

Chief Justice's Court

Case :- SPECIAL APPEAL No. - 115 of 2024

Appellant :- C/M Pratibha Inter College , Barabanki Thru. Manager Sri Indra Kumar and another

Respondent :- State of U.P. Thru. Prin. Secy. Deptt. of Secondary Education U.P. Govt. Lko. and others

Counsel for Appellant :- Girish Chandra Verma, Manvendra Singh, Raman Kumar

Counsel for Respondent :- S.C. Anand Kumar Singh, Sharad Pathak

Hon'ble Arun Bhansali,Chief Justice

Hon'ble Jaspreet Singh,J.

(Per: Arun Bhansali, CJ)

1. This appeal is directed against the order dated 10.05.2024 passed in Writ-A No. 3478 of 2024, whereby learned Single Judge has overruled the preliminary objection raised by the appellants regarding maintainability of the writ petition against the appellant institution.

2. The writ petition was filed by respondent no.4, aggrieved by the order dated 09.04.2024 passed by appellant no.1, whereby the services of respondent no.4 have been terminated and further an advertisement dated 16.04.2024 was also challenged, whereby the date of interview for appointment of Principal was fixed.

3. When the matter came up before the learned Single Judge, preliminary objection was raised by the appellants that the services of the respondent no.4, who was working on the post of Principal in an unaided recognized college, have been terminated by the impugned order dated 09.04.2024 and as his services are not governed by any statute, the dispute is a private one between the Committee of Management and the respondent no.4 and as the appellant institution is unaided, the terms and

conditions of the services of respondent no.4 are not governed under the provisions of U.P. Intermediate Education Act, 1921 (Act of 1921) and, therefore, there is no co-relation between the public function and public law. It is also contended that as the institution is unaided, same does not come under the purview of ‘State’ under Article 12 of the Constitution of India and, therefore, the petition deserves dismissal. Strong reliance was placed on the judgment of Hon’ble Supreme Court in **St. Mary’s Education Society and another vs. Rajendra Prasad Bhargava and others**, (2023) 4 SCC 498.

4. The submissions made pertaining to maintainability were contested by the respondent no. 4 *inter alia* with the submissions that the institution in question is a recognized Intermediate College and provisions of the Act of 1921 and Regulations made thereunder are applicable. It was further submitted that the services of respondent no. 4 are governed by the Regulations specifically meant for teachers of unaided recognized schools named as वित्तविहीन विद्यालयों के शिक्षकों के सेवा के लिए नियमावली, 2000 (Regulations, 2000). Further submissions were made that Section 9 (4) of the Act of 1921 empowers the State Government to pass such order or take such other action consistent with the provisions of the Act as it deems necessary and, therefore, it cannot be said that no public element was involved. Reliance was placed on the judgement of Hon’ble Supreme Court in **Marwari Balika Vidyalaya vs. Asha Srivastava and others**, 2020 (14) SCC 449.

5. After hearing the parties, learned Single Judge by the order impugned, came to the conclusion that the institution was a recognized College, recognition was granted under Section 7-A of the Act of 1921, in view of the fact that the procedure was prescribed by Regulations, 2000 for appointment of Teachers, such institution could be termed as having the status of ‘State’ within the expansive definition under Article 12 of the Constitution of India. The judgement in the case of **St. Mary’s Education**

Society (supra) was distinguished on the ground that in the said judgement, the institution was private unaided school, however, in the present case, the same was unaided recognized school under the Act of 1921. Further by following the decision in the case of **Marwari Balika Vidyalaya** (supra), the preliminary objection about maintainability was rejected.

6. Learned counsel for the appellants made vehement submissions that the controversy in the present appeal was squarely covered by the judgment in the case of **St. Mary's Education Society** (supra), wherein it has been categorically laid down by Hon'ble Supreme Court that unaided private schools though affiliated to CBSE is not 'State' within the meaning of Article 12 and, therefore, the determination made by learned Single Judge is *ex facie* contrary to the said judgement. Further submissions were made that insofar as the judgement in the case of **Marwari Balika Vidyalaya** (supra) is concerned, in the said case, the private school was receiving grant-in-aid from the Government and, therefore, the said judgement had no application to the facts of the present case. Learned counsel emphasised that the recognition granted by the State is only for the purpose of preparing candidates for admission to the Board's examinations as defined under Section 2 (d) of the Act of 1921.

7. With reference to Regulations, 2000, submissions were made that a bare look at the Regulations would reveal that the same only provides for qualification, procedure for selection, disciplinary proceedings, termination of services and resignation/abolition of post, and as there is no interference in the appointment and termination by the State Government, the same by itself cannot bring in involvement of public element. Learned counsel emphasised that the case was covered by judgement in the case of **St. Mary's Education Society** (supra) and referred to paras 62, 63, 64 wherein judgement in the case of **Marwari Balika Vidyalaya** (supra) was

distinguished and the conclusions drawn in para 75.2 of the said judgement.

8. It was submitted that the appeal against the order impugned was maintainable, as the same is in the nature of final order, whereby learned Single Judge has decided the issue of maintainability of the petition and, therefore, the objection raised in this regard has no substance. It was prayed that the appeal be allowed and the judgement impugned be set aside and consequently, the writ petition be dismissed as not maintainable.

9. Learned counsel for the respondents made submissions that the plea sought to be raised has no substance. It was submitted that as the issue pertaining to maintainability only has been decided, the appeal preferred against the said order is not maintainable as the learned Single Judge is yet to decide the petition on the merits of the dispute. On merits, it was submitted that in view of provisions of Article 21-A of the Constitution of India, the institution in question despite being unaided recognized institution is performing an essential public duty and, therefore, the same would fall within the definition of 'State' under Article 12 of the Constitution of India and the issue raised apparently has no substance.

10. Learned counsel submitted that the definition of institution under the Act of 1921 encompasses both aided and unaided institutions and that once the recognition is granted under the Act of 1921, the institution, cannot claim itself to be not amenable to judicial review of this Court under Article 226 of the Constitution of India. It was submitted that the Regulations, 2000, which are clearly applicable to the appointment of the respondent, clearly brings the aspect of termination of services of a part time teacher within the realm of public element and the submissions made to the contrary has no substance.

11. Learned counsel submitted that the judgement of Full Bench of this Court in **Rojchan Abraham vs. State of U.P.**, AIR 2019 All 96 has laid

down that private institutions imparting education to students from the age of six years onwards including higher education perform public duty, primarily a State function and, therefore, are amenable to judicial review of the High Court under Article 226 of the Constitution of India and, therefore, the plea raised in this regard has no substance. It was prayed that the appeal be dismissed as not maintainable and/or on merits.

12. We have considered the submissions made by learned counsel for the parties and have perused the materials available on record.

13. Insofar as the issue of maintainability of the present appeal is concerned, in view of the fact that the learned Single Judge, after hearing the parties at length, has conclusively decided the issue pertaining to maintainability of the writ petition, the said order impugned is final in nature, insofar as the maintainability of the writ petition is concerned and, therefore, it cannot be said that the present appeal would not be maintainable.

14. The entire emphasis of counsel for the appellants has been that the issue as raised pertaining to maintainability was squarely covered by the judgement in the case of **St. Mary's Education Society** (*supra*) and, therefore, the petition was liable to be dismissed as not maintainable. Hon'ble Supreme Court in the case of **St. Mary's Education Society** (*supra*), while exhaustively dealing with the issue, came to the conclusion that the Society involved in the said case, was affiliated to the Central Board of Secondary Education ('CBSE') and was governed by Rules and Bye-laws and had its own Bye-laws pertaining to the service conditions for the employees of the school, service rules for teaching and non-teaching staff and was not receiving any aid or had any control of the Government or any instrumentality of the Government. Reference was made to CBSE affiliation Bye-laws dealing with the appointments, code of conduct, disciplinary proceeding, procedure for imposing major penalty

and it was found after referring to various judgements on the issue that terms and conditions of service mentioned in the CBSE affiliation Bye-laws had no force of law and, therefore, the respondent in the said case could not find a cause of action on any ‘breach of law’ but only on ‘breach of contract’ and as such no public law element was involved.

15. The judgement in the case of **Marwari Balika Vidyalaya** (*supra*) was distinguished on the ground that while Bye-law 49(2) applicable in **St. Mary's Education Society** provided that no order with regard to major penalty shall be made by the disciplinary authority except after receipt of the approval of the Committee of the school, whereas in the case of **Marwari Balika Vidyalaya**, the same required approval of the State Government. The Court summed up its conclusions as under:-

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

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."

16. It would be seen from the conclusions drawn and relied on by both the learned counsel for the parties, wherein the appellants have relied on para 75.2, the respondent has relied on para 75.3 of the said judgement that Hon'ble Supreme Court has laid down that where the service conditions were regulated by the statutory provisions or 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, the petitions would be maintainable and in case, the matter relating to service is not

governed or controlled by the statutory provisions, the petitions would not be maintainable.

17. In the present case, it is not in dispute that the appellant institution falls within the definition of 'institution' as defined under Section 2 (b) of the Act of 1921, wherein institution means a recognised Intermediate College, Higher Secondary School or High School, and includes, where the context so requires, a part of an institution. It is also not in dispute that the appellant institution is recognized under the provisions of Section 7-A of the Act of 1921 and the provisions of Section 7-AA pertaining to employment of part-time teachers or part-time instructors are applicable to the said institution. For the purpose of applicability of provisions of Section 7-AA of the Act of 1921, the fact of institution receiving any grant-in-aid or not, apparently has no relevance. Sub-section (3) of Section 7-AA provides that no part-time teacher shall be employed in an institution unless such conditions as may be specified by the State Government by order in this behalf are complied with.

18. The State has issued Regulations, 2000 on 10.08.2001 (Annexure-4 to the writ petition). The said Regulations, which are specifically meant for unaided recognized institutions *inter alia*, as noticed hereinbefore, provide for age, qualifications, procedure for selection, disqualification, emoluments, disciplinary proceedings, termination of services and resignation/abolition of post. The clause dealing with termination of services and relevant for the present case is Clause 9 of the Regulations, which reads as under:

“9. सेवा समाप्ति:- यदि प्रबन्धतंत्र को यह समाधान हो जाये कि कोई भी अंशकालिक अध्यापक धारा-8 में वर्णित अथवा किसी नैतिक अधमता के अपराध में किसी सक्षम न्यायालय द्वारा दोषी सिद्ध कर दिया गया हो, तो वह इन अंशकालिक अध्यापकों की सेवायें समाप्त कर सकता है।

(क) किसी भी अंशकालिक अध्यापक की सेवाएं समाप्त करने के पूर्व प्रबन्धतंत्र द्वारा आरोपी के विरुद्ध लगाये गये आरोपों की जांच, जांच अधिकारी से करायी जायेगी।

(ख) जांच अधिकारी का तात्पर्य प्रबन्धतंत्र द्वारा नियुक्त अंशकालिक प्रधानाचार्य या किसी वरिष्ठ अंशकालिक अध्यापक से होगा।

(ग) जांच अधिकारी की जांच आख्या एवं संस्तुति पर प्रबन्धतंत्र निर्णय के पूर्व प्रबन्धतंत्र द्वारा सम्बन्धित अंशकालिक अध्यापक को सुनवाई का अवसर दिया जायेगा और इसके उपरान्त ही निर्णय लिया जायेगा।

(घ) यदि प्रबन्धतंत्र के निर्णय से संबंधित अंशकालिक अध्यापक विक्षुब्ध हो, तो वह इस निर्णय के विरुद्ध संबंधित जिला विद्यालय निरीक्षक को अपील प्रबन्धतंत्र के निर्णय प्राप्ति के दो माह के भीतर प्रस्तुत कर सकता है। जिला विद्यालय निरीक्षक का निर्णय अन्तिम होगा।

(च) जिला विद्यालय निरीक्षक द्वारा दिये गये निर्णय का पालन प्रबन्धतंत्र करेगा।

प्रबन्धतंत्र द्वारा जिला विद्यालय निरीक्षक द्वारा लिये गये निर्णय का पालन नहीं किया जाता है, तो प्रबन्धतंत्र के विरुद्ध उ0 प्र0 माध्यमिक शिक्षा अधिनियम 1921 से सुसंगत प्राविधानों के तहत कार्यवाही की जा सकेगी।”

(emphasis supplied)

19. A perusal of the above provisions would reveal that the same provides for termination of services wherein inquiry is required to be made and most importantly under Clause-9 (d), it has been provided that in case, the part-time teacher is aggrieved by the decision of the Management, he can file an appeal to the concerned District Inspector of Schools ('DIOS') within a period of two months from the date of receipt of the judgement and the decision of the DIOS would be final. Clause 9 (e) provides that the Committee would be bound to follow the decision of the DIOS and the Regulations further provide that in case, the same is not followed, action under the relevant provisions of the Act of 1921 can be taken.

20. The very fact that the Regulations, which have been framed under the provisions of Section 7-AA (3) of the Act of 1921, govern all the aspects of engagement of part-time teachers and against the decision of the Management, pertaining to termination, an appeal is provided to DIOS, besides the fact that it cannot be said that the service conditions are not regulated by the statutory provisions, the interference of the State through DIOS in case of termination is very much there.

21. The distinction which was drawn by Hon'ble Supreme Court in the case of **St. Mary's Education Society** (supra) in relation to the judgement in the case of **Marwari Balika Vidyalaya** (supra) regarding the appellate authority being the Committee of the school itself and State having no role, is not applicable as in the present case, not only an appeal has been

provided to the DIOS, and its order has been indicated as final and further in case of non compliance, action under the Act of 1921 has been prescribed, which clearly distinguishes the case of **St. Mary's Education Society** (supra) from the present case.

22. The non compliance, if any, of the order of DIOS, results in action under Section 16-D (3) (i) and (4) of the Act of 1921 and, therefore also, it cannot be said that the action of termination is not governed by the statutory provisions and the same does not have any public law element.

23. In view of the above, the entire action of termination cannot be said to be within the realm of private contract between the appellant institution and the respondent no.4 only, so as to make the action not amenable to writ jurisdiction under Article 226 of the Constitution of India.

24. Though, learned counsel for the appellants has attempted to make submissions on other aspect of the maintainability of the writ petition i.e. on account of appeal filed by the respondent no.4 being pending before the DIOS, as the said aspect was not agitated before the learned Single Judge/no determination has been made, we have not dealt with the said aspect and the same would remain open for being questioned before the learned Single Judge.

25. In view of the above discussion, it cannot be said that the learned Single Judge committed any error in coming to the conclusion that the writ petition was maintainable, though for slightly different reasons. There is no substance in the present appeal, the same is, therefore, **dismissed**. No order as to costs.

Order Date :-03.07.2024

RK

(Jaspreet Singh, J)

(Arun Bhansali, CJ)