Rakesh Kumar Tomar vs D.A.V.College Managing Committ on 26 March, 2025

Author: Prateek Jalan

Bench: Prateek Jalan

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
% Decided on: 26.03.2025

+ W.P.(C) 19669/2005
RAKESH KUMAR TOMAR .....
Through: Mr. Anil Mittal, Mr. S
Mittal, Mr. Atul Chauh
Advocates.
versus

D.A.V.COLLEGE MANAGING COMMITTEE .....Respondent
Through: Mr. Anurag Lakhotia, Mr. Udit,
Advocates.
CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN
PRATEEK JALAN, J. (ORAL)

1. The original petitioner, Rakesh Kumar Tomar (deceased), was employed as an Accounts Clerk in the respondent No. 2- D.A.V. Centenary Public School, Sector - 56, Noida, Uttar Pradesh ["the School"]. He had filed this writ petition, directed against orders dated 13.09.2004 and 15.12.2004. By the order dated 13.09.2004, his services were terminated by the School on the ground of "Absence without Leave"

for a period of two years. By the communication dated 15.12.2004, his representation against the termination was also rejected.

2. Two preliminary objections have been taken by Mr. Anurag Lakhotia, learned counsel for the School. The first relates to the maintainability of the writ petition in respect of a service dispute against a private unaided school, and the second, to the territorial jurisdiction of this Court.

3. I have heard Mr. Anil Mittal, learned counsel for the petitioners (legal heirs of the original petitioner), and Mr. Anurag Lakhotia, learned counsel for the respondent, on the preliminary objections.

4. The first objection is based upon the judgment of the Supreme Court in St. Mary's Education Society v. Rajendra Prasad Bhargava,1 which concerns the maintainability of writ petitions relating to service disputes, at the instance of employees of private

educational institutions. The Court considered its earlier judgments on this question, and came to the conclusion that, even if imparting education is taken to be discharge of a public function, this would not attract the writ jurisdiction, for adjudication of individual grievances of employees, which are governed by contractual relationships.

5. The conclusions of the Court have been set out in paragraph 75 of the said judgment and read as follows:

"75. We may sum up our final conclusions as under:

75.1. 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. 75.2. 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 (2023) 4 SCC 498 [hereinafter, "St. Mary's"].

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. 75.3. 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.

75.4. Even if it be perceived that imparting education by private unaided school is a public duty within the expanded expression of the term, an employee of a non-teaching 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 non-teaching 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 non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered with 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. 75.5. 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."2 Emphasis supplied.

6. It is evident from the above, particularly paragraphs 75.2 and 75.3 of the judgment, that the only exception carved out by the Court is in cases where service conditions are regulated by statutory provisions or where the employer has the status of "State", within the expansive definition under Article 12 of the Constitution. In other cases, the Court has held that an ordinary contract of service with no statutory force or backing, cannot form the basis of a petition under Article 226 of the Constitution.

7. It may be noted that the Division Bench of this Court, in Bharat Mata Saraswati Bal Mandir Senior Secondary School v. Vinita Singh & Ors.3, distinguished the judgment in St. Mary's on the ground of applicability of Section 10 of the Delhi School Education Acts and Rules, 1973. In the present case, the respondent - School is not located within the jurisdiction of the National Capital Territory of Delhi, and the said legal position, therefore, does not prevail.

8. Resultantly, Mr. Mittal does not urge any statutory terms and conditions, governing the original petitioner's service. He only submits that the respondent - School is affiliated to the Central Board of Secondary Education ["CBSE"] and is, therefore, governed by the Bye- laws and Rules and Regulations of CBSE. This aspect too, as pointed out by Mr. Lakhotia, has been adverted to in the judgment in St. Mary's:

> "30. We may at the outset state that CBSE is only a society registered under the Societies Registration Act, 1860 and the school affiliated to it is not a creature of the statute and hence not a statutory body. The distinction between a body created by the statute and a body governed in accordance with a statute has been explained by this Court in Executive Committee of Vaish Degree College v. Lakshmi Narain 2023 SCC OnLine Del 3934.
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> [Executive Committee of Vaish Degree College v. Lakshmi Narain, (1976) 2 SCC 58 : 1976 SCC (L&S) 176] , as follows : (SCC p. 65, para 10) "10. ... It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words the position seems to be that the institution

> concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body."

31. As stated above, the school is affiliated to CBSE for the sake of convenience, namely, for the purpose of recognition and syllabus or the courses of study and the provisions of the 2009 Act and the Rules framed thereunder.

32. The contention canvassed by Respondent 1 is that a writ petition is maintainable against the Committee of Management controlling the affairs of an institution (minority) run by it, if it violates any rules and Bye-laws laid down by CBSE. First, as discussed above, CBSE itself is not a statutory body nor the regulations framed by it have any statutory force. Secondly, the mere fact that the Board grants recognition to the institutions on certain terms and conditions itself does not confer any enforceable right on any person as against the Committee of Management.

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35. Thus, where a teacher or non-teaching staff challenges the action of Committee of Management that it has violated the terms of contract or the rules of the Affiliation Bye-laws, the appropriate remedy of such teacher or employee is to approach CBSE or to take such other legal remedy available under law. It is open to 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 Bye-laws.

36. It needs no elaboration to state that a school affiliated to CBSE which is unaided is not a State within Article 12 of the Constitution of India [see Satimbla Sharma v. St Paul's Senior Secondary School [Satimbla Sharma v. St Paul's Senior Secondary School, (2011) 13 SCC 760 : (2012) 2 SCC (L&S) 75]]. Nevertheless the school discharges a public duty of imparting education which is a fundamental right of the citizen [see K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg. [K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg., (1997) 3 SCC 571 : 1997 SCC (L&S) 841]]. The school affiliated to CBSE is therefore an "authority" amenable to the jurisdiction under Article 226 of the Constitution of India [see Binny Ltd. v. V. Sadasivan [Binny Ltd. v. V. Sadasivan, (2005) 6 SCC 657 : 2005 SCC (L&S) 881]]. However, a judicial review of the action challenged by a party can be had by resort to the writ jurisdiction only if there is a public law element and not to enforce a contract of personal service. A contract of personal service includes all matters relating to the service of the employee -- confirmation, suspension, transfer, termination, etc. [see Apollo Tyres Ltd. v. C.P. Sebastian [Apollo Tyres Ltd. v. C.P. Sebastian, (2009) 14 SCC 360 : (2009) 5 SCC (Civ) 358 : (2010) 1 SCC (L&S) 359]]."4

9. The conditions of service of the original petitioner were, therefore, not governed by statutory framework, and St. Mary's clearly comes in the petitioner's way. The affiliation of the respondent

School to the CBSE is also therefore of no assistance to the petitioner.

10. There is a second impediment to entertaining the present writ petition, which arises out of paragraph 75.4 of the judgment in St. Mary's. It is apparent therefrom, that the Court has clearly distinguished the cases of teaching employees and non-teaching staff. The Court has held that employment of teachers can, if governed by statutory provisions, be considered integral to the discharge of public functions. In contrast, employment of non-teaching employees has expressly been construed not to be an inseparable part of the obligation to impart education. The present case concerns disciplinary proceedings against a non-teaching employee of a private unaided school, where removal is not regulated by statutory provisions. Such a case is directly and expressly covered by Emphasis supplied.

paragraph 75.4 of St. Mary's, where the Court has held that a writ would not lie.

11. The judgment in St. Mary's has been followed in a subsequent judgment of the Supreme Court in Army Welfare Education Society New Delhi v. Sunil Kumar Sharma & Ors5.

12. Mr. Mittal submits that the judgment in St. Mary's must be read in the light of earlier pronouncements of the Court, including Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Samark Trust v. V.R. Rudani6, Ramesh Ahluwalia v. State of Punjab7, and Marwari Balika Vidyalaya v. Asha Srivastava8, in all of which writ proceedings against private educational institutions were held to be maintainable, including in service related disputes. He submits that Ramesh Ahluwalia was, in fact, a case of a non-teaching employee.

13. I am unable to accede to this submission of Mr. Mittal, in view of the fact that all these judgments have, in fact, been considered in St. Mary's and Army Welfare. The judgments in Ramesh Ahluwalia and Marwari Balika Vidyalaya, upon which the greatest reliance is placed by Mr. Mittal, are specifically referenced and discussed in paragraphs 58 to 63 of St. Mary's. When earlier judgments of the Supreme Court have been considered and explained in a later judgment, this Court cannot ignore the later judgment, on the argument that it is inconsistent with the view taken earlier. Reference may made to the following observations of the Supreme Court in Gregory Patrao and Others vs. Mangalore Refinery 2024 SCC OnLine SC 1683, (hereinafter, "Army Welfare").

(1992) 2 SCC 691.

(2012) 12 SCC 331 (hereinafter, "Ramesh Ahluwalia").

(2020) 14 SCC 449 (hereinafter, "Marwari Balika Vidyalaya").

and Petrochemicals Limited and Others9.

> "16. This Court thereafter had considered the decisions in U.P. Awas Evam Vikas Parishad10 and Himalayan Tiles & Marble11 and has distinguished the same and has observed and held that the decisions in U.P. Awas Evam Vikas Parishad12 and

Himalayan Tiles & Marble13 shall not be applicable with respect to the acquisition under the KIAD Act, 1966. Once, this Court in the subsequent decision in Peerappa Hanmantha Harijan14 dealt with and considered the earlier decisions in U.P. Awas Evam Vikas Parishad15 and Himalayan Tiles & Marble16 and distinguished the same and observed and held with respect to the acquisition under the KIAD Act, 1966 that the allottee company can neither be said to be a "person interested" nor entitled for hearing before determination of compensation, the said ratio was binding upon the High Court. Thus, it was not open for the High Court to not follow the binding decision of this Court in Peerappa Hanmantha Harijan17 by observing that in the subsequent decision in Peerappa Hanmantha Harijan18 , the earlier decisions in U.P. Awas Evam Vikas Parishad19 and Himalayan Tiles & Marble20 have not been considered. The High Court has not noted that as such while deciding the case of Peerappa Hanmantha Harijan21 , this Court did consider the earlier decisions in U.P. Awas Evam Vikas Parishad22 and Himalayan Tiles & Marble23 and had clearly distinguished the same. Not following the binding precedents of this Court by the High Court is contrary to Article 141 of the Constitution of India. Being a subsequent decision, in which the earlier decisions were considered and distinguished by this Court, the subsequent decision of this Court was binding upon the High Court and not the earlier decisions, which were distinguished by this Court."24 (2022) 10 SCC 461.

(1995) 2 SCC 326.

(1980) 3 SCC 223.

Supra (Note 10).

Supra (Note 11).

(2015) 10 SCC 469.

Supra (Note 10).

Supra (Note 11).

Supra (Note 14).

Supra (Note 14).

Supra (Note 10).

Supra (Note 11).

Supra (Note 14).

Supra (Note 10).

Supra (Note 11).

Emphasis supplied.

14. The other preliminary objection raised by Mr. Lakhotia, was with regard to territorial jurisdiction. He also submits that the original petitioner was a workman-cadre employee, who ought to have invoked his remedies under the Industrial Disputes Act, 1947. As I have held that the first preliminary objection has to be upheld, I do not consider it necessary to enter into these submissions. All rights and contentions of the parties on these questions are left open.

15. The writ petition is disposed of, with liberty to the petitioners to agitate their grievances in appropriate proceedings in accordance with law.

16. Although this writ petition has been pending before this Court for a very long time, the question of maintainability has only recently been decided against the petitioners by the judgment in St. Mary's. In these circumstances, the petitioners will also be at liberty to raise this before the concerned forum, for exclusion of the period during which the present writ petition was pending, under Section 14 of the Limitation Act, 1963, or principles analogous thereto.

PRATEEK JALAN, J MARCH 26, 2025 'Bhupi/SS/Jishnu'/