

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1934 of 2020

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Manaur Alam S/o Md. Islam, R/o Block Road, PO Narkatiyaganj, P.S.-
Shikarpur, District-West Champaran.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Chancellor of the Universities of Bihar, Raj Bhawan, Patna through its Officer on Special Duty, Raj Bhawan, Patna.
3. The Additional Chief-Secretary, Education Department, Government of Bihar, Patna.
4. The Director, Higher Education, Government of Bihar, Patna.
5. Dr. Rajvardhan Azad, Chairman, Bihar State University Service Commission, Patna and also Resident of Raj Retina and Eye Care Centre, Patel Nagar, Road No. 8, House No. 25, Patna-800023.
6. Raj Retina and Eye Care Centre, Patel Nagar, Road No. 8, House No. 25, Patna-800023 through its Director.
7. Bharti Eye Hospital at E-52, Greater Kailash-I, New Delhi-110048 through its Director.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Amit Pandey, Adv.
For the Respondent/s : Mr. Lalit Kishore (AG)

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 27-01-2020

The petition filed on 24.1.2020 is listed for hearing
for the first time today before the Court.



This application has been preferred praying inter alia
for the following relief/s:

“(i) For issuance of an order (s)/ direction (s) or appropriate writ(s) for setting aside Memo No. 15/ए 2-02/2016 (अंश 3) 557 dated 28.02.2019 issued by the Department of Education, Government of Bihar whereby Dr. Rajvardhan Azad, Ex-Chief & Professor of Ophthalmology, Dr. Rajendra Prasad, Centre for Ophthalmic Sciences, All India Institute of Medical Sciences, New Delhi has been appointed as the Chairman of the Bihar State University Service Commission inasmuch as Dr. Rajvardhan Azad being an Ophthalmologist does not have the basic qualification as enumerated in Section 5 of the Bihar State University Service Commission Act, 2017 for appointment to the post of Chairman of the Bihar State University Service Commission.

And/or

(ii) For issuance of an order (s) direction 9s) or appropriate writ(s) for removal of Dr. Rajvardhan Azad from the post of Chairman, Bihar State University Service Commission inasmuch as since his appointment as Chairman, Bihar State University Service Commission Dr. Rajvardhan Azad has been regularly active in his clinical practice as an Ophthalmologist at Raj Retina & Eye Care Centre, Patna and Bharti Hospital, New Delhi and as such liable to be removed from the post of Chairman, Bihar State University Service Commission as per Section



2(b) of the Bihar State University Service Commission Act, 2017.

And/or

(iii) For issuance of an order (s)/direction (s) or appropriate writ(s) preferably a writ in the nature of **quo-warranto** be issued directing the respondents to show the authority of law under which he occupied the post of the Chairman of the Bihar State University Service Commission thereby declaring his appointment on the post of Chairman to be illegal and void ab initio.”

Having heard learned counsel for the petitioner, we do not find any reason to interfere at this stage, for petitioner has not placed on record any material indicating the qualification of the private respondent who stands appointed as the Chairman of the Bihar State University Service Commission.

It is a settled principle of law that before approaching the Court, by way of a public interest litigation, the writ petitioner has to take steps of ascertaining the factual information; invite attention of the authorities to the illegality or inaction and only thereafter approach the Court praying for a writ of Mandamus.

Mandamus is what the Constitution Bench (Five Judges) has held to be in **Dr. Rai Shivendra Bahadur v. Governing Body of the Nalanda College, Bihar Sharif and**



others, AIR 1962 SC 1210 in the following terms:

“In order that mandamus may issue to compel the governing body of a College to do something it must be shown that the Statutes framed by the University under S. 20 of the University of Bihar Act impose a legal duty and the petitioner has a legal right under the Statutes to enforce its performance. According to the Statutes all appointments of teachers and staff have to be made by the Governing Body and no person can be appointed, removed or demoted except in accordance with Rules but where the petitioner has not shown that he has any right entitling him to get an order for appointment or reinstatement, he cannot come to Court and ask for a writ to issue against the governing body.”

Subsequently, in **Saraswati Industrial Syndicate Ltd. V. Union of India, (1974) 2 SCC 630**, the Apex Court in paragraph 24 held as follows:-

“The powers of the high Court under [Article 226](#) are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice. Nevertheless the well recognised rule that no writ or order in the nature of a Mandamus would issue when there is no failure to perform a mandatory duty applies in this country as well. Evert in cases of alleged breaches of mandatory duties the salutary general rule which is subject to certain exceptions applied by us as it is in England



when writ of Mandamus is asked for could be stated as we find it set out in Halsbury's Laws of England (3rd edition vol. 13 p. 106):

"As a general rule the order will not be granted unless the party complained of has known what it was he was required to do so that he had the means of considering whether or not he should comply and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce and that that demand was met by a refusal."

In the case of **D. N. Jeevaraj Versus Chief Secretary, Government of Karnataka & Ors. (2016) 2 SCC 653**, the Hon'ble Apex Court has held in paragraphs 35 to 38 as follows:-

"35. However, we note that generally speaking, procedural technicalities ought to take a back seat in public interest litigation. This Court held in *Rural Litigation and Entitlement Kendra v. State of U.P.* [*Rural Litigation and Entitlement Kendra v. State of U.P.*, 1989 Supp (1) SCC 504] to this effect as follows: (SCC p. 515, para 16)

"16. The writ petitions before us are not inter partes disputes and have been raised by way of public interest litigation and the controversy before the court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. We may not be taken to have said that for



public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court.”

36. A considerable amount has been said about public interest litigation in *R&M Trust* [*R&M Trust v. Koramangala Residents Vigilance Group*, (2005) 3 SCC 91] and it is not necessary for us to dwell any further on this except to say that in issues pertaining to good governance, the courts ought to be somewhat more liberal in entertaining public interest litigation. However, in matters that may not be of moment or a litigation essentially directed against one organisation or individual (such as the present litigation which was directed only against Sadananda Gowda and later Jeevaraj was impleaded) ought not to be entertained or should be rarely entertained. Other remedies are also available to public spirited litigants and they should be encouraged to avail of such remedies.

37. In such cases, that might not strictly fall in the category of public interest litigation and for which other remedies are available, insofar as the issuance of a writ of mandamus is concerned, this Court held in *Union of India v. S.B. Vohra* [*Union of India v. S.B. Vohra*, (2004) 2 SCC 150 : 2004 SCC (L&S) 363] that: (SCC p. 160, paras 12-13)



“12. Mandamus literally means a command. The essence of mandamus in England was that it was a royal command issued by the King's Bench (now Queen's Bench) directing performance of a public legal duty.

13. A writ of mandamus is issued in favour of a person who establishes a legal right in himself. A writ of mandamus is issued against a person who has a legal duty to perform but has failed and/or neglected to do so. Such a legal duty emanates from either in discharge of a public duty or by operation of law. The writ of mandamus is of a most extensive remedial nature. The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted.”

38. A salutary principle or a well-recognised rule that needs to be kept in mind before issuing a writ of mandamus was stated in *Saraswati Industrial Syndicate Ltd. v. Union of India* [*Saraswati Industrial Syndicate Ltd. v. Union of India*, (1974) 2 SCC 630] in the following words: (SCC pp. 641-42, paras 24-25)

“24. ... The powers of the High Court under Article 226 are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice. Nevertheless, the well-recognised rule that no writ or order in the nature of a mandamus would issue when there is no failure to perform a mandatory duty applies in this country as well. Even in cases of alleged breaches



of mandatory duties, the salutary general rule, which is subject to certain exceptions, applied by us, as it is in England, when a writ of mandamus is asked for, could be stated as we find it set out in *Halsbury's Laws of England* (3rd Edn.), Vol. 11, p. 106:

198. *Demand for performance must precede application.*—As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that that demand was met by a refusal.’

25. In the cases before us there was no such demand or refusal. Thus, no ground whatsoever is shown here for the issue of any writ, order, or direction under Article 226 of the Constitution.”

Insofar as the writ of quo warranto, as prayed for, is concerned, we do not find any material against the present respondent, sufficient enough to have been placed on record warranting any action. There cannot be a roving enquiry, without indication of prima facie material necessitating issuance of action.

The Apex Court in **The University of Mysore v. C. D. Govinda Rao and another**, AIR 1965 SC 491, has held in paragraph 7 as follows:



“As Halsbury has observed (Halsbury’s Laws of England, 3rd Ed. Vol. II, P. 145)

"An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, 'franchise, or liberty, to, inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."

Broadly stated, the quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the Executive from making appointments to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office



in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to the enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not.”

In **N. Kannadasan Versus Ajoy Khose and others, (2009) 7 SCC 1**, the Hon’ble Apex Court has held in paragraphs 131 to 136 as follows:-

“**131.** Concededly, judicial review for the purpose of issuance of writ of quo warranto in a case of this nature would lie:

(A) in the event the holder of a public office was not eligible for appointment;

(B) processual machinery relating to consultation was not fully complied.

The writ of quo warranto proceedings affords a judicial remedy by which any person who holds an independent substantive public office is called upon to show by what right he holds the same so that his title to it may be duly determined and in the event it is found that the holder has no title he would be directed to be removed from the said office by a judicial order. The proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right. It is indisputably a high prerogative writ which was reserved for the use of the Crown. The width and



ambit of the writ, however, in the course of practice, have widened and it is permissible to pray for issuance of a writ in the nature of quo warranto.

132. In *Corpus Juris Secundum* [74 C.J.S. Quo Warranto § 14], “Quo Warranto” is defined as under:

“Quo warranto, or a proceeding in the nature thereof, is a proper and appropriate remedy to test the right or title to an office, and to remove or oust an incumbent.

It is prosecuted by the State against a person who unlawfully usurps, intrudes, or holds a public office. The relator must establish that the office is being unlawfully held and exercised by the respondent, and that relator is entitled to the office.”

133. In *Law Lexicon* by J.J.S. Wharton, Esq., 1987, “Quo Warranto” has been defined as under:

“QUO WARRANTO, a writ issuable out of the Queen's Bench, in the nature of a writ of right, for the Crown, against him who claims or usurps any office, franchise, or liberty, to enquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user, or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the



defendant to show by what warrant he exercises such a franchise having never had any grant of it, or having forfeited it by neglect or abuse.”

134. Indisputably, a writ of quo warranto can be issued inter alia when the appointment is contrary to the statutory rules as has been held by this Court in *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat* [(2003) 4 SCC 712 : 2003 SCC (L&S) 565] and *R.K. Jain v. Union of India* [*R.K. Jain v. Union of India*, (1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464] . (See also *Mor Modern Coop. Transport Society Ltd. v. Govt. of Haryana* [(2002) 6 SCC 269] .) In *Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra* [(1998) 7 SCC 273 : 1998 SCC (L&S) 1802] , this Court has stated that it is not for the court to embark upon an investigation of its own to ascertain the qualifications of the person concerned. (See also *Arun Singh v. State of Bihar* [(2006) 9 SCC 375] .) We may furthermore notice that while examining if a person holds a public office under valid authority or not, the court is not concerned with technical grounds of delay or motive behind the challenge, since it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality. [See *Kashinath*



G. Jalmi (Dr.) v. Speaker [(1993) 2 SCC 703] .]

135. Issuance of a writ of quo warranto is a discretionary remedy. Authority of a person to hold a high public office can be questioned inter alia in the event an appointment is violative of any statutory provisions. There concededly exists a distinction in regard to issuance of a writ of quo warranto and issuance of a writ of certiorari. The scope and ambit of these two writs are different and distinct. Whereas a writ of quo warranto can be issued on a limited ground, the considerations for issuance of a writ of certiorari are wholly different.

136. In *Kashinath G. Jalmi (Dr.)* [(1993) 2 SCC 703], it was held that even the motive or conduct of the appellants may be relevant only for denying them the costs even if their claim succeeds but it cannot be a justification to refuse to examine the merits of the question raised therein, since that is a matter of public concern and relates to good governance of the State.”

As such, we dismiss the present petition, reserving liberty to the petitioner to approach the authorities inviting attention of the illegalities, if any, in the appointment of private respondent and only in the absence of the authorities taking any



appropriate action, approach the Court seeking redressal of the grievances, if any, as may be so advised.

(Sanjay Karol, CJ)

(Mohit Kumar Shah, J)

K.C.Jha/-

AFR/NAFR	NAFR
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