

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

LPA No. 87/2020

Presentation Convent Senior Secondary SchoolAppellant

Through :- Mr. Adarsh Sharma, Advocate with
Mr. Atul Verma, Advocate.

v/s

Satvinder SinghRespondent

Through :- Mr. Sachin Gupta, Advocate.

**CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE MOHD. YOUSUF WANI, JUDGE**

JUDGMENT (Oral)

Sanjeev Kumar-J

01. This intra-court appeal filed by the Presentation Convent Senior Secondary School and one another, is directed against an order and judgment dated 04.08.2020 passed by learned single judge (the "writ court") of this Court in WP(C) 971/2020 titled "*Satvinder Singh vs. Presentation Convent Senior Secondary School & Anr.*" whereby writ petition filed by the respondent has been allowed and the appellant-Presentation Convent Senior Secondary School has been directed to reinstate the respondent against the post of Teacher. However, appellant has been given liberty to either initiate a fresh enquiry against the respondent qua the alleged misconduct or else to resume enquiry already initiated against him from the stage it was stalled/abandoned by the respondents, in accordance with the Rules of 2007.

02. At the outset, Mr. Adarsh Sharma, learned counsel for the appellant submits that the writ petition filed by the respondent under Article 226 of the

Constitution of India seeking enforcement of contract of service entered into between the respondent and the appellant was not maintainable in the absence of involvement of public law element in the impugned action of the appellant. It is argued that the dispute between the parties is purely in the domain of contract law. Both the sides have referred to the case law in support of their rival contentions.

03. Mr. Sachin Gupta, learned counsel appearing for the respondent would submit that respondent was engaged in the performance of teaching duties in the appellant School and, therefore, was performing public duty. He would also place reliance upon Section 20 of the School Education Act, 2002 (“the Act of 2002”) to contend that the engagement and disengagement of teaching and non-teaching staff of the private educational institutions is required to be regulated by the terms and conditions of service to be framed and notified by such schools. He would, therefore, submit that in the absence of such rules and regulations, the services of respondent could not have been brought to an end, that too by passing an order which, on the face of it, is stigmatic in nature.

04. Having heard learned counsel for the parties and perused the material on record, we are of the considered opinion that the issue raised before us by the learned counsel is no longer *res integra*.

05. It is trite law that a writ of mandamus under Article 226 may be issued even against a private body which is not a state within the meaning of Article 12 of the Constitution of India and the High Court can exercise judicial review of the action of such body challenged by a party, provided there is public law element involved in such action. The writ jurisdiction cannot be exercised to enforce a pure private contract entered into between the parties. The term “any person or authority” used in Article 226 of the Constitution cannot be read

‘ejusdem generis’ to the term “authority” used in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights to be enforced under Articles 32 and 226 of the Constitution of India. However, Article 226 confers powers on the High Courts to issue writs even for enforcement of non-fundamental rights. The words “any person or authority” used in Article 226 of the Constitution are not to be confined only to statutory authorities and instrumentalities of the State. The writ under Article 226 would lie against any other person or body performing public duty. It is not the form of the body concerned that is much relevant. What is relevant, however, is the nature of duty imposed on such body. Mandamus cannot be denied on the ground that duty to be enforced is not one that is imposed by the statute. It may be sufficient if the public duty sought to be enforced is imposed by charter, common law, custom or even contract.

06. In view of the settled legal position, there is not even an iota of doubt that unaided private Educational Institutions do perform public duty of imparting education to children and, therefore, amenable to writ jurisdiction under Article 226 of the Constitution of India. Simply because a private unaided institution is amenable to writ jurisdiction does not mean that every dispute concerning such private institution also becomes *ipso facto* amenable to writ jurisdiction. The right which emanates from private law cannot be enforced by invoking the writ jurisdiction irrespective of the fact that such institution is discharging public functions. For issuance of writ of mandamus to an authority, it must be demonstrated that such authority is not only performing a public duty but doing a particular thing in a particular manner and it has failed in the performance of such public duty. There must be a public element or integral part thereof in the action of such authority.

07. The issue has been recently considered by Hon'ble the Supreme Court in the case of **St. Mary's Education Society and another vs. Rejendra Prasad Bargava and others**, 2022 SCC Online SC 1091. The Supreme Court after surveying the law on the subject summed up its conclusion in para 69 which is set out below:

"69. 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.

(Emphasis by me)

08. In view of the clear dictum of law laid down in the aforesaid judgment, we have absolutely no doubt in our mind that though an educational institution like the appellant Institute may be imparting public duty, yet unless the act complained of has direct nexus with the discharge of public duty, no writ would lie to enforce such act. The recruitment and service conditions of Teachers in the appellant Education Institute are, admittedly, non-statutory in character and fall purely in the realm of private contract. There is no public element involved in the action taken against the respondent. The relationship of master and servant that exists between the parties is governed purely in terms of contract of employment. Mere fact that appellant Institute is recognized by the Government or is affiliated to a statutory board will not alter the position. An unaided private educational institution may qualify to be a "Public authority" amenable to writ jurisdiction of the High Court, however, a mandamus will not be issued unless action of such authority complained of falls in the domain of public law as distinguished from private law.

09. The Hon'ble Supreme Court in the case of **K. K. Saxena v. International Commission on Irrigation and Drainage, (2015) 4 SCC 670,**

has made beautiful observations, which, for facility of reference, are set out below:

“43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a 'State' within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. Reason is obvious. Private law is that part of a legal system which is a part of Common Law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is 'State' under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law

10. Equally noteworthy are the observations made by the Supreme Court in paragraph (34) of the judgment in **St. Mary's Education Society** (supra) which we find apt to reproduce hereunder:-

“34. Thus, where a teacher or nonteaching staff challenges action of Committee of Management that it has violated the terms of contract or the rules of the Affiliation Byelaws, the appropriate remedy of such teacher or employee is to approach the CBSE or to take such other legal remedy available under law. It is open to the CBSE to take appropriate action against the Committee of Management of the institution for withdrawal of recognition in case it finds that the Committee of Management has not performed its duties in accordance with the Affiliation Byelaws.

11. In view of the aforesaid settled legal position, we need not advert to the contrary judgments relied upon by learned counsel for the petitioner except the judgment of Hon'ble Supreme Court in case of **“Marwari Balika Vidyalaya vs. Asha Srivastava”** (SC); 2019 (4) Scale 600. The aforesaid judgment passed by the Supreme Court is distinguishable on facts. From reading of judgment in Marwari Balika Vidyalaya, it clearly transpires that in the aforesaid case what had come up for consideration of the Hon'ble Supreme Court was stipulation akin to Section 8(2) of Delhi School Education Act which provided for engagement and disengagement of teaching and non teaching staff of the private

aided and unaided educational institutions with the approval of the Director School Education. In the aforesaid case, the respondent before the Hon'ble Supreme Court had been terminated from the service without approval of the competent authority. Having regard to the similar statutory provisions of Section 8 (2), Hon'ble Supreme Court came to the conclusion that for violation of a statute, the writ petition under Article 226 would lie.

12. We have gone through the provisions of Section 20 of the Act of 2010. We find that Section 20 is quite different from Section 8 (2) of the Delhi Education Act. Section 20 does not cast any statutory obligation on the schools to frame and notify the terms and conditions of service of teaching and non-teaching staff and get them approved from the Director School Education. There is also no provision under School Education Act, 2002 which provides that for engagement and disengagement of teaching and non-teaching staff in the school, approval of the Director School Education is a *sine qua non*. In the absence of any such statutory prescription, the writ court could not have issued mandamus as prayed for by the petitioner.

13. For all these reasons, we find merit in this appeal and the same is allowed. The impugned order is set-aside and consequently the writ petition is dismissed.

(Mohd. Yousuf Wani)
Judge

(Sanjeev Kumar)
Judge

JAMMU
06.11.2024
Abinash

Whether the judgment is speaking? **Yes**
Whether the judgment is reportable? **Yes**