

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 9th August, 2012

+ **LPA No.140/2002**

% **SMT. ASHA VIJ & ORS. APPELLANTS**

Through: Mr. Vinay Sabharwal, Adv.

Versus

THE CHIEF OF ARMY STAFF & ORS. RESPONDENTS

Through: Ms. Jyoti Singh, Sr. Adv. / Amicus
Curiae with Mr. K.K. Mishra, Adv.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra-court appeal impugns the judgment dated 07.11.2001 of the learned Single Judge dismissing W.P.(C) No.1722/1999 preferred by the appellants, as not maintainable. The appeal was admitted for hearing. None appeared for the respondents when the appeal was called for hearing on 19.07.2012 and 26.07.2012. In the circumstances, we requested Ms. Jyoti Singh, Senior Advocate, who was earlier appearing for the respondents, to assist us in the matter as Amicus Curiae. The counsel for the appellants and the learned Amicus Curiae have been heard. The counsel for the appellants has also filed written synopsis of arguments.

2. The appellants were working as teaching / non-teaching staff of Delhi Area Primary School at Noida and had filed the writ petition aggrieved from the notices issued by the Chief of Army Staff intimating them that they would be relieved from their duties with effect from 31.03.1999 and would be paid three months salary i.e. upto 30.06.1999 in lieu of three months notice period. Impugning the same, the writ petition from which this appeal arises, was filed.

3. The respondents took a preliminary objection as to the maintainability of the writ petition on the ground that Army Welfare Educational Society which was managing the school in question was neither a State nor an Authority as envisaged under Article 12 of the Constitution of India. It was pleaded that Army Welfare Housing Organization owned the building in which the School was situated and had allowed use thereof by the Society for running the Preparatory and Primary School for the children of serving and retired defence services personnel stationed at Noida; that it was a Preparatory School totally funded and run out of regimental funds; that the Ministry of Defence, Union of India was neither funding the School nor exercises any control over running thereof; that the Ministry of Defence has no schemes under which funds can be provided to the regimental private

schools; that the Society was neither a State nor would come within the ambit of Authority within the meaning of Article 12 of the Constitution.

4. The learned Single Judge has found that the School was run by the Headquarter, Delhi Area for primary education of children of serving and retired defence services personnel and that it was a regimental welfare institution; the School had a Managing Committee and was established in the year 1986 as an extension of Delhi Area Public School, Delhi Cantonment; that it initially had Nursery, K.G. and Class-I which was subsequently upgraded upto Class IV; however subsequently when the full fledged Army Public School started at Noida in 1995, Classes I to IV were shifted to Army Public School and the School in question was confined to Nursery and Preparatory classes; that the School was run totally out of regimental funds; that over a period of years, the strength of children of defence personnel started decreasing and that of civilians came to be in majority thereby defeating the very objective of the School; that keeping the totality of circumstances, a considered decision was taken on 18.03.1999 by the Management Committee of the School to close down the School as it was no longer viable and economical. The contention of the appellants that the writ petition was maintainable because the Society owning the School

was discharging a public function of imparting education was not accepted. Relying on *UOI Vs. Chotelal* JT 1998 (8) SC 497 (holding that the regimental funds are not public funds and a person paid out of such regimental funds cannot be said to be holder of civil post within the Ministry of Defence) and the Regulations qua regimental funds, the writ petition against the School was held to be not maintainable.

5. The counsel for the appellants has argued that the School had earlier terminated the services of some of the appellants and which had lead to the filing then of W.P.(C) No.5300/1998 titled *Smt. Asha Vij Vs. The Chief of Army Staff* which was allowed by a Single Judge of this Court vide judgment dated 30.10.1998. It is contended that the issue of maintainability of writ petition against the respondents was thus *res judicata*. It is also argued that no documents qua the existence of the Society have been produced before this Court. It is yet further contended that the General Officer Commanding (GOC), Delhi Area is the *ex officio* Chairman of the Managing Committee of the Schools functioning under the supervisory control of Headquarter, Delhi Area; that the device of closure of the School was adopted after being unsuccessful in the earlier attempt to terminate the services of the appellants; that in fact there is no closure inasmuch as the

children in the School have been shifted to the Army Public School; that the appellants were also thus entitled to be so absorbed in the Army Public School; that inspite of the direction of the learned Single Judge that as and when appropriate vacancies arise, the appellants be considered, none of the appellants have been absorbed in the Army Public School or in other Schools. It is also argued that initial fund for establishment of the School was provided by the Army Headquarter out of the Government Funds. Reliance is placed on *Unni Krishanan J.P. Vs. State of Andhra Pradesh* JT 1993 (1) SC 474 (holding that right to education is a fundamental right) and on *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust Vs. V.R. Rudani* AIR 1989 SC 1607 (holding that imparting education is a public duty and Army welfare is also part of public duty).

6. The learned senior counsel / Amicus Curiae has pointed out that the School was closed down as far back as in the year 1999 and has not re-opened; it is thus contended that the question of granting relief of reinstatement to any of the appellants does not arise. It is further stated that it is not a case of a merger as sought to be made out. Besides referring to *Chotelal* (supra), attention is invited to *Air Vice Marshal J.S. Kumar Vs.*

Governing Council of Air Force 126 (2006) DLT 330 (DB) where a Division Bench of this Court had held the writ petition to be not maintainable against the Air Force Sports Complex and held that merely because Government had provided some benefits and facilities like land for the golf course or concession in liquor would not make such complex a 'State' under Article 12 of the Constitution of India and the complex remains a private body only, providing recreation to Armed Forces officers and not discharging any public function or public duty.

7. The counsel for the appellants has in rejoinder contended that writ petitions have been held to be maintainable against Schools and the judgment of the learned Single Judge is liable to be set aside on this ground alone.

8. The appellant No.1 has filed an additional affidavit dated 04.01.2011 in this Court stating that of the fifteen appellants, the whereabouts of six are not known, five are employed elsewhere since closure of the subject School and four are not employed since then.

9. The judgment dated 30.10.1998 in the earlier writ petition filed by the appellants against termination of their service did not go into the question of maintainability of the writ petition and the writ petition was allowed finding

the termination to be contrary to the Rules of the School. We are therefore unable to accept the contention of the appellants that the same constitutes *res judicata* on the aspect of maintainability of writ petition.

10. The Apex Court in ***Chotelal*** (supra) has clearly held that a venture out of regimental funds, does not acquire the status of a venture from public funds. Though the counsel for the appellants has sought to argue that no material in this regard has been placed before this Court but it is the case of the appellants themselves that except for providing the initial funds, the School was self sustaining. The appellants themselves have placed before this Court the constitution of the School and which also does not show it to be amounting to 'State'. In fact the counsel for the appellants before us has confined his submissions to the writ petition being maintainable for the reason of the School being engaged in imparting education.

11. As far as the argument of the counsel for the appellants of the maintainability of the writ petition against other Schools is concerned, we may notice that the said writ petitions are entertained owing to the said Schools being recognized Schools within the meaning of Delhi School Education Act, 1971. That is not the case over here. The subject School was admittedly a Primary / Preparatory School neither situated in Delhi nor

recognized by the Act. It is in these circumstances, that the maintainability of the writ petition has to be adjudged.

12. Be that as it may, we, in the entirety of the facts aforesaid particularly considering that several of the appellants are re-employed elsewhere, the whereabouts of others are not known and the remaining also having attained the age of superannuation, are not inclined, in exercise of jurisdiction under Article 226 of the Constitution of India to interfere with the order of the learned Single Judge.

The appeal is accordingly dismissed. No costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

AUGUST 09, 2012

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