

Interlocutory AFR

Reserved on 03.05.2024

Delivered on 10.05.2024

Court No. - 20

Case :- WRIT - A No. - 3478 of 2024

Petitioner :- Guru Milan Prasad

Respondent :- State Of U.P. Thru. Prin. Secy., Deptt. Of Secondary Education, Lucknow And Others

Counsel for Petitioner :- Sharad Pathak

Counsel for Respondent :- C.S.C., Girish Chandra Verma, Manvendra Singh, Raman Kumar

Hon'ble Shree Prakash Singh, J.

1. Heard Sri Sharad Pathak, learned counsel for the petitioner, Sri Shailendra Kumar Singh, learned Chief Standing Counsel, Sri Vivek Shukla, learned Additional Chief Standing Counsel for State and Sri Raman Kumar, Manvendra Kumar and Sri Girish Chandra Verma, learned counsels for opposite party nos. 3 and 5.

2. Under challenge is the order dated 9th April 2024 passed by opposite party no. 3, whereby, the services of the petitioner has been terminated and further the advertisement dated 16th April 2024 is also under challenge whereby the date of interview is fixed for 5th May 2024 for appointment of Principal.

3. Preliminary objections are raised by the counsel for the opposite parties that the services of the petitioner, who was working on the post of Principal, in unaided recognised College, has been terminated vide impugned order dated 9th April 2024 and thereafter, an advertisement is published for appointment of a new Principal. It has been stated that since the services of the petitioner is not directly governed by any statute and therefore, the dispute is a private one between the Committee of Management and the petitioner and further the Institution is unaided and

the terms and conditions of the services of the petitioner is not governed with the provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred as 'Act 1921'), therefore, there is no correlation between public function and public law. Further, the Institute being unaided, does not come under the purview of State under Article 12 of the Constitution of India, thus, the writ petition is not maintainable.

4. Further contention of the counsel for the opposite party is that since the salary and other remuneration are not being paid by the State Exchequer and only the permission for running the higher classes are given.

5. Reliance is placed on a judgement and order rendered in **Civil Appeal No. 5789 of 2022 (SLP (Civil) No. 1118 of 2022), St. Mary's Education Society and Anr. Vs. Rajendra Prasad Bhargava and Ors** and submitted that in paragraph 3 of the abovesaid judgement, the question is framed and the same is answered in paragraph 68.

6. Paragraph 3 (a) and (b) and 68 are quoted hereinunder:-

“3. In the present appeal, two pivotal issues fall for consideration of this Court:

(a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?

(b) Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution?”

“68. We may sum up our final conclusions as under:

(a) An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.

(b) Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226.

Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.

(c) It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.

(d) Even if it be perceived that imparting education by private unaided the school is a public duty within the expanded expression of the term, an employee of a nonteaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and nonteaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of nonteaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered by the court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.

(e) From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character."

Referring the aforesaid, he submits that it has been answered that even if "it be assumed that an educational institution is imparting public duties, the act complained of must have a direct nexus with the discharge of public duty and individual wrongs or breach of mutual contracts without having any public element cannot be rectified through a writ petition under Article 226".

7. Concluding his arguments, he submits that in view of the aforesaid settled proposition of law, the petitioner was engaged by a private unaided College, with terms and conditions of employment in a form of contract, between the school and the petitioner and this will not constitute an inseparable part of the obligation to impart education. Therefore,

submission is that the petition is not maintainable and is liable to be dismissed.

8. Refuting the aforesaid contentions of the counsel for the opposite parties, the counsel for the petitioner submits that the institute namely Pratibha Inter College, Bhayara Road, Deva, Barabanki (herein after referred as 'Institution') is a recognised Intermediate College and the provisions of UP Intermediate Education Act 1921 and Regulations made thereunder, are applicable. Next added that initially, the College was granted recognition up till high school in the year 2006 and later on the school was given recognition up to the level of intermediate in the year 2010, wherein, the petitioner was appointed as a Principal from the very beginning.

9. Further contended that the services of the petitioner is governed by the Service Rules meant for the teachers of unaided recognised schools named as वित्तविहीन विद्यालयों के शिक्षकों के सेवा के लिए नियामवली, 2000 bearing its reference number EM1443/15-7-2001-1(19)2000 dated 10th August 2001 (hereinafter referred to as 'Service Rules'), wherein, the provision with respect to appointment, eligibility criteria, including the disciplinary proceedings regarding teachers are provided.

10. He submitted that powers are conferred, under Section 9(4) of the Act, 2021, upon the State Government that whenever, 'in the opinion of the State Government, it is necessary or expedient to take immediate action, it may, without making any reference to the Board under the foregoing provisions, pass such order or to take such other action consistent with the provisions of this Act as it deems necessary, and in particular, may by such order modify or resign or make any regulation in respect of any matter and shall forthwith inform the Board accordingly'. From the 'Service Rules' it's evident that those speaks about the appointment under section 7-AA as well as grant of recognition for higher classes under section 7-A of the Act, 1921. He further submits that the 'Service Rules' are consist of the provisions of appointment,

including the disciplinary proceedings of teachers therefore, the appointment of the principal in such institution cannot be termed as private function.

11. In support of his contention, he has placed reliance on a judgement and order rendered in case of **Marwari Balika Vidyalaya Vs. Asha Srivastava and Others** reported in **2020 (14) SCC 449** and has referred paragraph 12 to 16.

12. Paragraph 12 to 16 of the aforesaid judgement are extracted hereinunder:-

“12. Firstly, we examine the question with respect to the maintainability of the Writ Application. It has been clearly averred in the Writ Application that the appointment was, at first instance, on probation for two years. It is not in dispute that in the instant case that approval of the appointment had been made with retrospective effect 1st January 2001 and no approval admittedly has been obtained for the purpose of removal passed on 20.2.2001. There is a clear pleading in the Writ Application that the approval was necessary, its denial in reply is evasive. No such approval had been obtained in the instant case. It is apparent that the Government has also pleaded in its reply that approval of appointment was made necessary considering the arbitrariness in the appointments which was prevailing, and once approval for appointment was necessary there is no doubt that approval for removal was also necessary, which was not obtained in the instant case.

13. In Raj Kumar v. Director of Education & Ors.(supra) this Court held that Section 8(2) of the Delhi School Education Act, 1973 is a procedural safeguard in favour of employee to ensure that order of termination or dismissal is not passed without prior approval of Director of Education to avoid arbitrary or unreasonable termination/dismissal of employee of even recognised private school. Moreover, this Court also considered the Objects and Reasons of the Delhi School Education Act, 1973 and came to the conclusion that the termination of service of the driver of a private school without obtaining prior approval of Director of Education was bad in law. This Court observed:

“45. We are unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent School. Section 8(2) of the DSE Act is a procedural safeguard in favour of an employee to ensure that order of termination or dismissal is not passed without the prior approval of the Director of Education. This is to avoid arbitrary or unreasonable termination or dismissal of an employee of a recognised private school.”

14. This Court has laid down in Raj Kumar v. Director of Education & Ors. (supra) that the intent of the legislature while enacting the Delhi School Education Act, 1973 (in short, ‘the DSE’) was to provide security of tenure to the employees of the school and to regulate the terms and conditions of their employment. While the functioning of both aided and unaided educational institutions must be free from unnecessary Governmental interference, the same needs to be reconciled with the conditions of

employment of the employees of these institutions and provision of adequate precautions to safeguard their interests. Section 8(2) of the DSE Act is one such precautionary safeguard which needs to be followed to ensure that employees of educational institutions do not suffer unfair treatment at the hands of the management.

15. Writ application was clearly maintainable in view of aforesaid discussion and more so in view of the decision of this Court in Ramesh Ahluwalia v. State of Punjab & Ors. (supra) in which this court has considered the issue at length and has thus observed:

“13. in the aforesaid case, this Court was also considering a situation where the services of a Lecturer had been terminated who was working in the college run by the Andi Mukti Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust. In those circumstances, this Court has clearly observed as under:(V.R. Rudani case, SCC PP.700-701, paras 20 & 22) “20. The term 'authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

22. Here again, we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the Statute. Commenting on the development of this law, Professor de Smith states:'To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract. We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellant on the maintainability of the writ petition.

The aforesaid observations have been repeated and reiterated in numerous judgments of this Court including the judgments in Unni Krishnan and Zee Telefilms Ltd. brought to our notice by the learned counsel for the appellant Mr. Parikh.

14. In view of the law laid down in the aforementioned judgment of this Court, the judgment of the learned Single Judge as also the Division Bench of the High Court cannot be sustained on the proposition that the writ petition would not maintainable merely because the respondent institution is a purely unaided private educational institution. The appellant had specifically taken the plea that the respondents perform public functions i.e. providing education to children in their institutions throughout India.“

(emphasis supplied)

16. It is apparent from the aforesaid decisions that the Writ Application is maintainable in such a matter even as against the private unaided educational institutions.”

13. Referring the aforesaid, he submits that on identical factual matrix, the Hon’ble Apex Court has held that Delhi School Education Act, 1973 provides security of tenure to the employees and the school to regulate terms and conditions of their employment, immaterially they are functioning aided or unaided educational institution, and therefore, the view of the Apex Court is that even if an institution is purely unaided private educational institution but is discharging the public function under some public law, will come under the purview of the State. Adding his argument, he submits that the judgement and order in case of **St. Mary’s Education Society (supra)** and in case of **Marwari Balika Vidyalaya (supra)** are also considered and same favours the petitioner, as it has been held that the statute/public law must have a direct nexus with the discharge of public duty/function and further there must be either the service conditions were regulated by the statutory provisions or the employer had the status of ‘State’ within the expansive definition under Article 12 or it was found that the action complained of has public law element and since the state has granted recognition to the institute, therefore, the same is having the status of the ‘State’. Therefore, the present petition is maintainable and the contention of the opposite parties are liable to be turned down.

14. Considering upon the contentions of the counsel for the parties, it emerges that the institute, namely, Pratibha Intercollege is an unaided recognised Intermediate College, wherein, the petitioner is appointed as a Principal and fact remains that the institution was granted recognition up to high school in the year 2006 and later on up to the level of intermediate in the year 2010, and the same is granted under the provision of Section 7-A of the Act 1921.

15. The provision of Section 7-A is extracted hereinunder:-

“[7-A. Recognition of an institution in any new subject or; for a higher class.- Notwithstanding anything contained in Clause: (4) of Section 7-

(a), the Board may, with the prior approval of the State Government, recognise an institution in any new subject or : group of subjects or for a higher class;

(b) the Inspector may permit an Institution to open a new: section in an existing class.]”

16. Further Section 7-AA provides the employment of part-time teachers or part-time instructors to those institutions wherein the permission is granted under Section 7-A, though, there is no overt provision under Section 7-AA regarding the employment of Principal, in such institutions.

17. The undisputed fact is that the institution is an unaided and recognised institution under Section 7-A of the Act 1921, and provision is also provided vide order dated 10th August 2001 named as, **वित्तविहीन विद्यालयों के शिक्षकों के सेवा के लिए नियामवली**, wherein, provisions with respect to the terms and conditions of services of the teachers for unaided recognised schools are provided which contains not only the eligibility criteria for appointment of part-time teachers but the same also contains the provision of termination, referred to the Regulation 2(1) of the regulations made under Act 1921 and in case, such, teacher becomes aggrieved with the action of the Committee of Management, running the institution, he may represent to the District Inspector of Schools concerned. The Regulation 2(2) of regulations made under Act 1921, provides the provision regarding the appointment of head of institution, which is up graded from high school to Intermediate level.

18. The case in hand, is that the petitioner was kept on working since long back and because of the alleged dispute of two rival Committee of Management, he is said to be made scapegoat, as his services were terminated with by the Manager of Committee of Management, after receiving an enquiry report by the two-members enquiry committee, which is based on the resolution of Committee of Management, dated 7th April 2024.

19. Now question crop up that whether the institution comes under the purview of Article 12 of the Constitution of India or whether there is any nexus of discharge of duties of the petitioner as a principal termed as a public function or public duty under any public law.

20. On the close scrutiny of the aforesaid, it is an admitted fact between the parties that the institute is a recognised college, wherein, the petitioner was working as a Principal up till the date of termination. The institute was given recognition under section 7-A of the Act 1921, and further more, the provisions are also prescribed for appointment of teachers vide order dated 10th August 2001 in such unaided recognised school, though, the order dated 10th August 2001 is silent over the appointment of Principal/Head of the Institution, but the inference could be drawn that once an institution is given the recognition under a statute and even by way of the provision promulgated by the State Government, wherein, the procedure for the appointment of teachers are also prescribed, such institution could be termed having the status of 'State' within the expansive definition under Article 12 of the Constitution of India.

21. This Court is also of considered opinion that since the examinations of the students of the institution are also held and supervised by the Board and the Principal have entrusted upon the public duty of an administrative control over all those functions and therefore, such Principal, undisputedly performs a public function. The duties and function of the petitioner is in fact of such a nature which otherwise gets strength from the statute and therefore, this Court finds that there is a very good nexus of the public law element and the public duty in the present matter. In fact, the institution in question is not such educational institution which is performing the function in public life and societal sphere, but it has been recognised by a statute, thus, it is amenable to the writ jurisdiction.

22. With all respect, this Court may notice that the judgement and order rendered in St. Mary's Education Society and Anr. Vs. Rajendra Prasad Bhargava and Ors, the Apex Court has very clearly emphasised that the private unaided school performing a public duty, wherein, the employees are engaged for purpose of administration or internal management, is the only agency created by it, but so far as the present institution is concerned, that's not a 'private unaided school', but the same is 'unaided recognised school' under an statute named as Act 1921' and thus, the institute in terms of status of the 'State' very well comes under the expensive definition of Article 12 of the Constitution of India. Further to the certain extent of discharging the duties being the principal in an unaided recognised school, the nature of the function/duty cannot be declined to be the nature of performing a public function by the petitioner, and therefore, in the aforesaid terms, the present case is covered with the judgement and order in St. Mary's Education Society and Anr. Vs. Rajendra Prasad Bhargava and Ors(supra).

23. The identical controversy has also been considered in case of Marwari Balika Vidyalaya Vs. Asha Srivastava and Others(supra), which has also been considered in case of St. Mary's Education Society and Anr. Vs. Rajendra Prasad Bhargava and Ors(Supra).

24. In view of the abovesaid submissions and discussions, the preliminary objection raised by the counsel for the opposite parties, is hereby rejected.

25. List this matter on 21st May, 2024 within top ten cases, for hearing on merits.

26. The interim protection granted vide order dated 3rd May 2024 shall remain continue till then.

Order Date :- 10.5.2024

Anurag, PS Gr-I