IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Shekhar B. Saraf

W.P.A. 5544 of 2021
Bineeta Patnaik Padhi
Versus
Union of India & Ors.

For the Petitioner : Ms. Sonal Sinha, Adv.,
Mr. Avishek Prasad, Adv.

For the Union of India : Mr. Y.J. Dastoor, Ld. ASG,
Mr. Vipul Kundalia, Adv.,
Mr. Nilanjan Bhattacharya, Adv.,
Ms. Jayita Dhar, Adv.

Heard on : 08.03.2021, 12.03.2021, 18.03.2021 and 22.04.2021.

Judgment on : 01.06.2021

Shekhar B. Saraf, J.:

1. The petitioner, an educationist by profession, has been constrained to invoke the writ jurisdiction of this Court under Article 226 of the Constitution of India. The petitioner has averred that while she was discharging her duties as the Principal of Army Public School at Panagarh (arraigned as "Respondent No. 5" in this writ application and hereinafter referred to as the "said school") and whilst serving in her tenure as an extended probationer, she was terminated from such post in violation of both her fundamental

rights as well as certain statutory rights. This termination was effected on her by Chairman of the said school (hereinafter referred to as "Respondent No. 7").

2. In a bid to challenge her termination, the petitioner has pressed this writ application before this Court. However, when the matter was taken up for hearing on March 12, 2021, Mr. Y.J. Dastoor, learned Additional Solicitor General, appearing on behalf of the contesting Respondents 2 to 8, had demurred on the maintainability of the writ application itself.

3. In the opinion of Mr. Dastoor, such writ application was not maintainable for the forthright reason that the said school is a **private unaided educational institution** operated by the Army Welfare Education Society (arraigned as "Respondent No. 3" in this writ application and hereinafter referred to as "AWES"), a society registered under the Societies Registration Act 1860. In other words, Mr. Dastoor argued that since the said school was a private unaided school and the AWES which is managing it, is not a **public body**, in view of the mandate of Article 12 of the Constitution of India, neither the said school nor the society overseeing the affairs of the said school would be amenable to the writ jurisdiction of this Court.

4. An additional submission was also made by Mr. Dastoor; his specific submission being that the writ application was in realm of service matters and since the said school is not in the realm of rendering any **public duty**, the issuance of a writ to redress such *lis* would have limited applicability.

5. Ms. Sonal Sinha, learned counsel appearing on behalf of the petitioner, was nimble-footed in rebuffing the argument made by Mr. Dastoor. Ms. Sinha, on the other hand, prepared with precedents favouring her argument, submitted that the Respondents were indeed amenable to the Court's writ jurisdiction based on the exposition of the law laid down in such precedents.

6. Based on such line of argumentation, both parties placed multiple case laws on the point of **when** and to **whom**, a writ would lie under Article 226 of the Constitution of India. Suffice to say, the point of law is fairly settled by detailed judgments rendered both by the Supreme Court of India as well as various High Courts across the country. However, Ms. Sinha expressed her desire to file a detailed note of arguments on the point of demurral and such liberty was granted to all the parties.

7. After an extensive hearing over the course of two days, the hearing stood concluded and I had reserved the matter for judgment on April 22, 2021.

8. Therefore, in pursuance of the arguments advanced by the learned counsels appearing on behalf of both the parties, the issue which arises for the Court's consideration at this stage is whether the said school is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India in spite of being an unaided private educational institution and in light of being managed by the AWES, a society registered under the Societies Registration Act, 1860?

SUBMISSIONS OF BOTH PARTIES:

9. Ms. Sinha, learned counsel for the petitioner, commenced with an elucidation of the development of education laws in the country by emphasizing on the decision of the Supreme Court rendered in ***Unnikrishnan, J.P. –v- State of Andhra Pradesh***, reported in ***(1993) 1 SCC 645***, which unequivocally had held that the right to education was a fundamental right which finds its genesis from Article 21 of the Constitution of India.

10. Subsequent to the decision of ***Unnikrishnan JP (supra)*** in 1993, Ms. Sinha submitted that the Parliament of India, in its wisdom, passed the 86th Amendment Act in 2002 which introduced Article 21A into Part-III of the Constitution of India and enshrined the **right to education** as a **designated fundamental right**. Such an amendment made the right to education for all children between 6-14 years of age, a fundamental right. In furtherance of giving effect to such fundamental right, the Parliament passed the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as "RTE Act"). The State of West Bengal additionally, empowered by **Section 38** of the RTE Act, framed the West Bengal Right of Children to Free and Compulsory Education Rules, 2012 (hereinafter referred to as "WBRTE Rules").

11. Given the change in the development of education laws as stated in the foregoing paragraph, Ms. Sinha emphatically submitted that based on the

Supreme Court's decision in ***Marwari Balika Vidyalaya –v- Asha Srivastava***, reported in ***(2020) 14 SCC 449***, the Apex Court while examining the issue of termination of an Assistant Teacher in a private unaided institution, had held that a writ application is indeed maintainable in such cases even as against the private unaided educational institutions.

12. The Full Bench decision rendered by the Allahabad High Court in ***Roychan Abraham –v- State of U.P.*** reported in ***AIR 2019 All 96***, was also cited to submit that private institutions imparting education to students from the age of six years and onwards, including higher education perform a **public duty**; such a public duty was in the nature of State function and accordingly such institutions become amenable to the Court's writ jurisdiction under Article 226 of the Constitution of India. As a precursor to both ***Asha Srivastava (supra)*** and ***Roychan Abraham (supra)***, Ms. Sinha had cited that the Allahabad High Court in ***Rachna Gupta –v- Union of India*** reported in ***MANU UP 3494 2014*** had explicitly ruled that the Army Public School was, without ambiguity, amenable to the Court's writ jurisdiction. Important to note, a preliminary objection on maintainability of the writ petition was also taken in ***Rachna Gupta (supra)*** as was done in this case and was overruled by the Hon'ble Court.

13. Furthermore, Ms. Sinha then submitted that while it is an admitted fact that the AWES operates all Army Public Schools across the country; the individual schools, as the said school in this case, have to conform to the statutory compliances of the RTE Act, WBRTE Rules as well as the Affiliation

Bye-laws of the Central Board of Secondary Education to which such schools are affiliated. Highlighting such provisions namely Sections 2, 23 and 24, Ms. Sinha stressed on the aspect that the service of the petitioner was regulated under the RTE statute and contrary to the submission of Mr. Dastoor, learned Additional Solicitor General, was not merely a private contract of employment between the said school (employer) and the petitioner (employee).

14. Ms. Sinha also emphasized while being conscious of not admitting to such fact, that in ***arguendo***, even if the relationship between the petitioner and the respondent was considered to have emanated out of a contract, it would not shut the doors of this Court in invoking the writ jurisdiction under Article 226 of the Constitution. She relied on the Supreme Court ruling of ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust –v- V.R. Rudani*** reported in ***(1989) 2 SCC 691*** to suggest that a 'liberal approach' had been expounded by the Court in dealing with cases which may even find its genesis *inter alia* out of a contract; a writ in such cases would very well lie to redress such a grievance.

15. On the specific point of whether the Army Public School as an institution, was a public body, Ms. Sinha relied on the Supreme Court's decision in ***D.S. Grewal –v- Vimmi Joshi*** reported in ***(2009) 2 SCC 210***, to stress that the Apex Court had held that the said school was a 'public enterprise'.

16. Ms. Sinha also drew my attention specifically to the WBRTE Rules which prescribed that any appeal to be preferred by a teacher against the action of a school was to be preferred to the West Bengal Administrative (Adjudication of School Disputes) Commission, a statutory creature established by the West Bengal Act XXXIV of 2008 (hereinafter referred to as "Act of 2008"). While such Act of 2008 has been assented to by President of India and published in the Kolkata Gazette for publication, the same has not been notified. However, since the Act of 2008 has not been notified, **a relief before the writ court was the only efficacious remedy preferable** as the Act of 2008 specifically stated that disputes between teachers and students was **not envisaged to be agitated before civil courts**. With no alternative and efficacious remedy available, the petitioner has pressed this writ application seeking a redressal of this *lis*, submitted Ms. Sinha.

17. While concluding her submissions, Ms. Sinha on the point of a writ of mandamus being issued by this Hon'ble Court as a measure to enforce service conditions of teachers serving in private unaided educational institutions, relied on two coordinate bench decisions of this Court as follows:

a) ***Jayanti Mondal –v- State of West Bengal***, reported in ***2017 SCC Online Cal 362: (2017) 2 Cal LT 641***;

b) ***Sankar Prasad Mukherjee –v- Maulana Abul Kalam Ajad University*** reported in ***2019 SCC Online Cal 659***.

18. At the onset of his submissions, Mr. Dastoor, learned Additional Solicitor General, stated that in this case there is neither a violation of any statutory right nor any fundamental right guaranteed under Part III of the Constitution of India, as alleged by the petitioner. Mr. Dastoor submitted that the gamut of Army Public Schools in India are funded from Army Welfare Fund Welfare, a fund privately funded by the Army that is not a recipient of any financial contribution from the Union Government or any State Government. Mr. Dastoor has highlighted that this welfare fund is operated based on the financial contributions, received from various units of the Army, that is, from the army personnel themselves.

19. Based on such categorization, Mr. Dastoor submitted that the said school in question, cannot be considered to be a 'State' as defined under Article 12 of the Constitution of India. He also hastened to add that the implication which flowed from such an argument was that the rules framed by the AWES cannot be classified as 'statutory' in nature. In Mr. Dastoor's learned view, the jurisdiction under Article 226 could only be exercised by a constitutional court if, and only if, an element of public law is involved; this remains a *sine qua non* for the invocation of this Court's powers under Article 226 of the Constitution and such power is not to be trifled with merely to enforce private contracts of service/ or service related contracts entered into between two conscious and competent parties.

20. To lay emphasis to his line of argumentation, Mr. Dastoor relied on the following precedents:

    a) ***Shaheeda Begum –v- Principal, Army School, Secunderabad*** reported in ***2005 SCC OnLine AP 706: (2006) 3 SLR 448 (AP)***;

    b) ***Mrs. Sudha Soin –v- Union of India***, reported in ***2009 SCC OnLine P&H 2166***;

    c) ***V.K. Walia –v- Chairman Army School*** reported in ***2003 SCC OnLine All 1855: 2004 All LJ 530***;

    d) ***Abha Dave –v- Director, Army Institute of Management and Technology***, reported in ***2009 SCC Online Del 1652***;

21. As far as the second limb of his argument is concerned, Mr. Dastoor submitted that in the absence of any statutory requirement, a contract of employment cannot ordinarily be enforced against an employer and **the appropriate remedy, is not to file a writ application, but instead to sue for damages in a civil court of appropriate jurisdiction**. He highlighted the well-accepted exceptions to this rule; for instance, the case of a public servant dismissed from service in contravention to the protections offered under Article 311 of the Constitution of India, the reinstatement of a dismissed worker under Industrial/Labour law or dismissal effected by a statutory body in breach of obligations imposed by a statute. Mr. Dastoor has submitted that neither of these accepted exceptions have been made out in the case of the petitioner.

22. While concluding his arguments, Mr. Dastoor submitted that sight must not be lost of the fact that the petitioner was serving under a period of extended probation and it was legally permissible for both the AWES or the said school to evaluate the petitioner's performance by virtue of **her status as a probationer**, making her eligible for either a confirmation or a discharge from such service and in the event of a discharge, such contract could not be enforced through writ application under Article 226 of the Constitution of India. In support of his arguments, he relied upon the following case laws:

    a) ***Satya Naranyan Athya –v- High Court of Madhya Pradesh***, reported in ***(1996) 1 SCC 560***;

    b) ***State of U.P. –v- Bridge and Roof Co***. reported in ***(1996) 6 SCC 22***.

23. I have heard the learned counsels appearing on behalf of both the parties and have perused the materials on record.

ANALYSIS BY THE COURT:

Jurisdiction of the High Courts under Article 226:

24. The power of judicial review by the High Courts in the country emanates from Article 226 of the Constitution of India. Akin to the power bestowed to the Supreme Court of India under Article 32 which is placed in Part III of the Constitution of India thereby making it a fundamental right in its own standing, it is axiomatic to state that the scope of the power under Article 226 is much wider as compared to powers conferred under Article 32. The reason for such an exposition is an all-important, distinguishing feature: writ

applications under Article 32 can be pressed to enforce **only a fundamental right(s)**. However, in the case of Article 226, **in addition** to the enforcement of a fundamental right, a petitioner can also seek the enforcement of **any legal right.**

25. It would be quite apposite to fall back upon the exposition on this point of law made by Subba Rao, J. (as he then was) when he was speaking for the Constitution Bench in its decision rendered in ***Calcutta Gas Co. Ltd. –v- State of West Bengal*** reported in ***AIR 1962 SC 1044***:

> "5. The first question that falls to be considered is whether the appellant has locus standi to file the petition under Article 226 of the Constitution. The argument of learned counsel for the respondents is that the appellant was only managing the industry and it had no proprietary right therein and, therefore, it could not maintain the application. ***Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the court seeking a relief thereunder. The article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right***. In State of Orissa v. Madan Gopal Rungta [(1952) SCR 28] this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the court under Article 226 of the Constitution. In Chiranjit Lal Chowdhuri v. Union of India [(1950) SCR 869] it has been held by this Court that the legal right that can be enforced under Article 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the court for relief. ***We do not see any reason why a different principle should apply in the case of a petitioner under Article 226 of the Constitution. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself***, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified."

(Emphasis supplied)

26. A similar opinion was also voiced by P.N. Bhagwati, J. (as he then was) when the Full Bench of the Apex Court rendered its decision in the landmark case of ***Bandhua Mukti Morcha –v- Union of India***, reported in ***(1984) 3 SCC 161*** and more popularly known as the 'Bonded Labourers' Case':

> "15. We may point out that what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Article 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide terms as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Article 226. ***In fact, the jurisdiction of the High Courts under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights.***"

(Emphasis supplied)

27. A more recent view was reiterated by the Supreme Court in ***K.K. Saksena – v- International Commission on Irrigation & Drainage*** reported *in* ***(2015) 4 SCC 670***:

> "33. In this context, when we scan through the provisions of Article 12 of the Constitution, as per the definition contained therein, the "State" includes the Government and Parliament of India and the Government and legislature of each State as well as "all local or other authorities within the territory of India or under the control of the Government of India". It is in this context the question as to which body would qualify as "other authority" has come up for

consideration before this Court ever since, and the test/principles which are to be applied for ascertaining as to whether a particular body can be treated as "other authority" or not have already been noted above. ***If such an authority violates the fundamental right or other legal rights of any person or citizen (as the case may be), a writ petition can be filed under Article 226 of the Constitution invoking the extraordinary jurisdiction of the High Court and seeking appropriate direction, order or writ. However, under Article 226 of the Constitution, the power of the High Court is not limited to the Government or authority which qualifies to be "State" under Article 12. Power is extended to issue directions, orders or writs "to any person or authority". Again, this power of issuing directions, orders or writs is not limited to enforcement of fundamental rights conferred by Part III, but also "for any other purpose". Thus, power of the High Court takes within its sweep more "authorities" than stipulated in Article 12 and the subject-matter which can be dealt with under this article is also wider in scope.***"

(Emphasis supplied)

28. Therefore, when a preliminary objection has been raised *qua* maintainability of the writ application filed by the aggrieved petitioner at her own risk under Article 226 of the Constitution of India, it would augur well for all to be reminded of the basic premise on which such power is exercised by the constitutional courts. Therefore, if the petitioner has felt that she stands violated of her precious fundamental right or any legal right for that matter, it is this Court's bounden duty to inspect the propriety of the same. However, the hurdle which remains to be crossed is to examine if the said school, being an unaided school, as emphasized by Mr. Dastoor, is amenable to the Court's writ jurisdiction under Article 226 of the Constitution of India.

The aspect of discharge of a 'public duty/function':

29. It is not in dispute that the said school is an unaided school and is managed by the AWES. AWES, as has been previously stated, is a society registered under the Societies Registration Act, 1860. Whether such a categorization is sufficient to place the said school or the AWES beyond the contours of Article 12 of the Constitution of India requires a thorough examination. Merely registering a body under the Societies Registration Act, 1860 does not ensure that such body is beyond the pervasive edict of Article 12; a related case in point would be the case of ***B.S. Minhas –v- Indian Statistical Institute*** reported in ***(1983) 4 SCC 582***, whereby the respondent institute was declared to be an 'instrumentality' of the Union Government and classified as a State under Article 12 inspite of being a society registered under the Societies Registration Act, 1860.

30. Article 12 of the Constitution, which appears in Part III, states:

> "**12. Definition.—**In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

Initially, the definition of 'State' in Article 12 was considered to be straightforward. As the nation developed over time, multiple bodies have sprung up and these bodies suffice to say, serve manifold objects and discharge duties of myriad kinds to the citizenry. As a direct result of such

proliferation in the growth of such institutions, multiple rounds of litigation before the Supreme Court have produced a litany of tests, laid down by no less than Constitution Benches in a catena of judgments, in order to construe the terms 'local authorities' as well as 'other authorities', as stated in Article 12 of the Constitution of India, extracted above.

31. Mr. Dastoor had argued that the AWES was not a statutory body nor are its relations governed by a statute and for this reason alone, AWES or its educational institutions are not a 'State' within the meaning of Article 12 of the Constitution of India. Ms. Sinha, on the other hand, had relied upon ***V.R. Rudani (supra)***. The Supreme Court in the case had ruled very clearly stating that a writ of mandamus could lie to **any person or authority performing a public duty and owing a positive obligation to the affected party**, wherein such a duty need not be imposed by statute. The Court had held:

> "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." [Judicial Review of Administrative Action, 4th Edn., p. 540] ***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 appellants on the maintainability of the writ petition."

(Emphasis supplied)

32. Therefore, what follows is the fact that even if AWES was considered to be a private body/authority, a writ of mandamus under Article 226 of the Constitution could be issued to the same if it were proved that it is performing a public duty and it owed a positive obligation to an affected party. The reason for such permissibility is the **phraseology of Article 226 itself**. The Supreme Court had enunciated the implications of such an exposition in a detailed manner in ***Binny Ltd. –v- V. Sadasivan***, reported in ***(2005) 6 SCC 657*** and had held:

> "11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, ***Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function.*** The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. ***At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private***

authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest...

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. ***This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action***. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England, 3rd Edn., Vol. 30, p. 682,

"1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point."

(emphasis supplied)

33. Therefore, the major principles which emerge from ***V.R. Rudani (supra)*** and ***V. Sadasivan (supra)***, for the Court's consideration are as follows:

a) A writ of mandamus can be issued to a **private body/authority** under Article 226 of the Constitution of India.

b) Such a writ can only be issued to such a private body/authority if such an authority is **discharging a 'public function'** and the decision sought to be corrected or enforced must be in discharging a public function.

c) The scope of mandamus is determined by the **nature of the duty** to be enforced, rather than the **identity of the authority** against whom it is sought.

d) A body is performing a **'public function**' when it seeks to **achieve some collective benefit for the public or a section of the public** and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or **participate in social or economic affairs in the public interest**.

e) If the private body is discharging a public function and **the denial of any right is in connection with the public duty** imposed on such body, the public law remedy can be enforced.

f) The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be a public law element in such action.

34. As a result of these principles, what patently stands out is the necessity to examine a sole criterion, that is, if the AWES was discharging a **public duty** by operating the Army Public Schools, as is the case with the said school, through its supervision, management and financing. Mr. Dastoor's argument *apropos* the nature of AWES – private or otherwise- now appears to be nothing more than surplusage.

35. As recorded above, Ms. Sinha had submitted that the Parliament of India, in its wisdom, passed the 86th Amendment Act in 2002 which introduced Article 21A into Part-III of the Constitution of India and enshrined the **right to education as a fundamental right** for all children between 6-14 years of age. In furtherance of giving effect to such fundamental right, the Parliament passed the RTE Act, 2009 which has been in effect from April 1, 2010 onwards. Section 2(n) of the RTE Act, defines "school" in the following terms:

> "(n) "school" means any recognized school imparting elementary education and includes—
> (i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) **an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority**;"

(emphasis supplied)

36. Therefore, the organic deduction that follows is that since the said school which is run by AWES, being an unaided school, by virtue of the Section 2(n) of the RTE Act, the said school had come to discharge a public duty as was cast upon it by the said statute with effect from April 1, 2010. **Such a public duty stands imposed, in my opinion, in terms of both Article 21A of the Constitution of India as well as the RTE Act which gave effect to the fundamental right in unequivocal terms**. Unfortunately, as a result, all the four precedents cited by Mr. Dastoor in paragraph 20 above, prove to be inconsequential to his benefit as all these decisions had been rendered much prior to the coming into effect of the RTE Act, that is, prior to April 1, 2010; not to mention that these judgments did not have any binding effect on this Court, as per the doctrine of precedent.

37. Furthermore, in my opinion, in light of the law laid down in ***Asha Srivastava (supra)*** relied upon by Ms. Sinha, **the issue of a private unaided educational institute being amenable to the writ jurisdiction of this Court is no longer *res integra*.** The Supreme Court was seized with

this significant issue wherein the facts of that case were that an Assistant Teacher, working for gain in a private unaided educational institution, was terminated from such service by a stigmatic order and without either procuring the approval of pertinent authorities or holding a disciplinary enquiry. The Supreme Court had relied on its former decisions rendered in ***Ramesh Ahluwalia –v- State of Punjab***, reported in ***(2012) 12 SCC 331*** and ***Raj Kumar –v- Director of Education***, reported in ***(2016) 6 SCC 541***, and had ultimately held:

> "***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.***"

(emphasis supplied)

38. Subsequently, a learned Single Judge of the Jammu & Kashmir High Court had ruled on a similar case (termination of a teacher serving under probation) in ***Satvinder Singh –v- Presentation Convent Senior Secondary School***, bearing W.P. (C). No. 971/2020 dated August 4, 2020 wherein the learned Single Judge had relied explicitly on ***Asha Srivastava (supra)*** to hold that the respondent private unaided institution was amenable to the Court's jurisdiction under Article 226 of the Constitution of India. Thus, this exhibition clearly demonstrates that the law as laid down in ***Asha Srivastava (supra)*** now makes it binding upon all High Courts to give effect to it, in terms of Article 141 of the Constitution of India. Additionally, the Full Bench of the Allahabad High Court in ***Roychan Abraham (supra)***, upon a reference made by a learned Single Judge, had also relied on ***Ramesh***

Ahluwalia (supra) to reach the conclusion that private institutions imparting education to students were discharging a public duty and accordingly, were amenable to the writ jurisdiction of the Court under Article 226 of the Constitution.

39. However, the ordeal for the Respondents does not end here. The Supreme Court in ***D.S. Grewal (supra)***, had in paragraph 20 of its judgment dated December 17, 2008, noted explicitly that the Army Public School or the said school was a '**public enterprise**' and had directed the Uttarakhand High Court to dispose of the pending writ petition as expeditiously as possible. In deference to the same, the Division Bench of the Uttarakhand High Court in ***Km. Vimi Joshi –v- Chairman, School Managing Committee*** reported in **2010 SCC OnLine Utt 2462** by an order dated September 3, 2010 had ruled:

> "9. It was contended on behalf of the Management Committee that the School is not amenable to the jurisdiction of Writ Court. It was contended that the Division Bench of another Court has held that it is not an Authority within the meaning of Article 12 of the Constitution of India. ***In paragraph-20 of the judgment of Hon'ble Supreme Court, referred above, the Hon'ble Supreme Court, in no uncertain terms, has held that the School is a 'Public Enterprise'. In view of such pronouncement of the Hon'ble Supreme Court, we hold that the School is an Authority within the meaning of Article 12 of the Constitution of India and, accordingly, is answerable for each of its actions, which is tainted.***"
>
> (Emphasis supplied)

40. Therefore, based on the law declared by the Supreme Court in ***D.S. Grewal (supra)***, the said school was declared to be a 'public enterprise' much prior to

the coming into effect of the RTE Act, 2009 and this therefore, also becomes a declaration of the law under Article 141 of the Constitution of India and hence, becomes binding on this Court. As enunciated by the Uttarakhand High Court order in ***Km. Vimi Joshi (supra)*** which was in deference to the Supreme Court's declaration of the law, the said school in Panagarh is also held to be an authority within the meaning of Article 12 of the Constitution of India, as well as in line with the law laid down in ***D.S. Grewal (supra)***. **The sole issue before the Court is so answered.**

41. Having held so, Mr. Dastoor's interpretation of the law whereby a contract of employment cannot ordinarily be enforced against an employer and the appropriate remedy, is not to file a writ application, but instead to sue for damages in a civil court of appropriate jurisdiction deserves an examination.

42. An important caveat was appended by the Supreme Court in ***K.K. Saksena (supra)*** whereby the Court had ruled that even if an authority was deemed to be a 'State' under Article 12 of the Constitution, **the constitutional courts before issuing any writ, particularly that of mandamus, must satisfy that such impugned action of the authority concerned which is under challenge, forms a part of the public law as opposed to private law**. The Supreme Court had held:

> "43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "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 a 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. ***The reason is obvious. A 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.***"
>
> (Emphasis supplied)

43. Relying upon ***K.K. Saksena (supra)***, the Supreme Court in ***Ramakrishna Mission –v- Kago Kunya*** reported in ***(2019) 16 SCC 303*** had held that:

> "34. ***Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision***. Hence, for instance, in K.K. Saksena this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed."
>
> (Emphasis supplied)

Reading the 'Legislative Intent': The scheme of the RTE Act

44. Therefore based on the principles outlined in ***K.K. Saksena (supra)*** as well as ***Kago Kunya (supra)***, the overarching implications of the RTE Act requires a thorough examination to fathom if there is a character of public law involved in the present *lis*, which would permit the Court to exercise its

powers of judicial review under Article 226 of the Constitution of India. At this juncture, I am reminded of the omnipresent words of the House of Lords which were used in describing the meaning of 'legislative intent' and the means of interpreting the same. This was laid down in the well-known precedent of ***Salomon –v- Salomon Co. Ltd.***, reported in ***[1897] AC 22*** at page 38 to the following effect:

> "…"Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication…"

45. A bare perusal of the schematics of the RTE Act, exhibits that the legislative intent of the Parliament was to ensure that teachers were not left in the lurch in situations and their **grievances in school disputes**, would have to be addressed satisfactorily. **Specific provisions of the RTE Act lay down with utmost clarity, that compliance with the principles of natural justice are a must while specific grievance redressal mechanisms would be laid down by the 'appropriate government' as defined in the RTE Act**; sections 23 and 24 of the RTE Act states:

> "**23. Qualifications for appointment and terms and conditions of service of teachers.**—(1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorised

by the Central Government, by notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years.

3[Provided further that every teacher appointed or in position as on the 31st March, 2015, who does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of four years from the date of commencement of the Right of Children to Free and Compulsory Education (Amendment) Act, 2017].

(3) The salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed.

24. Duties of teachers and redressal of grievances.—(1) A teacher appointed under sub-section (1) of section 23 shall perform the following duties, namely:—

(a) maintain regularity and punctuality in attending school;

(b) conduct and complete the curriculum in accordance with the provisions of sub-section (2) of

section 29;

(c) complete entire curriculum within the specified time;
(d) assess the learning ability of each child and accordingly supplement additional instructions, if
any, as required;
(e) hold regular meetings with parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other relevant information about the child; and
(f) ***perform such other duties as may be prescribed***.
(2) ***A teacher committing default in performance of duties specified in sub-section (1), shall be liable to disciplinary action under the service rules applicable to him or her:***
Provided that before taking such disciplinary action, reasonable opportunity of being heard shall be afforded to such teacher.
(3) ***The grievances, if any, of the teacher shall be redressed in such manner as may be prescribed.***"

(emphasis supplied)

46. **Entry 25** in the **Concurrent List** of Seventh Schedule of the Constitution of India which makes '**Education**' a shared subject between the Union and States; in a bid to ensure decentralization of the grievance redressal mechanism of teachers, the RTE Act also envisaged **that State Governments be empowered to 'prescribe' and frame rules in this regard**.

47. **Section 2(a)** of the RTE Act defines an 'appropriate Government' as:

"(a) "appropriate Government" means—

(i) in relation to a school established, owned or controlled by the Central Government, or the administrator of the Union territory, having no legislature, the Central Government;

(ii) ***in relation to a school, other than the school referred to in sub-clause (i), established within the territory of—***

(A) a State, the State Government;

(B) a Union territory having legislature, the Government of that Union territory;"

Section 2(l) of the RTE Act defines **'prescribed'** to mean '**prescribed by rules made under this Act.**

Clause (n) to sub-section (2) of Section 38 of the RTE Act provides the appropriate Governments with the power to make subsidiary Rules with regard to such grievance redressal mechanism, in the following terms:

"**38. Power of appropriate Government to make rules**.—(1) The appropriate Government may, by notification, make rules, for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:—

(a) **

(l) the salary and allowances payable to, and the terms and conditions of service of, teacher, under sub-section (3) of section 23;

(m) the duties to be performed by the teacher under clause (f) of sub-section (1) of section 24;

(n) the manner of redressing grievances of teachers under sub-section (3) of section 24**;**

(r) **"

48. Accordingly, in pursuance of the powers conferred under **Section 38** of the RTE Act, the State of West Bengal framed the WBRTE Rules in 2012, which have been in effect since March 16, 2012. Particularly, **Sub-clauses (xiii), (xiv), (xv), (xvi), (xvii) and (xviii) to clause (g) under sub-rule (15) to Rule 10 of the WBRTE Rules** deals *inter alia* with pointed aspects of *recruitment of teachers, the publication of service rules and leave rules along with provisions pertaining to disciplinary proceedings*:

> "**10. Authority, form and manner of making applications for certificate of recognition under sub section (1) of section 18 and manner of giving hearing under second proviso to clause (3) of section 18.**
> ***
> ***
> (15) Every school seeking recognition under the section 18 shall, in addition to the requirements of the Board to which it is to be recognised or seeks to be affiliated to, abide by the following conditions:—
> ***
> ***
> (g) that the applicant school shall
>
> (xiii) comply with the rules and regulations, and satisfy the minimum qualification norms set by the National Commission for Teacher Education to the teachers' recruitment for the satisfaction of the recognizing authority;
> (xiv) have recruited teachers as per the staff pattern and qualifications specified by the State Government or the Board with which it is affiliated, whichever is higher;
> (xv) ***have a duly published service rules and leave rules for the teaching and non-teaching staff;***
> *(xvi)* ***follow the provisions relating to disciplinary proceedings in the manner as may be directed by the Board***;
> (xvii) have a determined the pay structure of its teaching and non-teaching staff in such manner as may be directed by the State Government;
> (xviii) have provisions for contributory provident fund and gratuity to the teaching and nonteaching staff;"

49. The grievance redressal mechanism for teachers, too, was prescribed by the State Government under the WBRTE Rules, as such burden was placed on the State Government to prescribe such a mechanism. **Rule 17** of the WBRTE Rules, as a result, conspicuously deals with the *grievance redressal mechanism* of teachers:

> "**17. Manner of redressing grievances of teachers under sub-section (3) of section 24.**—(1) Any grievance by a teacher of any school or a body of teachers shall be first addressed in writing to the School Management Committee of the concerned school, and the School Management Committee shall address such grievance by passing a reasoned decision within 4 (four) weeks of receipt of such complaint.
>
> (2) Where the School Management Committee fails to address the grievance or where the teacher is dissatisfied with the decision, appeal may be made to the West Bengal Administrative (Adjudication of School Disputes) Commission."

50. In juxtaposition to this scheme of the RTE Act and the WBRTE Rules, an interesting aspect arises for consideration by the Court. Paragraph 19 of the appointment letter of the petitioner dated June 19, 2019 had the following stipulation:

> "*19. You will redress grievances, if any through Chairman, School Administration and Management Committee. The decision of the Chairman shall be final and binding on you. It may be noted that Army Public School Panagarh comes under the category of Unaided Private*

School (illegible) and it is not a Government Institute. Legal Proceedings/Litigations are discouraged."

51. While the first part of Paragraph 19 *apropos* the initiating part of the grievance redressal mechanism was in compliance with Rule 17 of the WBRTE Rules, wherein the appropriate authority in dealing with the grievance of the petitioner was the School Administration and Management Committee, the latter half of the paragraph which attached finality to its decision and the assertion that the said school is an unaided private school and the discouraging attitude towards litigation is patently in the teeth of the statutory prescriptions of both the RTE Act, WBRTE Rules as well as the law laid down by the Supreme Court in ***D.S. Grewal (supra)*** and ***Asha Srivastava (supra)***. It is axiomatic to state that a contractual provision cannot run afoul of a statute as laid down distinctly under Section 23 of the Indian Contract Act, 1872, and so is the case herein.

52. This is squarely in opposition to Mr. Dastoor's interpretation of the law whereby a contract of employment cannot ordinarily be enforced against an employer and the appropriate remedy, is not to file a writ application, but instead to sue for damages in a civil court of appropriate jurisdiction. There is a patent manifestation of the violation of the petitioner's rights under the RTE Act read with the WBRTE Rules which makes it a fit case for judicial review under Article 226 of the Constitution of India. Therefore, I am of the informed opinion, that the quoted provisions of the RTE Act read with quoted

provisions of the WBRTE Rules, indeed regulates the contract of service of the petitioner, and this thereby falls within the exception as stated in ***Kago Kunya (supra).***

53. Ms. Sinha had pointed out that the statutory body under the Act of 2008 was presently not in existence as its parent Act was yet to be notified in spite of having been assented to by the President of India and having been published in the Calcutta Gazette Extraordinary dated December 29, 2011. This in Ms. Sinha's submission, has hindered the petitioner's right in exercising an appeal to the said Commission.

54. In light of the West Bengal Administrative (Adjudication of School Disputes) Commission Act, 2008 not having been notified as on date, the only efficacious and alternate remedy at the disposal of the petitioner for the redressal of her grievance was to indeed file a writ application under Article 226 of the Constitution of India.

55. **Thus, to summarize the findings of the Court**:

a) The said school, Army Public School, Panagarh, is held to be a 'State' under Article 12 of the Constitution in pursuance of the law laid down in ***D.S. Grewal (supra)***.

b) In spite of being an private unaided educational institution, since it has been discharging a public duty under the prescriptions of a statute and subsidiary rules made under it, that is, the RTE Act and the

WBRTE Rules, the said school is amenable to the Court's writ jurisdiction under Article 226 of the Constitution of India, as per the law laid down in ***Asha Srivastava (supra)***.

c) As per the principle laid down in ***K.K. Saksena (supra)***, even if an authority is deemed to be a 'State' under Article 12 of the Constitution, the constitutional courts before issuing any writ, particularly that of mandamus, must satisfy that such impugned action of the authority concerned which is under challenge, forms a part of the public law as opposed to private law. Accordingly, after the coming into effect of the RTE Act, the said school was guided by the same along with the WBRTE Rules vis-à-vis compliance with rules of natural justice as well as a prescribed grievance redressal mechanism. This gives it a distinct characterization of public law.

d) The examined provisions of the RTE Act read with provisions of the WBRTE Rules, indeed regulates the contract of service of the petitioner, and this thereby falls within the exception as stated in ***Kago Kunya (supra).***

e) *Lastly,* in light of the West Bengal Administrative (Adjudication of School Disputes) Commission Act, 2008 not having been notified as on date, the only efficacious and alternate remedy at the disposal of the petitioner for the redressal of her grievance was to file a writ application under Article 226 of the Constitution of India.

56. In conclusion thereof, the **preliminary objection raised on the grounds of maintainability of the present writ application is hereby rejected**. I also make it clear that a part of the arguments furnished by Mr. Dastoor, in paragraph 22 of this judgment, vis-à-vis the propriety of terminating the petitioner's services while she was a probationer, touches upon the merits of the matter and accordingly, I have refrained from delving into the same.

57. In conclusion thereof, the Respondent authorities are granted a period of four weeks to file their affidavits-in-opposition from date of this judgment. Affidavits-in-reply, if desired to be submitted by the writ petitioner, be submitted within a period of two weeks thereafter.

58. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Shekhar B. Saraf, J.)

Later

I am given to understand that a new principal has been appointed in place and stead of the petitioner. Her appointment is also as a probationer. In light of the fact that the judgment in this case would have a direct impact upon the person newly appointed, the petitioner is directed to add the newly appointed person as a party to this writ petition and duly serve the amended copy of the writ petition along with the order passed in court today upon the added respondent. The added respondent shall also be at liberty to file an

affidavit-in-opposition as directed above. I further make it clear that all parties shall abide by the result of this writ petition.

(Shekhar B. Saraf, J.)