Serial No.01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

MC (WA) No.2/2023 in
WA No.26/2023

Heard on: 22.08.2023
Date of Judgment: 23.08.2023

State of Meghalaya Vs. Brightstarwell Marbaniang & ors

Coram:
Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Applicant/Appellant : Mr. A. Kumar, Advocate-General with
Mr. A.S. Pandey, GA
Ms. S. Ain, GA
Ms. S. Laloo, GA
Ms. A. Thungwa, GA
Ms. S. Shyam, GA

For the Respondents : Mr. H.R. Nath, Adv with
Ms. B. Sun, Adv
Ms. P. Marak, Adv

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

JUDGMENT
Hon'ble, the Chief Justice:

In view of the good grounds shown, the delay of about 25 days in preferring the appeal is condoned and the appeal is taken up for immediate consideration.

2. The issue in this appeal pertains to an amendment effected by the State government to the set of executive guidelines that it has issued to educational institutions to which it grants financial aid.

3. At the outset, it must be appreciated that even though the guidelines are in the form of a set of rules and have been amended by a formal publication in the official gazette on April 8, 2021, the guidelines are not issued under any specific law and, as such, such guidelines may not have any statutory force. Yet the guidelines are effective; in the sense that an educational institution seeking grant-in-aid may not avail of such facility if it does not conform to the guidelines; or, any infraction of its part to adhere to the guidelines may entail the government stopping the grant-in-aid.

4. By a notification of March 23, 2021, Rules 6 and 7 of the original Rules regarding the conduct and discipline of employees of aided educational institutions in the State were somewhat tweaked.

5. Prior to the issuance of such publication, Rules 6 and 7 provided as follows:

> "**6.** No employee shall offer himself as a candidate for election to a Legislative Body or for holding office of any political organisation except in accordance with provisions of Rule 7:
>
> Provided that an employee may seek election as an independent candidate of a panchayat with the previous approval of the

> managing committee as the case may be but he shall not be entitled to accept any office there under except in accordance with the provision of Rule 7.
>
> "**7.** Any employee desiring to seek election to Legislative Body or to hold office of any Political Organisation or Local Bodies shall be on compulsory leave without pay from the date of filing his nomination till the announcement of the result by the proper authority and shall be eligible to rejoin his post immediately. In case he is elected, he shall be on compulsory leave without pay from the date of filing his nomination till the termination of his office to which he is elected. Such elected employee shall be allowed to retain a lien on his post for a period not exceeding the full term of the elected body to which the employee is so elected. In the event of such employee joining the post against which he had a lien the interim period of absence on compulsory leave will count for notional increment benefits of pay from the date of such re-joining."

6. By the notification of March 23, 2021, Rule 7 was completely omitted, the proviso to Rule 6 was also omitted and the words "except in accordance with provisions of Rule 7" appearing at the end of the substantive part of Rule 6 were done away with. Thus, modified Rule 6 of the said Rules, after the notification of March 23, 2021, provided as follows:

> "6. No employee shall offer himself as a candidate for election to a Legislative Body or for holding office of any political organisation."

7. Several assistant professors in government-aided colleges in the State challenged the amendment on the ground that they had been willy-nilly disallowed from holding office in any political organisation or

offering their candidature in any election to a public body. The writ court perceived the prayer before it to be for restoration of the old provisions so as to allow the writ petitioners to engage in political activities and contest in elections to legislative and public bodies as well as to posts in political organisations. The writ petition was allowed but the discussion in the impugned judgment of December 5, 2022 revolves around the concept of "office of profit" which is found in Articles 102(1) and 191(1) of the Constitution. The essence of the judgment is captured in the following paragraph:

> "20. Therefore as per the discussions made hereinabove and taking into account the settled legal position, the petitioners in the considered view of this Court, are not found to hold an Office of Profit, and if, they satisfy the other conditions as laid down in Articles 102(1) and 191(1), cannot be debarred by the rules as amended from contesting in elections or holding political office. Further the contention that the government exercises deep and pervasive control over the services of the petitioners and the institutions has not been borne out by the materials on record."

8. The State is in appeal. As to the impugned judgment, the State asserts that the entire discussion therein is not germane to the legal issue that presented itself. According to the State, the challenge in the writ petition was to the amendment and not to the original provisions as they stood. Indeed, the State points out that the writ court itself perceived the

writ petitioners' prayer to be for the restoration of the provisions to how they stood prior to the notification of March 23, 2021.

9. On the contrary, the appellant contends that what ought to have been considered by the writ court was whether the government had the authority to regulate the conduct of teachers in government-aided private colleges and the writ court completely failed to recognise such aspect of the matter or the effect of the impugned amendment.

10. Apart from the State's authority to regulate the conduct of teachers in government-aided private colleges, the State also submits that if it had the authority to make the rules in the first place it must be deemed to have due authority to amend the same. On this aspect, the State emphasises that even though it is not required to justify the matter of policy behind the amendment, the whole purpose was to insulate government-aided private colleges from political activities so that teachers could concentrate on imparting education and not indulge in politics.

11. A further ground that is canvassed by the State is that Article 226 of the Constitution could not have been invoked in such a situation as the matter related to an arrangement between the government on the one hand and institutions to which it granted aid for promoting

education on the other. Finally, it is the State's contention that no disqualification to contest in any election to a legislative or public body or disqualification to indulge in political activities has been imposed by the impugned amendment. The State says that a teacher in an aided private college not finding the arrangement between the college and the government best fitted for such teacher was free to leave the post for the undesirable condition not to be applicable to such teacher. The submission in such regard appears to be that the condition imposed by the amendment applies to the post and not to the person and, to such extent, the State is well within its rights to impose conditions as to the circumstances in which it would grant aid to a private college.

12. In support of the State's principal limb of contention to the effect that it has complete authority to regulate the conduct of teachers in private institutions to which it would grant aid, the appellant relies on a judgment reported at (1965) 1 SCR 890 *(State of Assam v. Ajit Kumar Sarma)*. In such case, Rule 7 of the similar rules in the then undivided Assam fell for consideration and such rule was similar to Rule 7 of the Meghalaya Rules except as to the date of rejoining. In the Assam Rules of 1961, the relevant provision provided that even if a teacher filed his nomination and lost, whether in any election or for any office of any

political party, he "shall be on compulsory leave without pay from the date of the filing of his nomination till the end of the next academic session …" In original Rule 7 of the Meghalaya Rules, the relevant condition was "shall be on compulsory leave without pay from the date of filing his nomination till the announcement of the result by the proper authority and shall be eligible to rejoin his post immediately." Thus, in the old Assam Rules despite a teacher in a government-aided college losing the election, whether to a legislative or public body or to the office of any political organisation, he had to wait till the next academic session before he could rejoin. In the Meghalaya Rules prior to the March 23, 2021 notification, such teacher could join immediately upon losing the election. The judgment in *Ajit Kumar Sarma* turned on such aspect of the matter. The relevant teacher lost the election and sought to immediately rejoin his post which the governing body of the relevant private college permitted. However, the resolution passed by the governing body of the private college was forwarded to the State government for its approval. The State government responded by indicating that the relevant teacher and others of his ilk could not be permitted to rejoin "immediately" and had to wait till the end of the academic session to rejoin their posts.

13. Upon the governing body of the aided private college informing the teacher accordingly, such teacher assailed the government decision by instituting proceedings under Article 226 of the Constitution before the Gauhati High Court which issued a writ against the State. The Supreme Court found that the State government had acted in terms of the relevant rules and also held that the rules for the purpose of granting aid were merely executive instructions and no writ petition could have been filed in respect thereof. However, the issue was not conclusively answered as would be evident from paragraph 14 of the report:

> "14. Then we come to the question whether a writ could have been issued against the Governing Body of the College. We find however that there is no appeal by the College against the order of the High Court issuing a writ against it. In these circumstances we do not think that we can interfere with the order of the High Court insofar as it is against the Governing Body of the College. At the same time we should like to make it clear that we should not be taken to have approved of the order of the High Court against the Governing Body of the College in circumstances like the present and that matter may have to be considered in a case where it properly arises."

14. The State next relies on a judgment reported at (1977) 4 SCC 94 *(Cyril E. Fernandes v. Sr. Maria Lydia)*. According to the State, such judgment relied on the dictum in *Ajit Kumar Sarma*.

15. However, even though the judgment in *Cyril E. Fernandes* referred to *Ajit Kumar Sarma* since the State in that case had not

preferred any appeal, the Supreme Court did not go into the question as to the enforceability of the grant-in-aid code as would appear from a passage at page 97 of the report quoted later.

16. In *Cyril E. Fernandes*, the appellant was a teacher in a government-aided private school in Goa. A student made some allegations against the appellant which was inquired into by the principal of the school, who was the first respondent before the Supreme Court. After making such inquiry, the principal sought permission from the government of the Union Territory to terminate the services of the appellant without assigning any reasons and upon payment of compensation due in such circumstances under the rules. The government approved the decision and the appellant's services were terminated. Subsequently, the government of the Union Territory issued a telegram to the principal to keep the proposed termination in abeyance since the proposed termination was upon receiving a complaint and such a scenario required an inquiry into the alleged misconduct. The principal challenged the government's *volte face* before the court of the Judicial Commissioner, where the concerned teacher was impleaded as a proper party. The Judicial Commissioner held that the termination was under a valid provision and the approval

given by the government was perfectly in order and it could not be subsequently superseded or revoked.

17. The government of the Union Territory, which suffered the order, did not prefer an appeal. The appeal before the Supreme Court was by the concerned teacher. In such circumstances, after referring to a passage from *Ajit Kumar Sarma*, the Supreme Court observed as follows at page 97 of the report:

> "On the authority of *State of Assam v. Ajit Kumar Sharma* it is clear that the appellant is not directly concerned with the question whether the rules in the grant-in-aid code conferred on the management of the school an enforceable right against the Government which is entirely a matter between the management and the Government. The appellant who has no say in the matter cannot challenge the finding on the point. The question as to the enforceability of the grant-in-aid code does not thus arise in this appeal and we express no opinion on it. The scope of the appeal must therefore be limited to what directly concerns the appellant in the impugned judgment…"

18. The appellant also places a judgment of the Kerala High Court reported at 2021 SCC OnLine Ker 1095 *(Moosa v. State of Kerala)*. A petition in public interest was filed before the Kerala High Court for declaring that the teaching staff of aided schools are not entitled to contest in the election to local bodies, including the State Legislative Assembly and Parliament. The High Court held, at paragraph 185 of the report, that a teacher in an aided educational institution in the State of

Kerala "in terms of the provisions of the Kerala Education Act, 1958 and the rules framed thereunder is a person holding an "office of profit", under the Government of the State of Kerala". Thus, the Kerala High Court clearly held that since teachers in government-aided schools received their salaries wholly or substantially from the grant provided to the relevant institution by the State, they would be holding "office of profit" as the expression has been used in Articles 102 and 191 of the Constitution.

19. In a sense, the Kerala judgment is contrary to the view expressed in the judgment impugned herein; but, as aforesaid, such consideration may not be relevant in the present circumstances since whether or not teachers in government-aided private colleges in the State held or hold an "office of profit" has not been changed as a consequence of the amendment brought about by the notification of March 23, 2021. The effect of the amendment is to altogether disentitle a teacher in an aided private college from offering his candidature for election to any local or legislative body or for any office of a political organisation.

20. The appellant graciously points out that the Kerala judgment is pending consideration in an appeal before the Supreme Court.

21. On the aspect as to whether the right to vote and, consequently, the right to offer one's candidature for a legislative or local body is a constitutional right or not, the State has referred to the recent Constitution Bench judgment on the constitution of the Election Commission reported at (2023) 6 SCC 161 *(Anoop Baranwal v. Union of India)*. The State has relied on the *Election Commission* judgment, since a judgment reported at (2016) 2 SCC 445 *(Rajbala v. State of Haryana)* was copiously placed before the Single Bench by the writ petitioners for the proposition that the right to vote and the right to contest the election to a legislative or local body were recognised therein to be a constitutional right.

22. In the *Election Commission* case, the Constitution Bench noticed the observation in *Rajbala* that the right to vote was a constitutional right, but the Constitution Bench did not address the issue since it found that in a previous Constitution Bench judgment reported at (2006) 7 SCC 1 *(Kuldip Nayar v. Union of India)*, a contrary view had been expressed. There is no denying that in *Kuldip Nayar*, at paragraph 361 of the report, the petitioners interpreted the majority view in the judgment reported at (2003) 4 SCC 399 *(PUCL v. Union of India)* to be that the right to vote was a constitutional right and also a facet of

fundamental right under Article 19(1)(a) of the Constitution. The argument was repelled in *Kuldip Nayar* at paragraph 362 of the report:

> "362. We do not agree with the above submission. It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in *Jyoti Basu v. Debi Ghosal* [(1982) 1 SCC 691], that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right."

23. It may do well to deal with the final argument of the State first: that the disqualification, so to say, attaches to the post and not to the person and a teacher in a government-aided private college is free to quit his post to contest in any election to a legislative or public body or to take up any office in a political organisation.

24. The matter touches upon the right to livelihood of a citizen. Technically, the State is right in asserting that the concerned teacher in a government-aided private college may resign and the condition imposed by the executive guidelines would no longer apply to him or her. In reality, however, a constitutional court must be conscious of how difficult it is to get employment and, that too, in the poorly-paid education sector. If a middle-aged career lecturer or professor has to quit his hard-earned job to pursue his right to contest the election to a legislative or public body or to an office of a political organisation, he

virtually signs a death warrant for himself and his dependants. For, if he loses, there is no coming back; and, he may be too old to be eligible to obtain a new position.

25. It is true that the relevant condition is a part of the grant-in-aid code that is an arrangement between the government and the private college which obtains the grant, but the effect of such condition is so onerous that, for all practical purposes, a teacher in a government-aided college has hardly a choice. It is a kind of Hobson's choice, that is to say, no meaningful choice at all. The matter must be realistically viewed from such perspective.

26. While it may be perfectly justified for a State government to ensure that the teachers in the private colleges to which it grants aid only concentrate on their teaching activities and not indulge in any politics in class or on the campus, the altogether barring of a person occupying such position of a teacher from contesting any election to any legislative or public body or office of any political organisation appears to be far too draconian, unreasonable and unconscionable. At any rate, no State government has any authority to disqualify a person from contesting any election to a legislative body. It is the sole prerogative of Parliament to do so as would be evident from Articles 102 and 191 of

the Constitution pertaining to Parliament and Legislative Assemblies, respectively:

> "**102. Disqualifications for membership.**– (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament–
>
> (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
>
> (b) if he is of unsound mind and stands so declared by a competent court;
>
> (c) if he is an undischarged insolvent;
>
> (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;
>
> (e) if he is so disqualified by or under any law made by Parliament.
>
> Explanation.– For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.
>
> (2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

> "**191. Disqualifications for membership.**– (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State–
>
> (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by

the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation.– For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule."

27. As to the distinction sought to be made by the State between the disqualification applying to a post and such disqualification not applying to any person, it may only be said that in the constitutional scheme of things, it is only Parliament which has the authority in such regard. And, if the State has no authority to prescribe any ground for disqualification under any law, it can scarcely do so by an executive fiat. In any event, the provisions for disqualification in Articles 102 and 191 of the Constitution make no distinction between a position and a

person and the argument of the State on such count is clearly a case of seeking to make a distinction without a difference.

28. There is no doubt, as *Ajit Kumar Sarma* instructs, that even though the grant-in-aid code may not be statutory, the State is entitled to impose certain conditions on an educational institution to which it grants aid. However, the issue that has arisen here was not considered in that case. Even in *Cyril E. Fernandes*, the issue did not pertain to a disqualification being attached to the post of a teacher in a government-aided school.

29. Though *Ajit Kumar Sarma* expressed some reservation as to the invocation of the writ jurisdiction by a teacher to assail a condition in the grant-in-aid code, more recent judicial pronouncements of the highest court have widened the scope of Article 226 of the Constitution. Further, in the present case, it cannot be said that the writ petitioners were not affected by the impugned amendment or that the lack of authority of the State or its arbitrariness or unreasonableness in imposing conditions that affect teachers would still not entitle the teachers to invoke the jurisdiction under Article 226 of the Constitution in such regard. At any rate, in view of the last five words of Article 226 inasmuch as it says "and for any other purpose", it cannot be lost sight

of that as long as there is a public element to the lis carried under such provision or a government action which is assailed, the writ court must be seen to have the authority to entertain the complaint.

30. The judgments in *Ajit Kumar Sarma* and *Cyril E. Fernandes* are distinguishable on facts as the impugned government actions in those two cases were assessed on the terms of the grant-in-aid codes that governed them. In neither case did the Court have to consider the disqualification of such magnitude as introduced by the notification of March 23, 2021 which has been challenged in the present proceedings.

31. It is needless to enter into a debate as to whether the right to vote and, whether consequently or otherwise, the right to contest elections to any legislative or public body is an inherent right or a constitutional right or a mere legal right, as long as it is recognised as a right. However, it may only be said that once the Preamble to the Constitution declares the State to be both democratic and a republic there is a promise held out therein that, subject to what may be prescribed by any procedure established by law, any citizen of this country would be entitled to both vote and contest elections to legislative and public bodies.

32. Though it may be banal in going into the etymology of the word "democracy" and its Greek origin, democracy in the modern day is popularly understood in the words of Abraham Lincoln from his Gettysburg address of 1863 where he referred to "government of the people, by the people, for the people". Both the principles of "of the people" and "by the people" encompass the wider concept of the right to participate in the formation of government by both having a right to vote and a right to contest in the larger sense of word that the concept of democracy conveys. Doubtless, such rights may be curtailed; but that must be under due authority of law.

33. Again, as this great nation was also conceived in liberty and dedicated to the proposition that all men and women are created equal, the right of a State government to interdict a citizen's right to contest the election to any legislative or public body or office in a political party by making a vanishing distinction between a position and a person must be guarded against.

34. Thus, for reasons entirely different than as indicated in the impugned judgment, the writ petition is allowed and the impugned notification of March 23, 2021 is set aside, restoring the position to as it stood immediately prior thereto. The amendment introduced by the

notification is found to be in excess of the authority available to the State government and otherwise onerous, unconscionable and unreasonable. The impact of the amendment on the individual teachers is so overwhelming to the extent it curtails a fundamental legal right and the only choice available to the teacher is, effectively, to give up his livelihood, that the distinction between the post and the person is illusory.

35. WA No.26 of 2023 is disposed of accordingly.

36. MC (WA) No.2 of 2023 is disposed of.

37. There will, however, be no order as to costs.

(Sanjib Banerjee)
Chief Justice

I agree.

(W. Diengdoh)
Judge

Meghalaya
23.08.2023
"lam DR-PS"