

Before Ajay Kumar Mittal & G.S. Sandhwalia, JJ.

UNION OF INDIA AND ANOTHER—Petitioners

versus

ASHISH(MINOR) AND ANOTHER—Respondents

LPA No. 1615 of 2012

May 01, 2013

Right of Children to Free & Compulsory Education Act, 2009 (RTE Act) - Ss. 2(p), 2 (n)(iii) (iv), 4, 5, 6, 8, 12(1)(c), 35 - Writ Petitioner-respondent directed by the Single Judge to be admitted in Class 6 under 25 % reserved category for economically weaker sections & disadvantaged group of society - Whether provisions of RTE Act for providing reservation would be applicable to boarding schools? Whether Section 12(1) would be applicable to boarding schools which start from Class VI - Decision taken that since Sainik School did not start from Class I but Class VI, provisions of the RTE Act would not be applicable in spite of the fact they were a specified school u/s 2(p) read with Section 2(n)(iii) - Boarding/Sainik Schools thus taken out from ambit of RTE Act - Held - Mandatory requirement of 25% reservation would not extend to boarding schools and orphanages. Appeal Allowed

Held, that on, a conjoint reading of Sections 5, 6, 8 and Rule 6 and the principles enunciated in the judgment in Society for Unaided Private Schools of Rajasthan's case (supra) would show that the purpose of reservation is to provide elementary education to the children belonging to the neighbourhood area and cannot be extended to the whole of the State, and the mandatory requirement of 25% reservation would not extend to boarding schools and orphanages as held by the Hon'ble Apex Court.

(Para 13)

Appeal Allowed

Anjali Kukkar, Advocate, *for the appellants.*

Balraj Gujjar, Advocate, *for respondent no. 1-caveator.*

G.S. SANDHAWALIA, J.

(1) The present intra court appeal is directed against the judgment of the learned Single Judge dated 18.04.2012 and the subsequent order dated 31.08.2012 whereby, the review application of the present appellant has been dismissed. Vide the impugned judgment, learned Single Judge directed that the writ petitioner/respondent-Ashish (minor) be admitted in Class 6th for the Session 2012-13 under the 25% reserved category seats belonging to economically weaker sections and disadvantaged group of the society. Reliance was placed upon an earlier decision of this Court in CWP No. 5350 of 2011, Ankit (minor) vs. Union of India and others decided on 02.11.2011 by holding that the said judgment was fully applicable in the present case. A letter dated 16.02.2012 issued by the Union of India relied upon by the appellants was also quashed.

(2) The facts of the case are that the writ petitioner filed civil writ petition seeking quashing of the result dated 07.02.2012 and admission notice for the year 2012-13 on the ground that 25% seats were not reserved for the students belonging to the economically weaker sections and the disadvantaged group of society even though The Right of Children to Free and Compulsory Education Act, 2009 (in short 'the RTE Act') had come into force w.e.f. 01.04.2010. Accordingly, direction was prayed that admission should be offered in the 6th class to the writ petitioner in the Sainik School, Kunjpura, Karnal. It was pleaded in the writ petition that the writ petitioner belongs to a disadvantaged group of society and a Scheduled Caste certificate was issued in favour of the mother of the writ petitioner by the competent authority on 09.02.2011. Certificate showing the income of the mother to be ₹800 per month was also appended. The respondent/appellant no. 2-School had issued the admission notice for the session 2012-13 without reserving any seat for the economically weaker section and the writ petitioner had applied for the admission in 6th class under 25% seats reserved and the result had been declared on 07.02.2012. Accordingly, the writ petition was filed placing reliance upon the RTE Act and judgment of this Court in *Ankit's case* (supra).

(3) In the written statement filed by appellants, it was averred that the writ petitioner had participated in the entrance examination under the Scheduled Castes category in which 15% reservation was there and when

the writ petitioner was not successful in the merit list, he adopted the present recourse to have admission in the school. The scheme to establish Sainik School was introduced in the year 1961 with the primary aim for preparing boys academically, physically and mentally for entering into National Defence Academy. The Sainik Schools admitted boys in classes 6th and 9th and 67% of the seats were reserved for boys from the State in which the school is located and the remaining seats were available to those outside the State. Further 25% were reserved for sons of defence personnel and ex-servicemen and 15% and 7-1/2% seats were reserved for admission of boys belonging to Scheduled Castes and Scheduled Tribes category respectively. The Sainik School did not start at Class I and started at Class VI and the provisions of Section 12(1)(c) of the RTE Act for providing free and compulsory education were not applicable to Sainik Schools as per letter dated 16.02.2012 which had been approved by the Government of India. Regarding the judgment passed by this Court in CWP No. 5350 of 2011 titled as Ankit (minor) vs. Union of India and others decided on 02.11.2011, it was pleaded at that time, the case for exemption under the provisions of Section 12(1)(c) of the RTE Act was under active consideration by the Ministry of Human Resources and Development. However, the same was not considered and 25% seats in the school for the academic session 2012-13 had not been reserved by the Government of India. The writ petitioner had not attached the Below Poverty Line card with the writ petition and had applied against the 15% seats in the Scheduled Castes category but had not come in the merit list published on 07.02.2012 under the reserved seats.

(4) The learned Single Judge based his decision on the judgment in *Ankit's case (supra)* wherein, it had been held that even where a school commences from Class 6th, it would necessarily follow that the expression 'Class I' was to be read as the 1st class of the instruction offered by the school and the Sainik School being a specified school was bound to obey the provisions of the RTE Act. Thereafter, review/recalling application came to be filed by the present appellant placing reliance upon the judgment of the Hon'ble Supreme Court in *Society for Unaided Private Schools of Rajasthan versus Union of India and another (1)*, wherein, reliance was placed upon para no. 13 of the judgment wherein, it had been held that

the boarding schools and orphanages in the several parts of India would not be governed by the RTE Act. Reliance was also placed upon instructions dated 13.07.2012. The review application was dismissed on the ground that the guidelines were issued after the date of the decision dated 18.04.2012 and there was no ground for recalling the order. Resultantly, the present appeal has been filed.

(5) Few facts which are to be noticed regarding the sequence of events are that the judgment in *Ankit (minor's) case (supra)* was passed on 02.11.2011 and the seat in the present case was reserved by the learned Single Judge on 16.03.2012. The impugned judgment was passed on 18.04.2012 and the review application was dismissed on 31.08.2012. The judgment of Hon'ble Apex Court is dated 12.04.2012, six days prior to the judgment pronounced by the learned Single Judge. The Hon'ble Apex Court, in *Society for Unaided Private Schools of Rajasthan's case (supra)*, while repelling the challenge to the RTE Act, examined the provisions of the RTE Act threadbare and also took into account the duty of the State Government to provide elementary education from 1st class to 8th class in all neighbourhoods and to ensure availability of neighbourhood schools including schools at Gram Panchayat level. Keeping in view the responsibility of the State under Article 21A of the Constitution of India whereby, the State has to provide free and compulsory education to all children between the age of 6 to 14 years which may be determined by law, the provisions of the RTE Act were upheld. However, the Hon'ble Apex Court came to the conclusion that the applicability of the RTE Act could not be extended to the boarders. Accordingly, directions were issued that appropriate guidelines be issued under Section 35 of the RTE Act clarifying the above said position. The said observations read as under:-

"13. However, we want the Government to clarify the position on one aspect. There are boarding schools and orphanages in several parts of India. In those institutions, there are day scholars and boarders. The 2009 Act could only apply to day scholars. It cannot be extended to boarders. To put the matter beyond doubt, we recommend that appropriate guidelines be issued under Section 35 of the 2009 Act clarifying the above position."

(6) In pursuance to the said directions issued on 12.04.2012 in *Society for Unaided Private Schools of Rajasthan's case (supra)*, the Government of India, Ministry of Human Resources Development (Development of School Education and Literacy) issued guidelines that the applicability of clause (c) of sub-section 1 of Section 12 would be limited to day scholars since only in respect of day scholars can the neighbourhood criteria apply. Accordingly, as per the instructions, the provisions of the said Act would not be applicable to residential schools which start admitting children in classes higher than class I. The contents of the said letter read as under:-

“Subject: Guidelines under Section 35(1) of the Right of Children to Free and Compulsory Education (RTE) Act, 2009 in respect of Residential Schools – reg.

The Hon'ble Supreme Court in para 13 of the judgment dated the 12th April, 2012 in WP © 95/2010 in the case of Society for Unaided Private Schools of Rajasthan vs. Union of India and Anr., and similar writ petitions tagged alongwith directed that appropriate Guidelines under Section 35 of the Right to Children to Free and Compulsory RTE Act, 2009 be issued clarifying its applicability to boarding and residential schools.

2. The aforementioned issue has arisen in the context of applicability of the provisions of clause (c) of subsection (1) of Section 12 of the Right of Children to Free and Compulsory RTE Act, 2009 on private unaided schools. In the said section it has been, inter alia, provided that children belonging to weaker section and disadvantaged group residing in the specified neighbourhood of the school have a right to be admitted therein to the extent indicated in the said clause and provided free and compulsory education till completion of elementary education. In respect of residential schools, however, the applicability of clause (c) of subsection (1) of Section 12 would be limited to day scholars, since only in respect of day scholars can the neighbourhood criterion apply.

3. The provisions of clause (c) of sub-section (1) of Section 12 of the Right of Children to Free and Compulsory RTE Act, 2009 shall not apply to the residential schools which start admitting children at classes higher than class I.

4. The aforementioned Guideline may be brought to the knowledge of all concerned for necessary compliance."

(7) Thus, from the reading of the observations of the Hon'ble Apex Court and the instructions subsequently issued, it would be clear that the provision of the RTE Act for providing reservation to 25% seats would not be applicable to boarding schools. It would also be necessary to take into consideration the stand of the appellant that since Sainik Schools start at Class 6th, therefore, Section 12(1)(c) of the RTE Act was not applicable and the said issue was pending consideration. On 16.02.2012, a decision was taken that since Sainik Schools did not start at Class I but at Class VI, the provision of Section 12(1)(c) of the RTE Act providing free and compulsory education to children from disadvantaged and economically weaker sections was not applicable to them in spite of the fact that they were specified category schools under Section 2(p) read with Section 2(n)(iii). The relevant contents of the letter read as under:-

"(a) Sainik Schools are specified category schools under section 2(p) read with Section 2(n) (iii) of the RTE Act. The extent of responsibility of specified category schools for providing free and compulsory education is as per the provisions of Section 12(1)(c), i.e. to the extent of 25% of the children from disadvantaged groups and weaker sections in class I each year.

(b) However, since Sainik Schools do not start at class I, but start at Class VI, the provisions of Section 12(1) (c) for providing free and compulsory education to children from disadvantaged groups and weaker sections from class I are not applicable to them.

(c) As regards the procedure for admission of children, a copy of the Guidelines issued under Section 35(1) is enclosed for reference."

(11) The Hon'ble Apex Court in *Society for Unaided Private Schools of Rajasthan's case (supra)* while examining the said provisions, came to the conclusion that concept of neighbourhood schools would mean school established at the Gram Panchayat level so that the elementary education from Class I to Class VIII could be fulfilled for the purpose of providing free and compulsory education. The relevant portion of the aforesaid judgment read as under:-

"7.....Section 4 inter alia provides for special provision for children not admitted to or who have not completed elementary education. Section 5 deals with the situation where there is no provision for completion of elementary education, then, in such an event, a child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of Section 2, for completing his or her elementary education. Chapter III provides for duties of appropriate government, local authority and parents. Section 6 imposes an obligation on the appropriate government and local authority to establish a school within such areas or limits of neighbourhood, as may be prescribed, where it is not so established, within 3 years from the commencement of the 2009 Act. The emphasis is on providing "neighbourhood school" facility to the children at the Gram Panchayat level."

(12) Counsel for the appellant relied upon Rule 6 of the Right of Children to Free and Compulsory Education Rules, 2010 (for short 'the RTE Rules'). Reference was also made to Section 5 to plead that the child could be transferred to other schools except the schools in sub-clause (iii) and (iv) of clause (n) of Section 2 which included a Sainik School since reference was there to a specified category school. Accordingly, it was contended that the benefit under Section 12(1)(c) of reservation under 25% could not be there in boarding schools. Rule 6 of the RTE Rules read as under:-

"6. Area or limits of neighbourhood :- (1) The area or limits of neighbourhood within which a school has to be established by the appropriate Government or the local authority shall be, -

(a) in respect of children in classes from I to V, a school shall be established within a walking distance of one km of the neighbourhood.

(b) in respect of children in classes from VI to VIII, a school shall be established within a walking distance of three km of the neighbourhood.

(2) Wherever required, the appropriate Government or the Local Authority shall upgrade existing schools with classes from I to V to include classes from VI to VIII and in respect of schools which start from class VI onwards, the appropriate Government or the Local Authority shall endeavour to add classes from I to V wherever required.

(3) In places with difficult terrain, risk of landslides, floods, lack of roads and in general, danger for young children in the approach from their homes to the school, the appropriate Government or the Local Authority shall locate the school in such a manner as to avoid such dangers, by reducing the area or limits specified under sub-rule (1).

(4) For children from small hamlets, as identified by the appropriate Government or the Local Authority, where no school exists within the area or limits of neighbourhood specified under sub-rule (1), the appropriate Government or the Local Authority shall make adequate arrangements, such as free transportation and residential facilities, for providing elementary education in a school, in relaxation of the area or limits specified in the said rule.

(5) In places with high population density, the appropriate Government or the Local Authority may consider establishment of more than one neighbourhood school having regard to the number of children in the age group 6- 14 years in such places.

(6) The Local Authority shall identify the neighbourhood school(s) where children can be admitted and make such information public for each habitation.

(7) In respect of children with disability, which prevent them from accessing the school, the appropriate Government or the Local Authority shall endeavour to make appropriate and safe transportation arrangements to enable them to attend school and complete elementary education.

(8) *The appropriate Government or the Local Authority shall ensure that access of children to the school is not hindered on account of social and cultural factors.*”

(13) On, a conjoint reading of Sections 5, 6, 8 and Rule 6 and the principles enunciated in the judgment in *Society for Unaided Private Schools of Rajasthan's case (supra)* would show that the purpose of reservation is to provide elementary education to the children belonging to the neighbourhood area and cannot be extended to the whole of the State, and the mandatory requirement of 25% reservation would not extend to boarding schools and orphanages as held by the Hon'ble Apex Court.

(14) Counsel for the respondents has relied upon the conclusion of the Hon'ble Apex Court in the above said judgment to submit that all schools including aided minority schools and schools which belong to specific category fell within the ambit of the RTE Act and, therefore, the appellant was under an obligation to provide reservation under Section 12(1)(c) of the RTE Act. Reference was also made to Section 4 of the RTE Act to contend that there was a special provision for children till the completion of the elementary education and the residents of the State of Haryana were entitled to admission in the schools. However, in view of the observations made in para no. 13 of the judgment in *Society for Unaided Private Schools of Rajasthan's case (supra)*, wherein, categorically, it has been held by the Hon'ble Apex Court that the provisions of the RTE Act would not be applicable to the boarding schools, the writ petitioner cannot have any enforceable right.

(15) Consequently, the judgment of the learned Single Judge dated 18.04.2012 and the order dismissing the review application dated 31.10.2012 are necessarily to be set aside and the writ petition filed by the writ petitioner-respondent is accordingly dismissed and the admission granted to him cannot continue. However, it is made clear that the appellant-school shall give a certificate to writ petitioner-respondent no. 1 on his account of having studied in the 6th class for the session 2012-13 immediately so that he can take admission elsewhere.