strata, should be more weary.

From a wholesome appreciation of the very intricate issue, which may have bearing on issues common in many matters; we are of the opinion that now it is for the Principal Secretary, Higher Education Department to take a decision after giving an opportunity of hearing to the Appellants. Till such time any decision is taken by him, it cannot be conclusively held that either the Appellant is a minority Institution or it is not a minority Institution. Whole position hangs in thin air.

This would dispose of the Appeal being A.P.O.T. No. 184 of 2011 and M.A.T. No. 602 of 2011 to the aforesaid extent”.

32. From the observations of the Hon'ble Division Bench as quoted above, it is clear that no ratio was laid down on the issue canvassed ***In the matter of: Arya Samaj, Kolkata & Ors. (supra).***
33. While delivering the judgment ***In the matter of: Anand Kumar Singh (supra)*** the Coordinate Bench had also considered the judgment ***In the matter of: Arya Samaj, Kolkata & Ors. (supra)*** and had observed as under:

“33. Mr. Lahiri raised a plea that issue raised by the school authority this matter is barred by constructive res judicata. In

case of Arya Samaj v. State of West Bengal (W.P. no. 1163 of 2008) (supra), a Hon'ble Single Bench observed that 'the question as to whether the schools and institutions established and run by Arya Samaj could be regarded as minority institution in a particular State was left open for a decision in future..... and there being no adjudication on legality of the notification dated November 10, 1976 in the absence of any determination in respect of minority status by the competent authority in terms of the relevant laws, it would be improper for the court of Writ to give any decision as adjudicator of the first instance.. The amendment of the Special Rules introduced in 1983 has not been brought to the notice of the Hon'ble Single Bench and hence, taking into consideration of such amendment, the Hon'ble Division Bench sitting in appeal over the order passed in W.P. no. 1163 of 2008 relegated the matter to the Principal Secretary, Higher Secondary Education to take a decision on the issue, Nothing has been placed before me to show that such decision was taken. It goes without saying that the order of the Hon'ble Single Bench has merged with the order passed by the Hon'ble Division Bench. Hence, from the foregoing analysis, an analogy which can be drawn is that there was no such issue what might attract the doctrine of constructive res judicata".

34. In view of the foregoing discussions and reasons this Court is of the considered and firm opinion that, the said Rule of 1973 has been declared as intra vires as a whole and not in segregation. The schedule to the said Act being part of the said Rules being an integral part thereof stands also to be intra vires. The schedule bears the name of Dayanand School. Rule 7 and Rule 12 also being an integral part of the said 1973 Rules shall apply and govern Dayanand School. In the event, Dayanand School proceeds for recruitment process, the same shall be governed strictly in terms of the said 1973 Rules and the relevant provisions mentioned thereunder.
35. As already discussed above the two respective statutes, namely the said Minority Commission Act and the said 1973 Rules, they are independent to

each other and operate in their respective independent fields. There shall not be any conflict between the two.

36. The reasoned order passed by the Joint Secretary, School Education Department, Government of India dated February 22, 2017 was passed taking into consideration and in the light of the provisions laid down under the National Commission for Minorities Act, 1992 and The West Bengal Minorities Commission Act, 1996 as would be evident from the following observations made by the Joint Secretary while passing the said reasoned order dated February 22, 2017:

*“The term "Minority" under the **National Commission for Minorities Act, 1992** means a community notified as such by the Central Government. **The West Bengal Minorities Commission Act, 1996** refers, besides religious minorities, to such other minority based on language within the purview of Art. 29 of the Constitution of India as the State Government may, by notification, specify. Thus it is clear that the power to declare some group or organization as Minority has been vested in the statutory authorities. But the Ld. Advocate for the Petitioner has failed to produce any document from where it would appear that the Arya Pratinidhi Sabha, Bengal or Arya Samaj, Asansol has been notified as a Minority, religious or linguistic.*

Hence, to issue no objection certificate in favour of an institution which has been established by an organization the minority character of which has not been certified by the competent authority will be equal to putting the cart before the horse and will amount to encroaching upon the jurisdiction of statutory authorities empowered to notify a community as a minority one.

On such ground and in the light of the foregoing discussion, it is decided that the application of Arya Samaj, Asansol, being Annexure P-3 to the aforesaid Writ Petition in the matter of issuing no objection certificate for getting minority status certificate for Dayanand Anglo-Vedic Higher Secondary School, Asansol is rejected on due consideration”.

(Emphasis supplied)

37. Hence this Court is of the considered opinion that, the said reasoned order dated **February 22, 2017**, at **page 44** to the writ petition, passed by the Joint Secretary, School Education Department, Government of West Bengal **shall have no bearing or effect or any further effect on the application of the said 1973 Rules on the Dayanand Anglo-Vedic Higher Secondary School.**
38. The impugned decision dated **September 13, 2019** of the respondent no.3, **Annexure P-9 at page 92** to the writ petition, stands set **aside** and **quashed**.
39. Accordingly, the petitioner school, namely, **Dayanand Anglo-Vedic Higher Secondary School** shall be free to proceed with its recruitment process without any fetter but strictly in accordance with law and in the event such recruitment process is carried out by the School all necessary and consequential steps shall be taken by the appropriate State authority/authorities in accordance with law but with utmost expedition.
40. With the above observations and directions this writ petition **WPA 18852 of 2019** stands **allowed**, without any order as to costs.
41. The principle and ratio laid down and the direction made herein shall also apply in the same manner and force in respect of **Dayanand Vidyalaya (H.S.)**, the petitioner school in **WPA 18856 of 2019**.
42. Accordingly, the said writ petition **WPA 18856 of 2019** also stands **allowed**, without any order as to costs.

43. The principle and ratio laid down and the direction made herein shall also apply in the same manner and force in respect of **Arya Kanya Uchcha Vidyalaya (H.S.)**, the petitioner school in **WPA 18857 of 2019**.
44. Accordingly, the said writ petition **WPA 18857 of 2019** also stands **allowed**, without any order as to costs.

(Aniruddha Roy, J.)