

A MARWARI BALIKA VIDYALAYA

v.

ASHA SRIVASTAVA & ORS.

(Civil Appeal No. 9166 of 2013)

FEBRUARY 14, 2019

B [ARUN MISHRA AND NAVIN SINHA, JJ.]

- C *Constitution of India: Art. 226 – Writ petition – Maintainability of – Termination of school teacher – Challenge to – Writ application filed by the school teacher against private school – Dismissed by the Single Judge of the High Court on the ground that the school was not a recognised primary school by State Government but a privately managed primary school, thus, the writ application was not maintainable – Division Bench held that the writ application was maintainable – Termination order was set aside and the school teacher was allowed to join appellant school with the full entitlement*
- D *of salary, allowances and service benefits – On appeal, held: Writ Application is maintainable even as against the private unaided educational institutions since providing education to children is a public function – Appointment was, at first instance, on probation for two years – Approval of the appointment from the District Inspector of Schools had been made with retrospective effect and no approval was obtained for the purpose of removal – Government 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 –*
- E *F Order of dismissal was passed in the most arbitrary manner without holding a departmental enquiry – Thus, the order of the Division Bench upheld – Issuance of direction to grant back wages to the school teacher – Service law.*

G *Committee of Management, Delhi Public School & Anr.*

*v. M.K. Gandhi & Ors. (2015) 17 SCC 353; Sushmita*

*Basu & Ors. v. Ballygunge Shiksha Samity & Ors.*

*(2006) 7 SCC 680 : [2006] 6 Suppl. SCR 506;*

*Satimbla Sharma & Ors. v. St. Paul's Senior Secondary*

*School & Ors. (2011) 13 SCC 760 : [ 2011] 10*

*SCR 203 - distinguished.*

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*Ramesh Ahluwalia v. State of Punjab & Ors. (2012) 12 SCC 331 : [2012] 12 SCR 315 ; Raj Kumar v. Director of Education & Ors. (2016) 6 SCC 541 : [2016] 1 SCR 697 ; Anoop Jaiswal v. Government of India & Anr. (1984) 2 SCC 369 : [ 1984] 2 SCR 453 – referred to.*

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**Case Law Reference**

[2012] 12 SCR 315	referred to	Para 11
[2016] 1 SCR 697	referred to	Para 11
(2015) 17 SCC 353	distinguished	Para 11
[2011] 10 SCR 203	distinguished	Para 17
[2006] 6 Suppl. SCR 506	distinguished	Para 18
[1984] 2 SCR 453	referred to	Para 22

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9166 D  
of 2013.

From the Judgment and Order dated 30.01.2009 of the High Court at Calcutta in A.P.O.T. No. 709 of 2001 in Writ Petition No. 889 of 2001.

Sanjiv Sen, Sr. Adv., Shabyashachi Patra, Sayan Ray, Soumo Palit, E M/S. Khaitan & Co., Advs. for the Appellant.

Arun K. Sinha, Swastik Verma, Sinha Shrey Nikhilesh, Suhaan Mukerji, Ms. Astha Sharma, Amit Verma, Dimple Nagpal, M/S. PLR Chambers And Co., Advs. for the Respondents.

The following Order of the Court was passed

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**O R D E R**

1. The main question for consideration in the appeal is as to maintainability of writ petition as against private school receiving grant in aid to the extent of dearness allowance. The appeal has been filed against the judgment and order dated 30.1.2009 passed by the Division Bench of the High Court of Calcutta whereby the appeal filed by respondent No.1 was allowed directing his reinstatement along with back wages.

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- A        2. The facts of the case are that respondent No.1 herein applied for the post of Assistant Teacher in the year 1985 and after the interview she was appointed as Assistant Teacher in the appellant-school on probation *w.e.f.* 01.04.1995. The school authority referred all requisite papers to the District Inspector of Schools concerned seeking approval on 31<sup>st</sup> March 1995. On 2<sup>nd</sup> January 1997 concerned District Inspector of Schools (Primary Education), Calcutta referred those papers to the Director of School Education, West Bengal for his opinion who in turn requested the District Inspector of Schools concerned to submit a declaration from respondent No.1 herein that she would not claim any arrear of salary. Respondent No.1 unwillingly agreed to such an undertaking.
- B        3. Thereafter, there was a delay in granting approval and respondent No.1 on 27.11.2000 filed a Writ Application No.3232 of 2000 before the High Court seeking Writ of Mandamus commanding the Director of School Education, West Bengal and concerned District Inspector of Schools to accord approval of the appointment. The High Court vide order dated 18.12.2000 in W.P. No.3232/2000 disposed of the Writ Petition with direction to Director of School Education to consider the matter with regard to approval of the appointment of respondent No.1 as Assistant Teacher in appellant school within a period of six weeks.
- C        4. The order passed in the Writ Petition was communicated to the appellant-school which resulted in a show cause notice being issued by the Secretary of the Managing Committee to respondent No.1 herein asking as to why she moved the said Writ Application impleading the District Inspector of Schools (Primary Education) Calcutta as a party in the proceeding, which as per their understanding caused breach of discipline of the school. Along with this letter order of suspension was issued and she was suspended for a period of 12 days *w.e.f.* 21.12.2000 to 01.01.2001.
- D        5. In her reply to the letters of the appellant school, respondent No.1 denied the charges against her. After the period of suspension was over, respondent No.1 reported to her duties. She was allowed to sign the attendance register but was restrained from taking classes. Respondent No.1 applied for leave and on 14.2.2001 she resumed her duties but she was not allowed to perform the duty. A letter was issued to her by the Secretary of the Managing Committee asking her not to attend duty from 15.02.2001. But she continued to attend school and

took the classes. On 19.02.2001 she was forcibly ousted from the school with the help of police and was asked to attend a meeting wherein she was threatened to face termination of service. On 20.2.2001 she was served with a letter of termination annexing two cheques.

6. Assailing the order of termination, respondent No.1 filed a Writ Application before the High Court. Learned Single Judge of the High Court vide order dated 20.8.2001 dismissed the W.P. No.889/2001 on the ground that as the concerned school was not a recognised primary school by State Government but a privately managed primary school, writ application was not maintainable. However, it allowed respondent No.1 to institute an appropriate suit for seeking relief claimed in the writ petition.

7. Challenging the dismissal of WP No.889/2001, respondent No.1 appealed before the Division Bench of the High Court. The Division Bench vide order dated 30.1.2009 in APOT No.709/2001 in W.P. No.889/2001 allowed the appeal preferred by respondent No.1 and set aside the termination order and allowed respondent No.1 to join appellant school within two weeks with the full entitlement of salary, allowances and service benefits as per law. This order of the Division Bench has been challenged before this Court.

8. It was urged by Mr. Sanjiv Sen, learned Senior Counsel appearing for the appellant that the Writ Application as against private unaided school was not maintainable in view of the decisions of this Court in *Committee of Management, Delhi Public School & Anr. v. M.K. Gandhi & Ors.* (2015) 17 SCC 353, *Sushmita Basu & Ors. v. Ballygunge Shiksha Samity & Ors.* (2006) 7 SCC 680 and *Satimbla Sharma & Ors. v. St. Paul's Senior Secondary School & Ors.* (2011) 13 SCC 760.

9. It was also submitted on behalf of appellant that the Single Judge or the Division Bench should have gone into the legality of the termination order and on the grounds on which the termination order had been passed. The respondent employee was guilty of insubordination and using foul language as mentioned in the order of termination. Learned counsel also pointed out that the explanation was asked from the respondent-employee but she could not submit a satisfactory explanation and consequently her services were terminated. He submitted that she was heard and there was no violation of principles of natural justice.

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- A 10. He also urged that no prayer was made in the writ application for grant of back wages and the Division Bench has not assigned any reason for granting relief of reinstatement in the instant case. Learned counsel prayed that back wages should not be granted in case reinstatement part is upheld.
- B 11. Mr. Arun K. Sinha learned counsel on behalf of the respondent-employee has relied upon the decision of this Court in *Ramesh Ahluwalia v. State of Punjab & Ors.* (2012) 12 SCC 331. He has also pressed into service the decision in *Raj Kumar v. Director of Education & Ors.* (2016) 6 SCC 541 to submit that approval of concerned Government authority was necessary for appointment, it was necessary for termination
- C also as found by the High Court, the termination was illegal and void. Back wages and reinstatement have been rightly ordered as no departmental enquiry was conducted before passing the order of termination.
- D 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 1<sup>st</sup> 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
- E F was necessary there is no doubt that approval for removal was also necessary, which was not obtained in the instant case.
- G 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
- H 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.”

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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.

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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:

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“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 Vandana 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)

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“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

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- A 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.
- B 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.
- C 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.
- D 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.
- E 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."
- F (emphasis supplied)
- G 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.
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16. Learned Senior Counsel relied upon the decision of this Court in *Committee of Management, Delhi Public School & Anr. v. M.K. Gandhi & Ors.* (*supra*) wherein the question of termination of services of teachers was involved. The Committee of Management filed a Civil Appeal in this Court against the decision of Allahabad High Court contending that the Delhi Public School, Ghaziabad was not a 'State' within the meaning of Article 12 of the Constitution. The question involved was that termination of service of teachers of a private school without conducting the enquiry was contrary to bye-laws. This Court held that the Writ Application was not maintainable as a private school is not 'State' under Article 12 of the Constitution. It is pertinent to mention here that the question of approval by Government authority was not involved in *M.K. Gandhi* (*Supra*). Thus, this decision is distinguishable.

17. In *Satimbla Sharma & Ors. v. St. Paul's Senior Secondary School & Ors.* (*supra*) relied upon on behalf of the appellant the question involved was whether an unaided private institution is subject to public law application and to what extent. The concept of equal pay for equal work was invoked for unaided institutions on the basis of parity with respect to the teachers in the Government and Government-aided schools. It was observed that the right to equality enshrined in Articles 14 and 39(d) of Constitution are available against 'State' only. It cannot be claimed against unaided private minority school. The teachers of the government school are paid mostly out of the Government funds and teachers of private unaided schools are paid out of fees and other resources of the private school. No relief can be given in absence of statutory provisions in favour of teachers in unaided private educational institutions. The school in question was not receiving any grant in aid from the Government of Himachal Pradesh and there was a provision in favour of teachers enabling them to claim an equal salary. The decision is wholly distinguishable on facts and proposition of law laid down has different field to operate.

18. Similarly, in *Sushmita Basu & Ors. v. Ballygunge Shiksha Samity & Ors.* (*supra*) the appellant was working in a recognised private educational institution in the State of West Bengal. The schools were not receiving grants in aid from the government but were getting dearness allowance component of the approved teachers working in the school. The issue was with respect to the applicability of recommendation of the First Pay Commission and that of Second Pay Commission though

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- A there was no statutory provision or even government order directing private unaided educational institutions to implement the recommendations of the Third Pay Commission, they were implemented by the schools as part of their agreement with the teachers. Though the management also implemented the recommendations of the Third Pay Commission in the sense that the salaries of the teachers were hiked in terms of the said report, the institution refused to give retrospective effect to the enhancement. The institution refused to give effect to the recommendations of the Third Pay Commission retrospectively w.e.f. 1.1.1998. Ultimately, this Court observed in *Sushmita Basu* (supra) that the Writ of Mandamus by the Court issued against the private institutions would be justified only if a public law element is involved.

19. The factual matrix in *Sushmita Basu* (supra) was different. It was with respect to the parity with the Government aided institution and the teachers working in unaided institutions and schools were not bound to implement recommendations of Pay Commission. No such proposition is involved in the present matter. Hence, the decision has no application to the instant case.

20. In view of the aforesaid discussion, we have no hesitation to hold that the Writ Application is maintainable as rightly held by the Division Bench of the High Court.

E 21. Coming to the question of relief of reinstatement and back wages, in view of the factual matrix of the instant case, we have taken note of the fact that the approval of the concerned authorities was not obtained and stigmatic order of dismissal was passed in the most arbitrary manner. It is not in dispute that no departmental enquiry was held.

F 22. In the case of *Anoop Jaiswal v. Government of India & Anr.* (1984) 2 SCC 369, the appellant was undergoing training as a probationer. On a particular day, all the trainees arrived late at the place wherein P.T./unarmed combat practice was to be conducted. An enquiry was initiated and the impugned order of discharge under Rule 12(b) of the IPS (Probation) Rules, 1954 on the ground of his unsuitability for being a member of the IPS. It was held that the order was punitive in nature which in absence of any proper enquiry. It was held as under:

G “13.....Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis

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of foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution.”

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23. In the present case, the employee has served for five years before dismissal from the service by a stigmatic order, passed without holding an enquiry, we cannot entertain the submission raised by learned Senior counsel for the Appellant-School that back wages should be denied. The manner in which termination had been made was clearly arbitrary and the order was illegal and void and thus back wages should follow.

24. Resultantly, the Civil Appeal is dismissed.

No costs.

Nidhi Jain

Appeal dismissed.