

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CWP No. 15644 of 2015 (O&M)
Date of decision: May 19, 2017

Dr. Kanwaljit Singh

...Petitioner

Versus

Shri Guru Ram Dass Hospital Charitable Trust and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Rishu Mahajan, Advocate,
for the petitioner.

Mr. Kanwaljit Singh, Senior Advocate with
Mr. Parunjeet Singh, Advocate,
for respondents No. 1 to 3.

JAISHREE THAKUR, J.

1. The petitioner herein seeks to challenge order dated 17.07.2015 (Annexure P-2) by which he has been transferred from Dispensary Gurdawara Dera Baba Nanak Gurdaspur to Dispensary at Shri Takht Sri Kas Garg Sahib Shri Anandpur Sahib Ropar.

2. The petitioner was appointed as demonstrator with Shri Guru Ram Dass Hospital Charitable Trust in 1993 and thereafter promoted as lecturer in Dental Surgery in the year 1995. Since the petitioner and others were claiming a revision in pay scale, this led to a round of litigation between the petitioner and the respondent trust. It is alleged that on account of a demand made by the petitioner for revision in his pay scale that he was being harassed. A transfer order dated 17.07.2015 was issued transferring

him with mutual consent to Dispensary at Shri Takht Sri Kas Garg Sahib, Shri Anandpur Sahib, Ropar. It is contended that in terms of his agreement, he could only be transferred to any other similar institution in the same assignment. The work at a Dispensary in Shri Takht Sri Kas Garg Sahib, Shri Anandpur Sahib, Ropar was not similar to the work he was doing as a lecturer and there was no were suitable work for him at the aforesaid Dispensary. Moreover, the transfer was not with his mutual consent as alleged.

3. Mr. Kamaljeet Singh, learned Senior Counsel with Mr Parunjeet Singh, Advocate on behalf of the Respondent Trust, raises a preliminary objection as to the maintainability of the writ petition. It is urged that the Respondent Trust is an unaided private institution, receiving no grant in aid from the State of Punjab and in fact is run under the aegis of Shri Gurudwara Prabandhak Committee, which contributes to the funds of the Trust. Reliance has been placed on **Civil Writ Petition No. 23815 of 2013 Dr Jaswinder Kaur Versus State of Punjab and others**, where a learned Single Bench of this Court held that there is no public law element involved in a private aided Trust managing the college and hospital from its own funds and donations from SGPC. The said judgment was upheld in **LPA No. 1180 of 2016 titled Dr. Jaspinder Kaur Versus State of Punjab and others decided on 05.09.2016**. Furthermore, reliance has also been placed on judgment rendered in **Mrs. Manju Sharma and others Versus State of Punjab and others reported in 2013 (4) S. C.T 226** to argue that an unaided college would not be amenable to writ jurisdiction and the remedy would lie elsewhere.

4. Per contra, Mr. Rishu Mahajan, learned counsel for the petitioner, vehemently contends that a writ would be maintainable against the Respondent Trust by relying upon the Division Bench judgment of this court rendered in **Navpreet Kaur versus Sri Guru Ram Dass Hospital Charitable Trust reported in 2003 (4) S. C. T. 709**, wherein against the same Trust, it has been held that High Courts have the power to issue writs not only to statutory authorities and instrumentalities of the State but also to 'any other person or body performing public duty'. It is urged that the Division Bench in **Navpreet Kaur's case** (supra) had perused the objects and reasons for setting up the Respondent Trust and came to the conclusion that the institution is performing a laudable charitable role for the treatment of humanity suffering from various ailments and where such institutions impart medical education and perform a vital public function in protecting the health of the nation, such institutions cannot act arbitrarily, treat equals unequally and to make or follow rules that are clearly violative of the prohibitions embodied in part III of the Constitution.

5. Before going into the merits of the case, whether the order of transfer dated 17.07.2015 is valid or not, the question that needs to be decided is, whether a writ would be maintainable against the respondent Trust in a matter which does not pertain to performance of its public function or public duty, but arises out of an agreement between the Managing Committee and an employee namely the petitioner herein.

6. In the classic case of **Andi Mukta Sadguru Shree Muktajee Vendas Swami Suvarna Jayanti Mahotsav Smarak Trust v. R.R. Rudani**, (1989) 2 SCC 68, it was held that even a purely private body,

where the State has no control over its internal affairs, would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution of India for issuance of a writ of mandamus, provided, of course, the private body is performing public functions which are normally expected to be performed by the State authorities. The Supreme Court succinctly put this issue beyond the pale of controversy in the following words :-

"20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied."

7. Everybody who is performing a public duty or performing a duty of the State is amenable to the jurisdiction of the High Courts under Article 226. However, Courts must exercise restraint and exercise these powers only in cases which involve public law public duty. Therefore, the test for invoking the writ jurisdiction is, whether the act complained of is in

the discharge of a public duty or a public function or not. In a judgment rendered by the Hon'ble Supreme Court in **Godavari Sugar Mills Ltd. Vs. The State of Maharashtra (2011) 2 SCC 439**, it has been held that *only* where the lis has a public law character or involves a question arising out of the public law functions, access to justice by way of a public law remedy under Article 226 will not be denied.

8. In a recent judgment of Supreme Court in **Joshi Technologies International Inc. Vs. Union of India (2015) 7 SCC 728**, it has held as under:-

“ 69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

(i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(ii) State in its executive capacity, even in the contractual field is under obligation to act fairly and cannot practice some discriminations.

(iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which

can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(iv) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State instrumentality and or agency of State is under the realm of a private law and there is no element of public law, the normal

course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(x) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to

adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. (emphasis added).

The dispute herein arises out of a transfer order that was issued by the management of an unaided college which is run on the funds given to it by the Shri Gurdwara Prabhandak Committee. There is no State aid or control over the functioning of the Trust for it to become an instrumentality of the State in the instant case. It is an inter-se dispute between the management and the petitioner with the color of a private dispute, and no public element is involved. In case, the respondent Trust had acted arbitrarily or illegally with regard to any function of a public domain, like in the instance of grant of admission, conducting of examination and the like, only in that eventuality a writ would be maintainable as held in **Andi Mukta case (supra)**. A similar view has been taken in **R.D. Sharma versus St John's High School and others 2002 (3) SCT 324 :**

“14. In my opinion a writ of mandamus is maintainable against a private institute even though it does not get aid and its duty runs shoulder to shoulder with a duty which is performed by a public institution. To clarify this aspect of the case, if a dispute involved in a particular lis with regard to the admission or education or with regard to the pay of a member of the staff, in such a situation a writ under [Article 226](#) is maintainable because imparting of education by a private institute is such a duty which is also being performed by the public institutions. In other words, mere label of a private institute will not oust the jurisdiction of the High Court under [Article 226](#) of the Constitution. We have to see what is being agitated or claimed by the writ petitioner. If a writ petitioner complains with regard to the deprivation of the admission or equal pay for equal work or remuneration at par

*with the Government aided institution, in such a situation the High Court will entertain the petition. But if the controversy involved in a particular writ petition is purely a service matter pertaining to the service conditions for a private contract, in such a situation if there is any breach, the High Court will not issue a mandate under [Article 226](#) of the Constitution. The distinction, in my opinion, is patent and clear. In the present case the alleged cause of action arose to the petitioner when his service had been terminated in an illegal manner without adopting the principles of natural justice. This is an alleged breach of contract or service on the part of St. John's High School which is a private institute not even aided by the government. In such eventually the remedy of the petitioner lies somewhere else either the general law or he may file a suit for damages in the competent court of jurisdiction. The Hon'ble Division Bench of **Guhauti High Court in Managing Committee, Silchar Medical College v. Deb Pada Bhattachar Jee, (1994)1 Gauhati L.R. 202** held in para No. 12 of the judgment as under:-*

"Although a private educational institution performs public duty insofar as imparting of education is concerned, it may not discharge public duty in other matters. The present case is purely of a private institution, and the management of the school is also a private body. Therefore, if the right of the employee in this school is purely of a private character, the management performs no public duty in this regard."

9. The case law as relied upon by the petitioner in **Navpreet Kaur's** case (supra) would be distinguishable, since the Division Bench was seized of a matter which pertained to admission being done. It was in that context that the Court held that an institution performing a duty

normally performed by the State would be expected to comply with the mandate of Article 14 of the Constitution of India and not act arbitrarily or treat equals unequally. The dispute here is against a transfer order making it dispute arising out of service conditions.

10. Resultantly, without going into the merit of the case, it is held that no writ would be maintainable under Article 226 of the Constitution of India, as the lis is purely private in nature and does not involve failure on the part of the Respondent Trust to perform its public duty . The petitioner is relegated to a remedy available under civil law.

11. The writ petition stands disposed of on the above terms.

May 19, 2017
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	No