

Court No. - 20

Case :- WRIT - A No. - 1939 of 2024

Petitioner :- Ajay Kumar Singh

Respondent :- State Of U.P. Thru. Prin. Secy. Higher Edu. Lko. And 4 Others

Counsel for Petitioner :- Anagh Shukla, Shweta Shukla

Counsel for Respondent :- C.S.C., Akhilesh Kumar Srivastava, Parmatma Prasad Singh, Rakesh Kumar Srivastava, Rakesh Mishra

Hon'ble Shree Prakash Singh, J.

Vakalatnama filed by Shri Parmatma Pd. Singh, Advocate on behalf of opposite party no. 5, is taken on record.

Heard Ms. Shweta Shukla, learned counsel for the petitioner, Sri Akhilesh Kumar Srivastava, learned counsel for opposite party nos. 2 and 3, Sri Shailendra Kumar Singh, learned Chief Standing Counsel for State, Sri Rakesh Kumar Srivastava, learned counsel for opposite party no. 4 and Sri Parmatma Pd. Singh, learned counsel for opposite party no. 5.

Notices to opposite party no. 4 is hereby dispensed with.

At the very out-set, Shri Akhilesh Kumar Srivastav, learned counsel appearing for the respondent-University has raised preliminary objection that the order dated 11th October 2023 passed by the Vice Chancellor is revisable under Section 68 of the UP State Universities Act 1973 (hereinafter referred as 'Act, 1973'). He added that the Vice Chancellor has taken decision vide order dated 11th October 2023 and refuted the claim of the petitioner while observing that the petitioner was promoted on the post of Associate Professor on 14th May 2022, and therefore, he is not entitled to be posted on rotation basis, as the same can be between the Professors, who can be inducted as Chairman/Convener of Board of Studies.

Adding his arguments, he submits that the petitioner has an efficacious alternative statutory remedy before the Chancellor, against the order passed by the Vice Chancellor and therefore, the present writ petition is not maintainable on this ground alone.

In support of his contention, he has placed reliance on a judgement reported in **2018 LawSuit(All) 2163, Committee of Management DAV Post Graduate College and Another Vs. State of U.P. and Others** and has referred paragraph 13, 14 and 15 of the abovesaid judgement.

Paragraph 13, 14 and 15 of the abovesaid judgement is quoted hereinunder:-

"13. The question as to whether the order of the Vice Chancellor impugned herein is sustainable or not, could very well be examined in Reference under Section 68 of the Act. It is noteworthy that the petitioner Committee claims that meeting dated 25.9.2016 in which it was elected was called by Narendra Kumar Srivastava, Secretary of the parent society. Concededly, the person initially elected as Secretary of the parent society was Vinod Kumar Srivastava. The petitioners claim that he was expelled from the post of Secretary of the parent society on 25.3.2016 and his membership was also ceased. So far, there is no adjudication by any authority upholding expulsion of Vinod Kumar Srivastava. The said dispute is pending before the Prescribed Authority under Section 25 (1) of the Act. In order to be successful, the petitioners have also to establish that Vinod Kumar Srivastava was validly expelled and in his place, Narendra Kumar Srivastava was validly elected. In the opinion of the Court, these issues, which require appreciation of evidence, should be permitted to be examined in Reference under Section 68 of the Act.

14. The remedy of Reference under Section 68 is an efficacious remedy, inasmuch as the Chancellor, while exercising power under Section 68 pertaining to a dispute relating to election, is also invested with specific power to pass such orders of stay as he thinks just and expedient. A Division Bench of this Court in Writ-A No.44972 of 2013 Managing Committee Shibli National PG College Vs. State of U.P. and others by judgement dated 30.9.2013 declined to entertain a writ petition holding that the remedy under Section 68 by way of Reference is a comprehensive remedy where questions of fact as well as law both could be raised and decided. Again, in Committee of Management, Raja Balwant Singh College and others Vs. State of U.P. and others, 2016 (1) ADJ 781, I have taken the same view and declined to entertain the writ petition relegating the parties to invoke the remedy of Reference under Section 68 of the Act.

15. No doubt, there is no absolute bar in entertaining a writ petition under Article 226 even though an alternative remedy is available under the Statute, but having regard to the facts and circumstances of the instant case, this Court is of the considered opinion that it is a fit case where the petitioners should be relegated to avail the alternative statutory remedy under Section 68 of the Act."

Referring the aforesaid, he submits that the Court, while dealing with the legal question has held that there is no absolute bar in entertaining a Writ under Article 226 of the Constitution of India. Concluding his arguments, he submits that since the petitioner did not refer any reason that why this Court should invoke it's discretion to entertain this petition, even the alternative statutory remedy is available to him. Therefore, submission is that this petition is liable to be dismissed on this ground alone.

Shri Parmatma Pd. Singh, learned counsel appearing for the opposite no. 5 has also opted the aforesaid arguments of counsel for the respondent-University and added that several litigation are instituted by the petitioner, though he is not entitled to be appointed, as the claim which is being raised by the petitioner is premature according to his present post.

On the other hand, the learned counsel for the petitioner has vehemently opposed the contentions aforesaid and submits, that the order impugned dated 11th October 2023 has been passed after an order was passed by this Court on 4th August 2023 in Writ-A No. 5631 of 2023. She further added that there can be no absolute bar, in entertaining the writ petition under article 226 of the Constitution of India and therefore the petition is maintainable. She also added that the facts which are narrated/contended by the learned counsel for the opposite parties, are not correct as the petitioner is entitled for his appointment on rotation basis.

The learned counsel for the petitioner has also placed reliance on a judgement, rendered in ***Special Appeal No. 64 of 2020, Dr. Smt. Abha Sharma, Associate Professor, Department of English, Agra College, Agra Vs. State of U.P. and Others*** passed by this Court and has referred paragraph 9 of the abovesaid judgement.

Paragraph 9 of the judgement is quoted hereinunder:-

"9. Having regard to the facts of the case, and in particular the fact that one of the principal grounds sought to be raised to assail the order impugned in the writ petition is that the statutory authority has not acted in accordance with the provisions of the relevant statutory provisions, this Court is of the view that the writ petition ought to have been heard upon exchange of affidavits and only after consideration of what has been stated by the respective parties in their affidavits a final decision ought to have been taken in the matter."

Placing reliance on the aforesaid, she submits that the Division Bench of this Court has held that in case, any order is passed by the Vice Chancellor and even if the remedy under Section 68 of the Act 1973 is available, that could not be a bar and therefore, submission is that the writ petition is maintainable.

Considering the submissions of the learned counsel for the parties and after perusal of the material placed on record, it transpires that the petitioner is aggrieved as he is not being considered to be appointed following the roster, as prescribed under the law, though it is contended from other side that the petitioner is appointed in year 2022 on the post of Associate Professor and as such he is not even entitled for the same.

Needless to say that there is an efficacious alternative remedy under Section 68 of the Act, 1973, which clearly speaks about the provision with respect to challenge to the order passed by the Vice Chancellor and the same is also applicable in the present case as the Vice Chancellor has rejected the claim of the petitioner while observing that he is not entitled to be considered for his appointment while applying the roster as he is appointed on 14th May 2022 on the post of Associate Professor.

Time and again it has been settled that if there is efficacious and alternative statutory remedy available, the interference would be under the exceptional circumstances. It's self imposed restriction and thus, it's rule of discretion not

compulsion.

Hon'ble Supreme Court has settled this issue and the view of the Apex Court remains consistent starting from the judgement and order rendered in Case of ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, reported in (1998) 8 SCC 1.***

In the aforesaid case, it has specifically been held by the Supreme Court that a Writ Court would be justified entertaining a writ petition despite the alternative remedy is not availed, provided that: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; (iii) where the order or the proceedings are wholly without jurisdiction; or (iv) where the vires of an Act is under challenge.

The law laid down by the Supreme Court in case of ***Radha Krishna Industries v. State of Himachal Pradesh, reported in (2021) 6 SCC 771***, also adopts the same view as is held in case of Whirlpool Corporation (supra).

Paragraphs 25, 26 and 27 of the abovesaid judgement are quoted hereinunder:-

"25. In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In Whirlpool Corporation v Registrar of Trademarks, Mumbai²¹, a two judge Bench of this Court after reviewing the case law on this point, noted:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we

would rely on" some old decisions of the evolutionary era of the constitutional law as they still hold the field."

(emphasis supplied)

26. Following the dictum of this Court in *Whirlpool (supra)*, in *Harbanslal Sahnia v Indian Oil Corpn. Ltd.*²², this court noted that

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

(emphasis supplied)

27. The principles of law which emerge are that :

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where
(a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;
(b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without

jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

This view has also been adopted by the Apex Court in judgement and order rendered in case of ***South Indian Bank Ltd. and Others Vs. Naveen Mathew Philip and Another reported in (2023) SCC OnLine SC 435*** and has held that the Apex Court is conscious enough of the fact that powers conferred under Article 226 of Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances.

Thus, it has been a settled view of the Apex Court that an alternative remedy is not an absolute bar in an appropriate case but ordinarily a writ petition should not be entertained when an efficacious alternative remedy is provided under law.

From the above said principles, laid down by the Apex Court, the present matter is not an appropriate case, wherein, this Court could find objectively that the nature of the controversy requires the exercise of writ jurisdiction.

Sheet anchor of the argument of counsel for the petitioner is the judgement and order dated 27.01.2020, is with respect to peculiar facts and circumstances of the case concerned, which is apparent from the starting words of paragraph 9 of the judgement itself, and further the counsel for the petitioner has also failed to substantiate that those facts are identical to the facts of present matter and therefore, the benefit of the judgement and order dated 27th January 2020 is not available to the petitioner.

Considering the abovesaid facts and circumstances, this Court is of considered opinion that under the facts and circumstances of the present matter, this is a fit case, where the petitioner should be relegated to exhaust the alternative remedy

under Section 68 of the Act, 1973.

Consequently, the writ petition is hereby **dismissed** on the ground of maintainability.

However, it is open for the petitioner to approach the appropriate forum, in accordance with law.

No order as to costs.

Order Date :- 19.4.2024

Anurag, PS Gr-I