

**IN THE HIGH COURT AT CALCUTTA
(CONSTITUTIONAL WRIT JURISDICTION)**

APPELLATE SIDE

Present:

The Hon'ble Justice Partha Sarathi Chatterjee

WPA 23438 of 2005

With

CAN 1 of 2020

[Assigned]

Anand Kumar Singh

-Vs.-

State of West Bengal & Ors.

For the Petitioner

*: Mr. Shuvro P. Lahiri,
Mr. Rajesh Naskar.*

For the Respondent Nos. 6-8.

*: Mr. Sandip Kumar De,
Mr. Abhijit Sarkar.*

For the State

: Mr. Sumon Dey.

Heard on

: 10.01.2024

Judgment on

: 12.02.2024

Partha Sarathi Chatterjee, J:-

PRELUDE:

1. In a voyage to get back his job as Assistant Teacher in Work Education in Dayanand Anglo-Vedic High School, the petitioner, who has suffered an order of dismissal from service, preferred this writ petition praying for issue of writ of and/or in the nature of mandamus and/or appropriate order declaring that the notification vide. no. 404-Edn(S) dated March 19, 1973 issued by the Joint Secretary, Government of West Bengal, Education Department, known as 'Special Rules' in common parlance, is ultra vires to Rule 28(8), 32 and 33 of the Rules of Management of Recognised Non-Government Institution (Aided and unaided) Rules, 1969 as well as to Article 14 and 16 of the Constitution of India and setting aside the second show cause notice and the order of dismissal from service passed by the Disciplinary Authority in conclusion of a disciplinary proceeding initiated against him.

PETITIONER'S CASE:

2. Before going to delve into the contour of controversies involved in the writ petition, it would be apt to advert to the facts frescoed in the writ petition and subsequent pleadings of the petitioner which are as follows:
 - i) The petitioner built his academic career by acquiring qualification of B.com from University of Burdwan. He obtained Diploma in Work Education from an Institution, namely, 'Siksha Samsad', registered under West Bengal Societies Registration Act, 1976 and he also obtained Diploma in Computer Education from Bidhan Chandra

Computer Engineers (India) and got his name registered with the concerned Employment Exchange.

- ii) The Dayananda Anglo-Vedic High School, Asansol, Burdwan (hereinafter referred to as the school) is run as a Minority institution governed by the 'Special Rules' framed for the management of 'Secondary Schools established and administered by Arya Samaj and/or Gurukul Vidyalaya Trust, under the aegis of Arya Pratinidhi Sabha of the State (Representative Body of Arya Samajis in the State) by the Hon'ble Governor in exercise of the power conferred by Rule 33 of the Management of Recognized Non-Government Institution (Aided and Unaided) Rules, 1969 (in short, Management Rules).
- iii) On receipt of requisition sent from the school, the Employment Exchange sponsored the names of some eligible candidates including the petitioner's for the post of Assistant Teacher in Work Education in the School.
- iv) The petitioner participated in the selection process and emerged to be 1st empanelled candidate. The panel prepared by the selection committee was approved by the District Inspector of Schools (SE), Burdwan. Subsequent thereto, letter of appointment dated 22.11.2000 was issued in favour of the petitioner and the petitioner joined the school as Assistant Teacher in Work Education on 23.11.2000 as probationer. His appointment was approved by the D.I. of Schools concerned w.e.f. 3.6.2001.

- v) On 13th May, 2003, the petitioner was served a show cause notice dated 7th May, 2003. The petitioner submitted his reply to show cause notice dated 7th May, 2003 but he was again served another show cause notice dated 29.05.2003 and by an letter dated 26.06.2003, he replied to the show cause notice dated 29.05.2003. In the aforesaid show-cause notices, it was alleged that on enquiry, it revealed that the petitioner had obtained Diploma in Work Education from an institution which is not recognised by the Government and as such, he had no requisite qualification for being appointed in the post but his grand-father, who happened to be Secretary of the school at the relevant point of time, exercised his influence over the selection committee and secured the petitioner's appointment in the post.
- vi) Challenging the aforesaid show-cause notices dated 7.05.2003 and 29.05.2003, the petitioner preferred one writ petition being W.P. no. 9944(W) of 2003. By passing an interim order, a Hon'ble Coordinate Bench of this Court directed the school authority to maintain status quo with regard to the service of the petitioner with a further direction that the school authority might proceed with the enquiry against the petitioner in accordance with law but no penal action would be taken without leave of the court.
- vii) The petitioner participated in the enquiry proceeding. Upon completion of enquiry, the enquiry officer returned his findings on 26.09.2003, inter alia, holding that the certificate of work education possessed by the petitioner was not from the Government-recognized

institution and as such, the same was not proper in terms of the Government notification no. 69-Edn(S) dated 01.02.1984 issued by the Director of Secondary Education but the allegation that influence was exerted on the part of the petitioner in getting such appointment was not proved.

- viii) The Managing Committee of the school disagreed with the findings of the enquiry officer and served another show-cause notice dated March 21, 2005 upon the petitioner making an observation therein that both the allegations levelled against the petitioner stood proved. However, by that notice, the petitioner was asked to show cause as to why the petitioner would not be terminated from service. The petitioner replied to the show cause notice dated March 21, 2005 by his letter dated April 5, 2005.
- ix) The writ petition being W.P. no. 9944(W) of 2003 was dismissed by an order dated December 2, 2005 but as a protective measure, petitioner was allowed to continue to hold the post for two weeks considering the fact that the enquiry report was in his favour.
- x) The order dated December 2, 2005 was assailed by the school authority in an appeal being A.S.T no. 7 of 2006 which was disposed of by an order dated 16.1.2006 remanding the matter to the Hon'ble Single Bench to go into the issues framed therein.
- xi) In the midst thereof, by an order dated December 05, 2005 the school authority dismissed the petitioner from service. The petitioner has preferred the instant writ petition, inter alia, challenging the tenability

of the second show cause notice, disciplinary proceeding and order of dismissal of service.

- xii) In the additional supplementary affidavit, the petitioner contended that the Special Rules has been rescinded by a notification vide. no. 1014/Edn(S) dated 10th November, 1976 and as such, the school cannot claim benefits under the Special Rules yet by taking recourse to the Special Rules, the school authority illegally dismissed the petitioner from service. It is specific case of the petitioner that the School authority was required to take prior approval from the Board before removing the petitioner from service in terms of Rule 28 of the Management Rules, 1969.
- xiii) By annexing two Memoranda vide. no. 321/EB(SE) dated July 26, 2018 & 806-PD(SE) dated September, 03, 2019, it was averred that the D.I. of Schools concerned has refused to issue 'no objection certificate' to enable the School to obtain Minority Status Certificate from Minority Affairs & Madrasa Education Department, Government of West Bengal and the school authority was restrained from taking any step to recruit teaching and non-teaching staffs in the school. From an order dated July 22, 1996 in CMP. 25311/88 in Transfer Case (Civil) no. 26 of 1990(Arya Pratinidhi Sabha & Anr. -vs- The State of West Bengal & Ors.) passed by the Hon'ble Supreme Court it would be explicit that the State of West Bengal has virtually took the stand the school is not a minority institution.

xiv) In the affidavit-in-reply, petitioner stated that the source of the Special Rules being Rule 33 of the Management Rules, 1969 has been omitted by a notification vide. no. 1069-SE(S) dated August 29, 2008 and hence, the Special Rules cannot be claimed to be still in operation. It was further averred therein that the Management Rules, 1969 is made applicable to all recognized non-Government aided and unaided institutions which would be explicit from the last note of Rule 28 of Management Rules, 1969.

CASE OF THE SCHOOL AUTHORITY:

3. Defence taken in affidavit-in-opposition used by the school authority is that the institution from which the petitioner obtained diploma was not recognised by the Government and hence, the petitioner had no requisite qualification for the post. The petitioner's appointment is illegal and the selection process in which the petitioner was chosen as most eligible candidate is void *ab initio*. Approval of panel and approval of the appointment of the petitioner are also bad. Regarding applicability of the 'Special Rules', the school authority took specific plea that the notification *vide*. no. 4040-Edn(S) dated March 19, 1973 (the Special Rules), which is still in force, is applicable to the school and the Management Rules, 1969 are not applicable to the school. It was emphatically denied that the Special Rules is ultra vires to any rule of the Management Rules. The Managing Committee of the school is the appointing authority and in exercise of the powers conferred under the Special Rules, the Managing Committee is competent to initiate disciplinary proceeding against its staffs and can issue show-cause notice or pass order of

dismissal from service upon conclusion of such proceeding. It was claimed that report of the enquiry officer was inherently inconsistent and hence, the Managing Committee disagreed with the findings of the enquiry officer and passed the order of dismissal from service against the petitioner.

STAND TAKEN BY THE STATE RESPONDENTS:

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.

SUBSEQUENT EVENTS:

5. Initially, this writ petition was disposed of on June 30, 2011 by a Hon'ble Coordinate Bench of this Court relegating the petitioner to the

appellate authority to assail the order of dismissal from service and the appellate authority was directed to dispose of the appeal, if filed within the time specified therein, on merits in accordance with law.

6. The petitioner assailed the order dated June 30, 2011 passed in this writ petition by preferring an appeal being F.M.A. 1165 of 2014 which was dismissed by an order dated June 9, 2017. The matter was carried in the Hon'ble Supreme Court. The Civil Appeal nos. 8562-8563 of 2019 (arising out of SLP(C) nos. 4548-4549 of 2018) preferred by the petitioner was disposed of by the Hon'ble Supreme Court, *inter alia*, by passing the following order:

“... In our view, the Appellate Authority cannot decide the issue of validity of the rules. This validity of the rules could be decided only by the High Court. Therefore on this short ground alone, we set aside the orders of both the learned Single Judge and the Division Bench of the High Court and restore the writ petition to its original number and request the High Court to decide whether the rules are valid or not.

Learned counsel for the appellant points out that, in fact, these rules stand already repealed. This assertion is disputed. The High Court shall also consider this submission and pass appropriate orders in accordance with law.

Since the writ petition is of the year 2005, we request the High Court to decide the writ petition on merits and dispose of the same as early as possible ...”

SUBMISSIONS:

7. Mr. Lahiri , learned advocate argued on behalf of the petitioner. The argument advanced by Mr. Lahiri, as crystalized, are as follows:
- i) Arya Sabha and/or Arya Samaj is not either linguistic or religious minority in the State of West Bengal within the meaning of Article 26 and 30 of the Constitution of India and hence, the school ran and established by the Arya Samaj and/or Gurukul Vidyalay Trust under the aegis of Arya Pratinidhi Sabha cannot be stated to be minority institution.
 - ii) The notification no. 404-Edn(S) dated March 19, 1973 (Special Rules) had been rescinded by notification dated November 10, 1976 and hence, the disciplinary proceeding, which the school had initiated against the petitioner in exercise of the power under Rule 12(2) of the Special Rules, is bad and consequently, the show cause notices and/or order of dismissal of service issued and/or passed against the petitioner are illegal.
 - iii) The school being aided school one should have applied the provisions of Management Rules, 1969 and consequently, as per Rule 28(8) of the Management Rules, before issuance of show cause notice and even before passing order of dismissal of service, prior approval from the Board was required to be taken and in absence of such prior approval, the disciplinary proceeding, notices and order passed in connection therewith are all illegal.

- iv) The Special Rules is bad for non-compliance with the provisions of Article 166 of the Constitution of India and the Special Rules is ultra vires to the provisions of Rule 28(8), 32 and 33 of the Management Rules.
- v) Rule 33 of the Management Rules, 1969, which is source of the Special Rules has been omitted in 2008 and hence, the Special Rules cannot be said to be in operation.
- vi) In F,M.A. 647 of 2011, a Hon'ble Division of this Court considering the decision taken by the Hon'ble Apex Court in TC(C) no. 26 of 1990 dated 25.03.2003 set the issue at rest by holding that the Special Rules has been rescinded by the notification dated November 10, 1976.
- vii) The school authority is estopped from raising the issue that it is minority institution and the Special Rules is applicable to the school due to constructive res judicata.
- viii) To invigorate his submission, he places reliance upon the judgments delivered in cases of Arya Samaj, Kolkata & Ors. –vs- State of West Bengal & Ors. reported in MANU/WB/1495/2011, Sahila Khatun –vs- The State of West Bengal & Ors. reported in 2016(4) CalLT 53(HC), Mrs. Y. Theclamman -vs- Union of India and Others, reported in (1987) 2 SCC 516 , Deepali Gundu Surwase –vs- Kranti Junior Adhyapak Mahavidyalaya (D.ED.) And Others, reported in (2013) 10 SCC 324, State of Uttar Pradesh and Others –vs- Principal Abhay Nandan Inter College and Others, reported in (2021) 15 SCC 600 one unreported judgment passed by a Hon'ble Division Bench of this Court on July 6,

2018 in CAN 1027 of 2016 in MAT 1800 of 2016 (Convent of Our Lady of Providence Girls' High School and Others –vs- Anita Nigam and Others).

8. Mr. De, learned advocate appeared on behalf of the school authority.

The contention canvassed by Mr. De are follows :

- i. Notification dated November 10, 1976 has not been notified in the Official Gazette. Such notification might be in the file of the Government but such notification has never been gazetted. Publication of such notification in the Official Gazette is mandatory. The Special Rules which was promulgated by its publication in the Official Gazette can only be rescinded by a notification which must be published in any Gazette.
- ii. Special Rules was amended in 1983. If it is assumed that the Special Rules has been rescinded, then its amendment made by the legislature in 1983 would be otiose. Such amendment was duly published in the Official Gazette.
- iii. Article 166 of the Constitution of India has got no application in the present *lis*.
- iv. The opening words and the language used in the circular of 1983 are akin to the opening words and the language of the Special Rules whereas from the language used in the notification 10, 1976, it would be explicit that no legislature can publish such a notification which contains wrong construction of English.

- v. The petitioner not having requisite qualification was appointed in the post and hence, invoking Rule 12(2) of the Special Rules, disciplinary proceeding was initiated against the petitioner and after following all the procedure and after observing principles of natural justice, order of punishment was passed. There is no illegality and irregularity in initiation, continuation and conclusion of the disciplinary proceeding.
- vi. Rule 33 has been omitted by the amendment introduced in 2008 but the provisions of Rule 33 has been incorporated in Rule 32. So, there was repeal coupled with the re-enactment. Drawing inspiration from the provisions of Section 24 of General Clauses Act and S. 25 of Bengal General Clauses Act, he asserts that such repeal coupled with re-enactment cannot wipe out the appointment and/or the acts given and/or done under the previous enactment. According to him, petitioner cannot claim that due to omission of Rule 33, his illegal appointment will be legalised.
- vii. To embolden his submission, he places reliance upon an unreported judgments pronounced by two Hon'ble Coordinate Bench of this Court in W.P. no. 15526(W) of 2017(Bandana Gupta & Ors.-vs- State of West Bengal & Ors.) and in W.P. no. 15031 of 2022(Arnab Bandyopadhyay-vs- State of West Bengal & Ors.). He also refers the decisions rendered by the Hon'ble Apex Court in cases of I.T.C. Bhadrachalam Paper Boards & Anr.-vs- Mandal Revenue Officer , A.P. & Ors., reported in (1996)6 SCC 634, Chandana Das (Malakar) –vs- State of West Bengal & Ors., reported in (2020)13 SCC 411 , Fibre Boards Pvt. Ltd., Bangalore

–vs- Commissioner of Income Tax, Bangalore, reported in (2015) 10 SCC 333 , Shree Bhagwati Steel Rolling Mills –vs- Commissioner of Central Excise & Anr., reported in (2016) 3 SCC 643.

viii. Mr. De strenuously contends that the judgments relied upon by Mr. Lahari are distinguishable on facts.

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 & Ors. –vs- State of West Bengal & Ors, reported in 2008(1) CalLJ (Cal) 167 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 – vs- State of West Bengal & Ors.).

10. In reply, Mr. Lahiri contends that irrespective of the fact whether the notification dated November 10, 1976 had been published in the Official Gazette, facts remain that in many of the judgments and orders, this Court has accepted the proposition that the Special Rules has been rescinded. He argues that notification dated 28.04.1983 whereby the Special Rules was amended came into force on 07.06.1976 and such amendment was introduced to save the actions taken prior to rescission of the Special Rules. He asserts that the disciplinary proceeding initiated against the petitioner invoking the provisions of the Special Rules is bad. He contends that the judgments relied upon on behalf of the school authority and State have got no applicability in the case at hand.

ANALYSIS:

11. It is condign to note that vires of one Plenary Legislation can be challenged on the ground of the legislative competence and when the same is violative of fundamental right or rights enshrined in Part-III of the Constitution of India or any other Constitutional requirement or limitation or if the assent of the Hon'ble President or the Hon'ble Governor, as the case may be, is not obtained, when required or where there is repugnance between two legislations. In addition to the grounds referred above, vires of the subordinate legislation can be challenged on grounds, namely, -i) for non-conformity with the parent statute under which it is made or any other plenary law; ii) Excessive delegation or iii) manifestly arbitrary and unreasonable. (See, case of Indian Express Newspaper(Bombay)(P) Ltd. –vs-

UOI, reported in AIR 1986 SC 515). Initially, there is a view that a law cannot be questioned on the ground of arbitrariness. But in case of *Shayara Bano –vs- UOI*, reported in AIR 2017 SC 4609 and *Navtej Singh Johar –vs- UOI* reported in AIR 2018 SC 4321, it is held that even a legislation may be assailed as being manifestly arbitrary. A subordinate legislation may be substantially or procedurally ultra vires. If subordinate legislation transgresses the limits set by the parent statute, is repugnant to its other substantive provisions or its general purpose or is repugnant to any other statute, it may be called to substantially vires and it will suffer from the vice of procedural ultra vires if the procedure prescribe by the statute like publication, consultation, laying on any condition precedent for enacting it or the manner of performance is not followed.

12. Needless of observe that the Management of Recognised Non-Government Institution (Aided and Un-aided) Rules, 1969 and the Special Rules are both subordinate legislations. The Management Rules was framed in exercise of the Rule making powers conferred upon the State Legislature under Section 2(d) read with Section 45 of the West Bengal Board of Secondary Education Act, 1963(in short, the Act of 1963).
13. Now, for clarity and convenience, it would be apt to quote the rule 28(8), 32(Pre-2008) and 33(Pre-2008) of the Management Rules, 1969 which are as follows :

28(8).—Both in aided and un-aided Institutions the Committee shall have the power, subject to the prior approval of the Board, to remove or dismiss permanent or temporary teachers and other employees For

this purpose the Committee shall first draw up formal proceedings and issue charge-sheet to the teacher or the employee concerned, and offer him reasonable facilities for defending himself. The teacher or the employee proposed to be proceeded against shall submit his explanation, ordinarily, within a fortnight of the receipt of the charge-sheet, the committee shall send to the Board all relevant papers including the charge-sheet, explanation submitted by the teacher or the employee concerned and the reasons for which the Committee decides in favour of taking disciplinary action. If the Board considers that there are sufficient grounds for taking disciplinary action the Committee shall issue formal notice calling upon the teacher or the employee concerned to show-cause, ordinarily within a fortnight, why he should not be dismissed or removed from service. The Committee shall, then, send again to the Board all relevant papers including the explanation submitted by the teacher or the employee concerned and the recommendations of the Committee for the action proposed to be taken. So far as the Committee is concerned, the decision of the Board shall be final:

Provided that the Board may delegate to any Committee constituted under Section 24 of the Act the powers and functions conferred on the Board by this sub-rule.

32.(pre-2008) --Nothing in these rules shall apply to the institutions maintained and managed by the State Government, the Union Government or the Railway Board or the Schools managed under the

provisions of the St. Thomas School Act, 1923(Bengal Act XII of 1923) or to any other Institution as may be specified by the State Government by Order, made in this behalf from time to time.

“33. (Pre-2008) --Nothing in these rules shall affect the power of the State Government to frame, on the application of any Institution or class of Institutions, to which provisions of Article 26 or Article 30 of the Constitution of India may apply, further or other rules for the composition, powers, functions of the Managing Committee or Committees of such Institution or class of Institutions.

14. The Special Rules was framed and/or published in the Calcutta Gazette in the name of the Governor by a notification *vide*. no. 404-Edn.(S) dated 19th March, 1973. In the preamble of the Rules, it was stated that the Rules were made by the Hon’ble Governor in exercise of the power conferred by rule 33 of the Management Rules, 1969 for the composition, powers, functions of the Managing Committees of the institutions to which the provision of Article 30 of the Constitution of India applies and such rules were framed on the basis of the application made by the Arya Pratinidhi Sabha of Bengal and Assam.
15. Rule 7(a) of the Special Rules has empowered the school committee of any institution run by Arya Pratinidhi Sabha of the State to appoint its employees, both permanent or temporary, to suspend, dismiss or terminate such employees whereas Rule 12(2) of the Special Rules lays down that no permanent employee shall be dismissed except after giving him or her an opportunity to defend himself or herself and in such cases the employee concerned may appeal to the Founder Body of the school or such Body which

the Governing Body may appoint, against its decision. The decision of the Founder Body or such Body which the Governing Body may appoint, as the case may be shall be operative but the Director of Public Instruction, West Bengal shall have the right to call for all relevant papers relating to an employee who is dismissed and if the Director of Public Instruction is not satisfied with the decision, he may then advice the school authorities to reconsider the matter. A final decision shall lie with the Founder Body or such Body which the Governing Body may appoint except in case of employees of the institutions receiving financial assistances from the State Government, Decision of Director of Public Instruction shall be final. Rule 13 has empowered the School Committee to place its employee under suspension when a disciplinary proceeding against such employee is contemplated or pending.

16. So, it is quite vivid and luminescent that the Management Rules, 1969 applies to the recognised non-Government (Aided and unaided) institution whereas the Special Rules applies to the institutions to which the provision of Article 30 of the Constitution of India applies. In case of former institution, if the Managing Committee wants to initiate disciplinary proceedings against any of its employee, at every step, it is to take prior approval from the Board whereas in case of latter institution, no such approval is necessary. Only Director of Public Instruction can call for the relevant documents and take actions as per prescription of rule 12(2) of the Special Rules.
17. On cursory glance of Rule 33 of the Management Rules, 1969, it would be explicit that this rule speaks that nothing in the rules 1 to 32 shall affect the

power of the State Government to make rules for the composition, powers, functions of the Managing Committee or Committees of the institutions to which the provision of Article 30 of the Constitution of India applies. So, irrespective of what has been written in the preamble in the School, it cannot be denied that the Rule making power always lies with the State Government and the Management Rules 1 to 32 do not affect such power. In case of Chandana Das –vs- State of West Bengal, reported in (2015) 12 SCC 140, it was observed that minority institution is entitled to establish and administer their institution but such right of administration does not denude the State of its power to frame rules to ensure that the institution is ran efficiently for the reason that right to administer does not include the right to maladministration and such view has been reiterated with approval in case of Chandana Das (Malakar)(*supra*).

18. So, what flows from the above discussion is that those who are minority, either linguistic or religious, have their fundamental rights enshrined in Article 26 and Article 30 of the Constitution to establish and run an institution. The object of Article 30 of the Constitution of India is to give a sense of security and a feeling of confidence not merely by guaranteeing the right to profess practice and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic but also to enable all minorities, religious or linguistic to establish and administer educational institutions of their choice. (See, case of A.P.Christians Medical Educational Society –vs- Govt. of A.P. , reported in AIR 1986 SC 1490). So, it was clear as day that it is not that for the Special Rules, Arya Pratinidhi Sabha

has acquired minority status. As minority, Arya Pratinidhi Sabha has established the institution and the State has prescribed the Special Rules for smooth administration of the school. In the judgment of Ahmedabad St. Xavier's College Society –vs- State of Gujarat, reported in (1974)1 SCC 717, Justice Khanna while speaking for the Bench was pleased to hold that right to administer the minority institution includes the right to choose its teacher and to exercise disciplinary control over such teacher. The State either for grant of aid or for any other reason cannot take away such right since it is well acclaimed proposition of law that grant of aid cannot be made subservient to conditions which deprive the institution of their substantive right of administering such institutions. In Case of Chandana Das (*supra*) in unequivocal terms it was observed that Rule 28 of the Management Rules, 1969 does not apply to minority institutions of the State of West Bengal. Hence, the submission of Mr. Lahiri that the due to the foot-note of the Rule 28 which provides that an Institution receiving financial assistance from the State Government shall be treated as aided Institution for the purpose of these rules, the school is bound to follow Rule 28 of the Management Rules, 1969 is not tenable.

19. As has been stated earlier, the Management Rules, 1969 has been framed in exercise of the power delegated to the State Government under Section 2(d) and Section 45(1) of the Act of 1963. The petitioner in any of his pleadings or in his argument could not make out any case wherefrom it can be inferred that such Rules is ultra vires to any provision of its parent Act or any

Fundamental rights as enshrined in Part-III of the Constitution of India or such Rules is invalid.

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.

21. Suffice it to note that the approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach with a view to pick holes or search for defect for drafting, much less inexactitude of language employed. The petitioner also could not place any cogent materials to lead me to

conclude the any rule of the Special Rules is violative of the Article 14 and 16 of the Constitution of India or it has prescribed any unreasonable classification and a different yardstick for different class of its employees.

22. The next plunk of argument advanced by Mr. Lahiri is that the Special Rules has been rescinded by a notification vide. no. 1914 Edn(S) dated 10th November, 1976. The learned advocates for the School and the learned advocate for the State have conjointly voiced that such notification has not been published in the official Gazette and such notification has not been given effect to and the school is still enjoying the fruits of the Special Rules.
23. Admittedly, there are conflicting judgments of this Court on the issue whether the Special Rules has been rescinded or not but there is no determination whether such notification was ever published in the Official Gazette or has been given effect to.
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 order 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 & Anr.(*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 pre-condition 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 & Anr.(*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.

25. Parliamentary legislation is made publicly whereas the subordinate legislation is made in the chambers of the Ministers or Secretaries and hence, publication of subordinate legislation in the official Gazette is mandatory to bring transparency in administration.

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.

27. Mr. Lahiri contends that since the Rule 33 of the Management Rules. 1969 was omitted in 2008, the Special Rules has been ceased to operate. Mr. De riposted such claim of Mr. Lahiri. The petitioner was appointed in 2003 and he was dismissed from service in 2005. Therefore, the omission of Rule 33 is post-dismissal event. Admittedly, Rule 33 was omitted in 2008 by a notification vide. no. 1089-SE(S) dated 29.08.2008. in this context, reproduction of Amended Rule 32(c) and explanation would be instructive which are as follows :

“32. Rules not to apply to certain Institutions:-

(a) to (b)

(c) the non-Government aided Educational Institution established and administered by a Minority referred to in clause (c) of section 2

of the West Bengal Minorities Commission Act, 1996 (West Bengal Act XVI of 1996) or

(d)

Explanation :- For removal of any doubt, it is hereby declared that the State Government may, for the purpose of ensuring quality education, access and equity, on an application by an non-Government aided Educational Institution referred to in clause (c), make rules under the provisions of the said Act for the composition, powers, functions etc. of the Committee of such Institution.”

28. On cursory reading of the amended provision of Rule 32, it would be crystal clear that there was repeal and re-enactment and in the amended rule, there is no express provision regarding the Special Rules. In Section of 25 of the Bengal General Clauses Act, 1899, it was laid down that where any enactment is, after the commencement of this Act, repealed and re-enacted by a Bengal Act or West Bengal Act with or without modification, then unless it is otherwise expressly provided, any appointment, order, scheme, rule, bye-law, notification or form made or issued under the repealed enactment shall so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted , unless and until it is superseded by an appointment, order, scheme, rule, bye-law, notification or form made or issued under the provisions so re-enacted and as per the provisions of section 8 of the Bengal General Clauses Act, 1899 When any West Bengal Act repeals any enactment, then, unless a different intention appears, the repeal shall not affect the previous operation of any

enactment so repealed or anything duly done or suffered thereunder or affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed or affect any investigation, legal proceeding or remedy , in respect of any such right privilege, obligation, liability , penalty, forfeiture or punishment.

29. Hence, in pursuance with the provision of Section 8 of the Act of 1899, the departmental enquiry initiated, continued and concluded against the petitioner and the penalty imposed upon him are saved despite of repeal of Rule 33. Adopting a strict view, it can be stated that in amended Rule 32, there was a repeal along with re-enactment with modification. In un-amended Rule 33, reference of the Institutions to which the provision of Article 30 of the Constitution of India was given whereas in the amended rule of 32, reference to the Institutions established and administered by a Minority referred to in clause (c) of Section 2 of the West Bengal Minorities Commission Act, 1996 has been made.

30. Admittedly, in clause (c) of Act of 1996 or may be, in the notification published under clause (c) of National Commission for Minorities Act, 1992, Arya Pratinidhi Sabha did not find its berth but fact remains that by issue of a notification (Special Rules) the State of West Bengal declared that the provision of Article 30 of the Constitution applied to the School. Hence, as per Section 25 of Act of 1899, since in the amended rule there was no express provision regarding the Special Rules, unless such rule is rescinded or superseded by any subsequent enactment, the Special Rules cannot be claimed to have ceased to operate automatically.

31. Article 166 of the Constitution of India postulates that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor and the orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of such order or instrument shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. It is well-known proposition of law that even if an executive action of the State Government is not formally expressed to have been taken in the name of Governor, Article 166 does not provide that it would, therefore, be void or invalid. Article 166(1) is only directory. Though an impugned order was not issued in strict compliance with the provisions of Article 166(1), it can be established by evidence aliunde that the order was made by the appropriate authority. An omission to make and authenticate an executive decision in the form mentioned in Article 166 does not make the decision itself illegal, for the provisions of that article, like their counterpart in the Government of India Act, are merely directory and not mandatory. However, both the rules namely, the Management Rules, 1969 and the Special Rules were issued in name of the Hon'ble Governor and hence, it cannot be claimed that the rules are bad due to non-compliance of the provisions of Article 166 of the Constitution of India.
32. In my respectful view that the provisions of Article 166 of the Constitution of India have got no application in the present *lis*.
33. Mr. Lahiri raised a plea that issue raised by the school authority in this matter is barred by constructive *res judicata*. In case of *Arya Samaj & Ors.* –

vs- State of West Bengal & Ors. (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 the Transfer Case (Civil) no. 26/90, the learned counsel for the State of West Bengal submitted that the *'State would have no objection to the petitioner appointing a Managing Committee to run the affairs of the Institution but without prejudice to the rights of the State in maintaining that the petitioner is not a minority institution...'* .Such submission made on

behalf of the State is not a clear determination that the State has taken decision regarding minority status of the Institution. Factual matrix of the case of Convent of Our Lady of Providence Girl's High School & Ors. –vs- Anita Nigam & Ors.(*supra*) is totally different from the fact of the case at hand.

35. The notification *vide*. no. 69-Edn.(S) dated 1st Feb., 1984 issued by the Education Department, Secondary Branch, Government of West Bengal mandates that no candidate having degrees/ diplomas/ certificates in work education from an institution not recognised by the Government shall be eligible for being appointed as Assistant Teacher in any Secondary School. In the writ petition the petitioner himself admitted that he obtained diploma in work education from an institution which is not recognised by the Government. On the allegation that the petitioner had no requisite qualification for the post, show cause notice was issued. The petitioner was afforded opportunity to submit his reply to such show cause notice and then the departmental enquiry was commenced and the same was continued in terms of the order dated July 9, 2003 passed in W.P. no. 9944(W) of 2003. The petitioner participated in the enquiry. Nowhere the petitioner claimed that he was not afforded opportunity to defend himself. Upon conclusion of enquiry, the enquiry officer returned his finding. The Managing Committee disagreed with the findings of the enquiry officer and issued second show cause notice. The petitioner replied to the second show cause notice. Ultimately, by an order dated December 05, 2005, the petitioner was dismissed from service. Hence, there is no irregularity and/or illegality in

decision making process. The school authority following the procedure prescribed in Rule 12(2) of the Special Rules initiated, conducted and concluded the disciplinary proceeding and principle of natural justice was also observed. Consequently, there is no scope to interfere with the second show cause notice and the order of dismissal from service.

36. It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. There is no scintilla of doubt as regards the proposition of law as laid down in the judgments upon which reliance has been placed by Mr. Lahiri, however, the same are distinguishable on facts.

CONCLUSION :

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.

ORDER :

38. With the observations and order, the writ petition and its connected application are, thus, dismissed, however, without any order as to the costs. It is made clear that this order shall not preclude the petitioner to avail of the remedy available in Rule 12(2) of the Special Rules nor shall it debar any statutory authority to act as per prescription made in Rule 12(2) thereof.
39. Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.
40. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Partha Sarathi Chatterjee, J.)