

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Aniruddha Roy

**W.P.A. 16573 of 2019
with**

C.A.N. 1 of 2022

Kausik Majumdar

Vs.

The State of West Bengal & Ors.

For the Petitioner:

**Mr. Shamim Ahammed, Adv.,
Mr. Arka Maiti, Adv.,
Ms. S. Bhattacharjee, Adv.,
Ms. Ambiya Khatun, Adv.,
Mr. Arka Ranjan Bhattacharjee, Adv.**

For the Respondent Nos. 2 to 4:

**Mr. Ujjal Ray, Adv., (through virtual mode)
Mr. Arpa Chakraborty, Adv.,
Mr. Sk. Abdur Rahim, Adv.**

For the State Respondent No.1:

**Mr. Biswabrata Basu Mallick, Ld. AGP,
Mr. K.M. Hossain, Adv.**

Reserved on:

17.01.2024

Judgment on:

23.02.2024

ANIRUDDHA ROY, J.:

Facts:

1. The petitioner was appointed and joined at **W.W.A. Cossipore English School** (for short, the School) on September 07, 1992 as an Office Assistant. The employment of the petitioner was confirmed by the school in 1992, **Annexures P-1 and P-2** at **page 15 and 16** to the writ petition.
2. Pursuant to an advertisement published on May 14, 1995 for recruitment for the Post of Computer Teacher, the petitioner applied. After being selected therein the petitioner was shifted from the office duty to the teaching faculty on April 08, 1996, **Annexure P-2** at **page 17** to the writ petition. The petitioner since then had been working as such. On the ground of an alleged offence of sexual harassment the petitioner was hauled up by the school authority and ultimately on October 29, 2018 the employment of the petitioner was terminated **Annexure P-4** at **page 20** to the writ petition. The petitioner made representations **Annexure P-5** at **page 21 to 35** to the writ petition. The petitioner alleges that in violation of the provisions laid down by the school education department of the State enumerated in the procedure for taking disciplinary action against a permanent staff for Anglo Indian and other listed institutions in a **notification** dated **December 24, 1993**, **Annexure P-6** at page 36 to the writ petition, being the code of regulations, the petitioner's employment was terminated.
3. Challenging the said termination, the petitioner filed the instant writ petition for the following reliefs:

“A) A Writ in the nature of Mandamus commanding the respondent authorities to set aside the order of termination dated 29.10.2018 and reinstate petitioner in his earlier post.

B) A writ in the nature of Mandamus commanding the respondent authorities to release the arrear salary and other financial benefits immediately.

C) A writ in the nature of certiorari directing the respondents to transit the entire records of the case to this Hon'ble Court so that conscionable justice may be rendered to set aside the said impugned order dated 29.10.2018.

D) An interim order directing the respondents authorities to allow the petitioner to join his earlier post immediately.

E) Rule NISI interms of prayer (A) (B) and (C) above.

F) The cost of the litigations.

G) Such further order or orders and/or direction or directions as this Hon'ble Court may deem fit and proper for the ends of justice”.

4. The respondent nos. 2, 3 and 4 being the school authorities have filed their affidavit-in-opposition. The petitioner has filed its affidavit-in-reply.

Submission:

5. At the threshold relying upon a decision of the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another vs. Rajendra Prasad Bhargava and Others, reported at 2022 SCC OnLine SC 1091***, Mr. Ujjal Ray learned counsel appearing for respondent nos. 2 to 4 raised the point of ***maintainability*** of the writ petition. He submits that, the relevant school being a private unaided school and the relationship between the petitioner and the school being employer and employee under a private contract, the instant writ

petition is not maintainable. The relevant school is not an authority within the meaning of **Article 12** of the Constitution of India.

6. Before going into the merit of the writ petition to defend the said point of maintainability, Mr. Shamim Ahammed learned counsel for the petitioner has argued in the manner stated hereinafter.
7. Referring to diverse provisions from **THE WEST BENGAL ADMINISTRATIVE (ADJUDICATION OF SCHOOL DISPUTES) COMMISSION ACT, 2008** (For short, the said 2008 Act), Learned counsel for the petitioner submits that the said 2008 Act was promulgated after receiving the assent from the President of India, though the same being a State Legislation. He submits that the school as defined under the said 2008 Act is a school as recognized under the State Acts but does not include a government school. The school also means an unaided school, as the said school in the instant case. He submits that, the **school disputes**, inter alia, means and includes all the affairs relating to a school including the **disciplinary matters**. He submits that the cause of action in the instant writ petition comes within the meaning and purview of **disciplinary matters** as defined under the said 2008 Act. Referring to Chapter II from the said 2008 Act learned counsel for the petitioner submits that, the establishment and composition of a **commission** has been provided for under Section 3 and 4 of the said 2008 Act. Referring to Chapter III from the said 2008 Act he submits that, Section 12 and 13 thereunder define the jurisdiction and power of commission. The commission shall exercise jurisdiction, power and authority in relation to all matters for adjudication or trial of any school

disputes and the matters connected therewith or incidental thereto. The jurisdiction of Civil Court is barred with effect from such date the commission shall exercise its jurisdiction, power and authority in the matter of adjudication or trial of any school disputes. Since the termination of employment of the petitioner is a disciplinary matter, the same should have been tried and adjudicated by the commission. Referring to Section 13 from the said act of 2008, it is submitted that, save and otherwise expressly provided in the Act, the commission shall have jurisdiction to adjudicate a school dispute and make order to a person directing redressal of the school dispute. The commission is empowered in particular and without prejudice to the generality of the provision of Sub-Section (1) to Section 13 in adjudicating a school dispute to declare that a law or an instrument, statutory or otherwise, or an act has or shall have effect or of no such effect.

8. Referring to the aforesaid provisions from the Act of 2008 Mr. Shamim Ahammed learned counsel for the petitioner, submits that the jurisdiction and power of the commission is wide enough to adjudicate school disputes as defined under Section 2(k) of the said Act of 2008. The commission has not yet been established and set up. Hence, for redressal of grievance this writ petition is maintainable in absence of existence of the said commission.
9. Mr. Ahmed then refers to a Central Legislation **The Right of Children to Free and Compulsory Education Act, 2009** (for short, the **said Act of 2009**). He submits that, the primary object behind the enactment of the said 2009 Act was to ensure the right of children to free and compulsory education, which

flows from the Constitution of India. The said Act of 2009 deals with the responsibilities of the schools and teachers and protection of right of children. Referring to Sub-Section (1) to Section 24, he submits that a teacher shall be amenable to disciplinary action under the service rules applicable to him provided that before taking such disciplinary action, reasonable opportunity of being heard shall be afforded to such teacher. Sub-Section 3 prescribes the grievance, if any, of the teacher shall be redressed in such manner as may be prescribed.

10. Referring to the **West Bengal Right of Children to Free and Compulsory Education Rules, 2012** (for short, the **2012 Rules**). Learned counsel for the petitioner submits that rule 17 thereof, inter alia, provides that any grievance by any teacher of a school or a body of teachers shall be first addressed in writing to the school management committee of the concerned school and the school management committee shall address such grievances by passing a reasoned decision within four weeks of receipt of such complaint. When the school management committee fails to address the grievance or where the teacher is dissatisfied with the decision, appeal may be made to the West Bengal Administrative (Adjudication of School Disputes) Commission.
11. Learned counsel for the petitioner submits that, the said Rule of 2012 was framed in exercise of powers conferred by Sub-Section (1) to Section 38 of the said Act of 2009. The Governor of the State assented for the rule. He submits that since the said rule was framed in exercise of power conferred under a central legislation, the same would have a prevailing effect over the said Act of

2008 which is a state legislation. He submits that whatever disputes relating to the disciplinary matter touching the teachers of any school shall, therefore, be tried by the said commission. The commission, therefore, would have an unfettered jurisdiction and power even in addition to the provisions made under the said state legislation, that is, the said act of 2008 to try the disciplinary matters. Since the commission has not yet been established, in absence of such statutory remedy made available to the petitioner, the instant writ petition is maintainable.

12. In support of the above contentions and also to demonstrate that against the said school previously also it was held that writ petition was maintainable, the learned counsel has relied upon the following decisions:

(a) Judgment delivered by a Coordinate Bench In the matter of: Dr. Sirijit Chandra Singh vs. Mr. J.R. Kalia, President, WWA Cossipore English School Managing Committee & Ors., reported at (1999) 2 Cal LT 115;

(b) Judgment delivered by a Coordinate Bench In the matter of: Sabari Chatterjee vs. State of West Bengal & Ors., dated July 29, 2019 rendered in W.P. 13426(W) of 2015 and;

(c) Judgment of the Hon'ble Division Bench In the matter of: W.W.A. Cossipore English School vs. The State of West Bengal & Ors., dated July 31, 2018 rendered in M.A.T. No. 1912 of 2017.

13. Mr. Shamim Ahammed learned counsel for the petitioner then submits that while imparting education the said school discharges public duty. When the

employment of the petitioner was terminated in an arbitrary and illegal manner, the petitioner is entitled to maintain the instant writ petition. In support, he relied upon a decision of a Coordinate Bench ***In the matter of: Bineeta Patnaik Padhi vs. Union of India and Others, reported at (2021) 1 Cal LT 21.***

14. Learned Counsel then submits that teachers of an educational institution are not workmen within the meaning of the Industrial Disputes Act, 1947. Hence, the petitioner teacher cannot ventilate its grievance before the Labour and Industrial Forum and the writ petition is maintainable. In support, he has relied upon a judgment of the Hon'ble Supreme Court ***In the matter of: Miss A. Sundarambal vs. Government of Goa, Daman and Diu and Others, reported at (1988) 4 Supreme Court Cases 42.***
15. To distinguish the judgment of the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra)*** learned counsel for the petitioner submits that, while considering the issue the Hon'ble Supreme Court in **paragraph 68** of the report held that an application under Article 226 of the Constitution is maintainable against an individual or entity engaged in public duties and functions. The public duty may be statutory or otherwise, but it must involve a public law element and be owed the public. To ascertain the discharge of public functions, it must be proven that the actions aim for the collective benefit of the public, and the authority to do so is acknowledged by the public. By enacting the Act of 2008, the State Legislature has affirmed that even a teacher of unaided school discharges public functions and framed a

statutory frame work for a settlement of disputes arising out of a service of a teacher. This writ petition is, therefore, even otherwise maintainable because of the statutory recognition that the petitioner discharges public functions.

16. Learned counsel for the petitioner submits that Section 12(1) of the said Act of 2008 does not limit the jurisdiction of the commission over specified State Acts only. The word “**only**” is absent before the words “**Specified State Acts**” in the Section. The Court cannot add words into the statute when its meaning is clear. Section 12(1) of the Act of 2008 merely excludes the jurisdiction of the Civil Courts insofar as school disputes emanating from specified acts are concerned. Inasmuch as definition of school disputes covers a wide range of disputes including selection of the site of setting up of a school, determination of strength of teaching staff and of non teaching staff etc., the same would be further evident from Section 12(2) of the Act of 2008 which provides for continuance of all proceedings under the Code of Criminal Procedure, 1973.
17. Learned counsel for the petitioner submits that Section 13 of the Act of 2008 provides the jurisdiction of the commission. Section 13(2) makes it further clear that the jurisdiction of the commission is not limited to Specified State acts only since it provides that the commission has the jurisdiction to declare a law or an instrument, statutory or otherwise or an act has or shall have such effect or no such effect. Moreover Section 16 of the Act of 2008 makes the Commission a Court of record. Had the legislature intended to limit the jurisdiction of the commission to specified State Acts alone, it would have

mentioned specified State Acts and would not have clothed the commission with the status of Court of record.

18. Referring to Article 254(2) and Article 200 from the Constitution of India Mr. Shamim Ahammed, learned counsel for the petitioner submits that the opinion of the Governor is not justifiable or has to be accepted by the Hon'ble Court. In either case, it is clear that the intention of the legislature was never to limit the operation of the said Act of 2008 to this specified State Acts only. Therefore, the present grievance of the petitioner in this writ petition could have been tried by the commission had it been constituted and established under the provisions of the said Act of 2008 and since the commission is not established and made functional yet, this writ petition is maintainable.
19. Per contra Mr. Ujjal Ray Learned counsel appearing for the respondent nos. 2 to 4 submits that, the provisions under the said 2008 Act are unambiguous. The conjoint reading of Section 12 and 13 of the said act of 2008 would clearly demonstrate that the commission has jurisdiction to try the school disputes only for redressal of the same as provided under the specified State acts. He submits the said act would not cover the disputes raised by the petitioner in the instant case. Hence, the commission would not have jurisdiction to try the disputes raised by the petitioner in relation to the termination of his employment. If the commission inherently lacking to try the dispute raised by the petitioner, it is incorrect to contend that in absence of the establishment of the commission and since the petitioner could not approach the commission, this writ petition is maintainable.

20. Relying upon the judgment of the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra)*** learned counsel for the respondents submits that merely because a writ petition is maintained against the private individuals discharging the public duties and/or public functions, the same cannot be entertained if the enforcement is sought to be secured under the realm of a private law. The relationship between the petitioner and the said school is that of employee and employer which stood ceased with the termination of the petitioner. The employment was the result of a private contract between the said school which is a private unaided school and the petitioner, an individual. Even if, for the sake of argument it is noted that the termination of employment of the petitioner, as contended by the petitioner, was bad in law then also it would have been at best a breach of a private contract for which writ petition is not maintainable just because the petitioner as a teacher imparts education for the school which imparts education to the society at large. It cannot be contended that the petitioner was also discharging public functions and public duties when the dispute between the petitioner and the school arose out of a private employment contract, hence, the writ petitioner is not maintainable. In support, Mr. Ray has placed reliance upon a judgment of a Coordinate Bench ***In the matter of: Dr. Nirjhar Bar vs. Union of India and Others dated December 16, 2022 rendered in W.P.O. 2432 of 2022.***
21. Learned counsel then submits that writ would not lie to enforce private law rights. In support, Mr. Ray relied upon a judgment of the Hon'ble Supreme

Court ***In the matter of: K.K. Saksena vs. International Commission on Irrigation and Drainage and Others, reported at (2015) 4 Supreme Court Cases 670.***

22. In the light of the above, Mr. Ray submits that the writ petition is not maintainable and should be dismissed in limini.
23. Mr. Biswabrata Basu Mallick Learned Additional Government Pleader appears for the respondent no.1. He adopts the submission of Mr. Ujjal Ray learned counsel. He submits that the writ petition is not maintainable in view of the ratio laid down by the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra).***

Decision:

24. This Court, at the outset, makes it clear that, the writ petition has not been heard on merit and has only been heard on the point of its maintainability.
25. The facts relevant for adjudication on the point of maintainability are admitted. The admitted facts are that the school is a private unaided school. The employment of the petitioner has been terminated. The employment of the petitioner with the school was under a private contract.
26. On a harmonious reading of the provisions including the preamble of the statute being Act of 2008, it appears to this Court that, the said State Legislation had received assent of the President of India. From a schematic reading and harmonious construction of the provisions under the said 2008 Act, this Court is of the considered view that, the said Act of 2008 was promulgated for adjudication of the school disputes as defined under **Sub-**

Section (k) to Section 2 of the Act. The School disputes, inter alia, includes disciplinary matters. The said Act of 2008 provides for redressal of various administrative issues relating to running of a school as defined under Sub-Section (i) to Section 2 of the Act. The definition of school under the said Act includes an unaided school. **Chapter II** of the said Act of 2008 provides for establishment and composition of commission, whereas **Chapter III** provides for the jurisdiction and power of such commission.

27. For the sake of convenience, the provisions under Section 12 and 13 from the said Act of 2008 are quoted below:

“12. (1) This Act shall apply to every specified State Act with effect from such date as the State Government may, by notification, appoint, and the Commission, save as otherwise expressly provided under such specified State Act and subject to other provisions of this Act, shall exercise jurisdiction, powers and authority in relation to all matters of adjudication or trial of any school disputes and the matters connected therewith or incidental thereto; and no civil court shall, with effect from such date. exercise any jurisdiction, powers or authority in the matter of adjudication or trial of any school disputes.

(2) Notwithstanding anything contained elsewhere in this Act, all proceedings triable by any court or courts in accordance with the provisions of the Code of 2 of 1974 Criminal Procedure, 1973, shall continue to be tried by such court, and the Commission shall have no jurisdiction to try such proceedings.

13. (1) *Save as otherwise expressly provided in thi in this Act, the Commission shall have jurisdiction to adjudicate a school dispute and make order to a person directing redressal of the school dispute.*

(2) In particular and without prejudice to the generality of the provision of sub- section (1), the Commission shall, in adjudicating the school dispute, have jurisdiction to declare that-

(i) a law or an instrument, statutory or otherwise, or an act has or shall have such effect or no such effect,

(ii) a party has or shall have such right or duty or no such right or duty, and

(iii) an act has or shall have such effect or no such effect.

subject to such conditions and restrictions, if any, as may be mentioned in the judgment:

Provided that where the matter relates to disposal of question of constitutional validity of any provision of any specified State Act, the matter shall be decided by a Bench constituted of at least three Members of which the Chairman shall be one.

(3) The Commission shall, in making order for redressal of the school dispute. have jurisdiction to make order to the person directing him to pay such cost, compensation and interest, if any, as may be mentioned in the order”.

28. From a conjoint and harmonious reading of both the above two provisions from the said Act of 2008, it appears to this Court that, to invoke the jurisdiction of the commission by a teacher the tests laid down under Section 12 of the said Act of 2008 are required to be satisfied. Such tests include that the said provision of 2008 shall apply to every **Specified State Acts**, as defined under **Sub-Section (n) to Section 2** to the said 2008 Act read with the **schedule**. The establishment of the commission depends upon the notification for its appointment to be published by the State Government. The commission shall exercise its jurisdiction save and otherwise expressly provided under such Specified State Acts and subject to other provisions of the Act to adjudicate and try a school dispute as defined under **Sub-Section (k) to Section 2** of the Act and matters connected therewith or incidental thereto. Therefore, when an

issue will be raised for consideration before the commission, under Section 12 of the Act, the same has to be within the said **Specified State Acts** and for that the jurisdiction of the Civil Court shall be barred.

29. Section 13 of the 2008 Act specifically deals with the jurisdiction of the commission. The provision, inter alia, provides that save and otherwise expressly provided in the Act, the commission shall have jurisdiction to adjudicate a school dispute and make order to a person directing redressal of the school disputes. In this particular Section of the statute there is no mention or whisper of the expression **Specified State Acts**. Therefore, this Section does not limit the adjudication of a School dispute which will be limited to the Specified State Acts. This Section also does not bar the jurisdiction of the Civil Court.
30. On a conjoint, harmonious and meaningful reading of both the Section 12 and 13 of the said 2008 Act, this Court is of the considered view that, two different situations were taken care of under both the said two Sections. Section 12 of the 2008 Act restricts adjudication of the school disputes in which Specified State Acts shall apply. No such restriction is imposed under Section 13 of the 2008 Act. Therefore, under Section 13, any school dispute in relation with other than the Specified State Acts can also be adjudicated by the commission and there shall be no bar for the jurisdiction of Civil Court.
31. None of the Specified State Acts as mentioned in the schedule to the said Act of 2008 are applicable for or attracted to the said school nor do they apply in connection with the disputes raised by the petitioner.

32. Thus, this Court is of the firm view that, the disputes raised by the petitioner in the instant writ petition though not related with the Specified State Acts, was amenable to the jurisdiction of the commission under the said 2008 Act.
33. Now, the question arises, since the commission is not yet established, whether the petitioner can maintain this writ petition as the statutory forum is not available.
34. At this juncture, the petitioner has to satisfy the tests laid down by the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra)***.
35. The relevant observations of the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra)*** are quoted below:

“3. In the present appeal, two pivotal issues fall for consideration of this Court:-

(a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?

(b) Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution? In other words, even if a body performing public duty is amenable to writ jurisdiction, are all its decisions subject to judicial review or only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction?

35. It needs no elaborating to state that a school affiliated to the CBSE which is unaided is not a State within Article 12 of the Constitution of India [See: Satimbla Sharma v. St. Pauls Senior Secondary School [(2011) 13 SCC 760]. Nevertheless the school discharges a public duty of imparting education which is a fundamental right of the citizen [See: K. Krishnamacharyulu v. Sri

Venkateshwara Hindu College of Engineering, (1997) 3 SCC 571]. The school affiliated to the CBSE is therefore an “authority” amenable to the jurisdiction under Article 226 of the Constitution of India [See: Binny Ltd. v. V. Sadasivan, (2005) 6 SCC 657]. However, a judicial review of the action challenged by a party can be had by resort to the writ jurisdiction only if there is a public law element and not to enforce a contract of personal service. A contract of personal service includes all matters relating to the service of the employee—confirmation, suspension, transfer, termination, etc. [See: Apollo Tyres Ltd. v. C.P. Sebastian, (2009) 14 SCC 360].

42. *In the background of the above legal position, it can be safely concluded that power of judicial review under Article 226 of the Constitution of India can be exercised by the High Court even if the body against which an action is sought is not State or an Authority or an Instrumentality of the State but there must be a public element in the action complained of.*

43. *A reading of the above extract shows that the decision sought to be corrected or enforced must be in the discharge of a public function. No doubt, the aims and objective of the appellant No.1 herein is to impart education, which is a public function. However, the issue herein is with regard to the termination of service of the respondent No.1, which is basically a service contract. A body is said to be performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so.*

44. *In the case of Committee of Management, Delhi Public School v. M.K. Gandhi, reported in (2015) 17 SCC 353, this Court held that no writ is maintainable against a private school as it is not a “State” within the meaning of Article 12 of the Constitution of India.*

45. *In the case of Trigun Chand Thakur v. State of Bihar, reported in (2019) 7 SCC 513, this Court upheld the view of a Division Bench of the Patna High Court which held that a teacher of privately managed school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management.*

46. *In the case of Satimbla Sharma (supra), this Court held that the unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not "State" within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority private schools.*

47. *The Full Bench of the Allahabad High Court in the case of Roychan Abraham v. State of U.P., AIR 2019 All 96, after taking into consideration various decisions of this Court, held as under:-*

"38. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right upon the aggrieved to invoke 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 petition under Article 226. Wherever Courts have intervened in exercise of jurisdiction under Article 226, either the service conditions were regulated by 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."

(Emphasis supplied)

48. *We may refer to and rely upon one order passed by this Court in the case of S.K. Varshney v. Principal, Our Lady of Fatima H.S.S., in the Civil Appeal Nos. 8783- 8784 of 2003 dated July 19, 2007, in which the dispute was one relating to the retirement age of a teacher working in an unaided institution. This Court, while dismissing the appeal preferred by the employee, held as under: -*

"Both the petitions were dismissed by the learned single Judge on the ground that no writ would lie against unaided private institutions and the writ petitions were not maintainable.

Aggrieved thereby, writ appeals have been filed before the Division Bench without any result. The Division Bench held that the writ petitions are not maintainable against a private institute. Aggrieved thereby, these appeals have been filed.

Counsel for the appellant relied on a decision rendered by this Court in *K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering*, (1997) 3 SCC 571. He particularly relied on the observation made by this Court in paragraph 4 of the order that when an element of public interest is created and the institution is catering to that element, the teacher, being the arm of the institution, is also entitled to avail of the remedy provided under Article 226.

This Court in *Sushmita Basu v. Ballygunge Siksha Samity*, (2006) 7 SCC 680 in which one of us (Sema, J.) is a party, after considering the aforesaid judgment has distinguished the ratio by holding that the writ under Article 226 of the Constitution against a private educational Institute would be justified only if a public law element is involved and if it is only a private law remedy no writ petition would lie. In the present cases, there is no question of public law element involved inasmuch as the grievances of the appellants are of personal nature. We, accordingly, hold that writ petitions are not maintainable against the private institute. There is no infirmity in the order passed by the learned single Judge and affirmed by the Division Bench. These appeals are devoid of merit and are, accordingly, dismissed. No costs."

(Emphasis supplied)

54. We now proceed to look into the two decisions of this Court in the cases of *Ramesh Ahluwalia (supra)* and *Marwari Balika Vidhyalaya (supra)* resply.

55. In *Ramesh Ahluwalia (supra)*, the appellant therein was working as an administrative officer in a privately run educational institution and by way of disciplinary proceedings, was removed from service by the managing committee of the said educational institution. A writ petition was filed before the learned single Judge of the High Court challenging the order of the disciplinary authority wherein he was removed from service. The writ petition was ordered to be dismissed in limine holding that the said educational institution being an unaided and a private school managed by the society cannot be said to be an instrument of the State. The appeal before the Division Bench also came to be dismissed. The matter travelled to this Court. The principal argument before this Court was in regard to the maintainability of the writ petition against a private educational institution. It was argued on the behalf of the appellant therein that although a private educational institution may not fall within the definition of

"State" or "other authorities/instrumentalities" of the State under Article 12 of the Constitution, yet a writ petition would be maintainable as the said educational institution could be said to be discharging public functions by imparting education. However, the learned counsel for the educational institution therein took a plea before this Court that while considering whether a body falling within the definition of "State", it is necessary to consider whether such body is financially, functionally and administratively dominated by or under the control of the government. It was further argued that if the control is merely regulatory either under a statute or otherwise, it would not ipso facto make the body "State" within Article 12 of the Constitution. On the conspectus of the peculiar facts of the case and the submissions advanced, this Court held that a writ petition would be maintainable if a private educational institution discharges public functions, more particularly imparting education. Even by holding so, this Court declined to extend any benefits to the teacher as the case involved disputed questions of fact.

56. We take notice of the fact that in *Ramesh Ahluwalia (supra)* the attention of the Hon'ble Judges was not drawn to the earlier decisions of this Court in *K. Krishnamacharyulu (supra)*, *Federal Bank (supra)*, *Sushmita Basu v. Ballygunge Siksha Samity*, (2006) 7 SCC 680, and *Committee of Management, Delhi Public School v. M.K. Gandhi (supra)*.

57. In *Marwari Balika Vidhyalaya (supra)*, this Court followed *Ramesh Ahluwalia (supra)* referred to above.

58. We may say without any hesitation that the respondent No. 1 herein cannot press into service the dictum as laid down by this Court in the case of *Marwari Balika Vidhyalaya (supra)* as the said case is distinguishable. The most important distinguishing feature of the case of *Marwari Balika Vidhyalaya (supra)* is that in the said case the removal of the teacher from service was subject to the approval of the State Government. The State Government took a specific stance before this Court that its approval was required both for the appointment as well as removal of the teacher. In the case on hand, indisputably the government or any other agency of the government has no role to play in the termination of the respondent No. 1 herein.

59. In context with *Marwari Balika Vidhyalaya (supra)*, we remind ourselves of the Byelaw 49(2) which provides that no order with regard to the imposition of major penalty shall be made by

the disciplinary authority except after the receipt of the approval of the disciplinary committee. Thus unlike Marwari Balika Vidhyalaya (supra) where approval was required of the State Government, in the case on hand the approval is to be obtained from the disciplinary committee of the institution. This distinguishing feature seems to have been overlooked by the High Court while passing the impugned order.

60. *In Marwari Balika Vidhyalaya (supra), the school was receiving grant-in-aid to the extent of dearness allowance. The appointment and the removal, as noted above, is required to be approved by the District Inspector of School (Primary Education) and, if any action is taken dehors such mandatory provisions, the same would not come within the realm of private element.*

61. *In Trigun Chand Thakur (supra), the appellant therein was appointed as a Sanskrit teacher and a show cause notice was issued upon him on the ground that he was absent on the eve of the Independence day and the Teachers day which resulted into a dismissal order passed by the Managing Committee of the private school. The challenge was made by filing a writ petition before the High Court which was dismissed on the ground that the writ petition is not maintainable against an order terminating the service by the Managing Committee of the private school. This Court held that even if the private school was receiving a financial aid from the Government, it does not make the said Managing Committee of the school a "State" within the meaning of Article 12 of the Constitution of India.*

62. *Merely because a writ petition can be maintained against the private individuals discharging the public duties and/or public functions, the same should not be entertained if the enforcement is sought to be secured under the realm of a private law. It would not be safe to say that the moment the private institution is amenable to writ jurisdiction then every dispute concerning the said private institution is amenable to writ jurisdiction. It largely depends upon the nature of the dispute and the enforcement of the right by an individual against such institution. The right which purely originates from a private law cannot be enforced taking aid of the writ jurisdiction irrespective of the fact that such institution is discharging the public duties and/or public functions. The scope of the mandamus is basically limited to an enforcement of the public duty and, therefore, it is an ardent duty of the court to find out whether the nature of the duty comes within the peripheral of the public duty. There must be a public law element in any action.*

64. *The aforesaid decision of this Court in Ramakrishnan Mission (supra) came to be considered exhaustively by a Full Bench of the High Court of Allahabad in the case of Uttam Chand Rawat v. State of U.P., reported in (2021) 6 All LJ 393 (FB), wherein the Full Bench was called upon to answer the following question:-*

(i) Whether the element of public function and public duty inherent in the enterprise that an educational institution undertakes, conditions of service of teachers, whose functions are a sine qua non to the discharge of that public function or duty, can be regarded as governed by the private law of contract and with no remedy available under Article 226 of the Constitution?"

65. *The Full Bench proceeded to answer the aforesaid question as under:-*

"16. The substance of the discussion made above is that a writ petition would be maintainable against the authority or the person which may be a private body, if it discharges public function/public duty, which is otherwise primary function of the State referred in the judgment of the Apex Court in the case of Ramakrishnan Mission (supra) and the issue under public law is involved. The aforesaid twin test has to be satisfied for entertaining writ petition under Article 226 of the Constitution of India.

17. From the discussion aforesaid and in the light of the judgments referred above, a writ petition under Article 226 of the Constitution would be maintainable against (i) the Government; (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

18. There is thin line between "public functions" and "private functions" discharged by a person or a private body/authority. The writ petition would be

maintainable only after determining the nature of the duty to be enforced by the body or authority rather than identifying the authority against whom it is sought.

19. It is also that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if Court is satisfied that action under challenge falls in the domain of public law, as distinguished from private law. The twin tests for maintainability of writ are as follows:

1. The person or authority is discharging public duty/public functions.

2. Their action under challenge falls in domain of public law and not under common law.

20. The writ petition would not be maintainable against an authority or a person merely for the reason that it has been created under the statute or is to governed by regulatory provisions. It would not even in a case where aid is received unless it is substantial in nature. The control of the State is another issue to hold a writ petition to be maintainable against an authority or a person."

(Emphasis supplied)

69. *We may sum up our final conclusions as under: -*

(a) 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.

(b) 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.

c) It must be consequently held that while a body may be discharging a public (rev 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.

(d) Even if it be perceived that imparting education by private unaided the school is a public duty within the expanded expression of the term, an employee of a non-teaching 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 non-teaching 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.

(e) 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.

70. *In view of the aforesaid discussions, we hold that the learned single Judge of the High Court was justified in taking the view that the original writ application filed by the respondent No.1 herein under Article 226 of the Constitution is not maintainable. The Appeal Court could be said to have committed an error in taking a contrary view”.*

36. ***In the matter of: Dr. Sirijit Chandra Singh (supra)***, the Coordinate Bench in paragraph 8 of the report held that the writ petition was maintainable after heavily relying upon the principle of law laid down by the Hon’ble Supreme Court ***In the matter of: K. Krishnamacharyulu vs. Sri Venkateswara Hindu College of Engineering, reported at AIR 1998 SC 295.*** In the recent judgment of the Hon’ble Supreme Court in paragraph 35 of the report ***In the matter of: St. Mary’s Education Society and Another (supra)***, the said earlier view of the Hon’ble Supreme Court ***In the Matter of: K. Krishnamacharyulu (supra)*** was considered in detail and thereafter the Hon’ble Supreme Court held that a judicial review of the action challenged by a party can be had by resort to the writ jurisdiction only if there is a public law element and not to enforce a contract of personal service, as in the instant case. A contract of personal service includes all matters relating to the service of the employee-confirmation, suspension, transfer, termination, etc. Therefore, in view of the law settled recently ***In the matter of: St. Mary’s Education***

Society and Another (supra), the ratio of the judgment ***In the matter of: Dr. Sirijit Chandra Singh (supra)*** has no application and is of no relevance in the facts of this case.

37. ***In the matter of: Sabari Chatterjee (supra)*** the writ petition was held to be maintainable by a Coordinate Bench prior to the law settled ***In the matter of: St. Mary's Education Society and Another (supra)***.
38. ***In the matter of: W.W.A. Cossipore English School (supra)*** the writ petition was filed challenging an order passed by the second Industrial Tribunal, hence the writ petition was held to be maintainable. In the instant case, the action of the school is under challenge arising out of a disciplinary proceeding. Hence, the ratio has no application in the facts of this case.
39. ***In the matter of: Bineeta Patnaik Padhi (supra)*** the judgment of the Coordinate Bench was delivered prior to the law was settled by the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra)***. In **paragraph 57** of the report, the Coordinate Bench held that in absence of the commission writ petition was maintainable. However, after the law being well settled ***In the matter of: St. Mary's Education Society and Another (supra)***, to maintain the proceeding under Article 226 of the Constitution of India, as in the instant case, the petitioner has to satisfy the tests laid down by the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra)***, already discussed above.
40. ***In the matter of: A. Sundarambal (supra)*** the dispute arose out of the Industrial Disputes Act, 1947 wherein it was held by the Hon'ble Supreme

Court that, the teachers do not come within the definition of “**Workman**”. The writ petition arose from the decision of the Government of the relevant State, hence, the writ petition was held to be maintainable. In the facts of this case the ratio of the said judgment has no application at all.

41. Relying upon the law laid down by the Hon’ble Supreme Court ***In the matter of: St. Mary’s Education Society and Another (supra)*** a judgment was delivered by a Coordinate Bench ***In the matter of: Dr. Nirjhar Bar (supra)***.

The relevant observations of the Coordinate Bench are quoted below:

“11. The question would thus be: what is it that the petitioner seeks to be redressed by way of the present writ petition?”

20. The recent decision of the Supreme Court in St. Mary’s Education Society vs. Rajendra Prasad Bhargava; 2022 SCC OnLine SC 1091 is a lucid statement of the law on the circumstances in which a High Court can invoke Article 226 of the Constitution. The appellant no. 1 before the Supreme Court was a society which ran a private unaided educational institution. The respondent no. 1, an office employee of the appellant no. 1 was served with a show cause-cum-suspension order by the appellant no. 1 alleging misconduct in service. Several grounds were urged against the respondent no. 1 in the charge-sheet and the termination notice which followed. The learned Single Judge of the Madhya Pradesh High Court rejected the writ petition as not being maintainable; the Division Bench set aside the judgment of the first court and allowed the appeal holding that the writ petition challenging the order of termination from service was maintainable under Article 226 of the Constitution of India. The Supreme Court set aside the judgment of the Division Bench and held that the writ petition was not maintainable. One of the issues before the Supreme Court was whether a service dispute in the private realm involving a private educational institution and its employees can be adjudicated in a writ petition filed under Article 226 of the Constitution.

21. The related question was whether all the public functions of a body were subject to judicial review? The Supreme Court came to the view that a person or body discharging public duties must be shown to owe an obligation to the public involving a public law element. The Supreme Court considered Ramesh Ahluwalia vs.

State of Punjab; (2012) 12 SCC 331 and took notice of the fact that several of the earlier decisions passed by the Supreme Court were not considered in *Ramesh Ahluwalia. Marwari Balika Vidyalaya vs. Asha Srivastava*; (2020) 14 SCC 449 was distinguished on the fact that in the said case the removal of a teacher from service was subject to the approval of the State Government. The Supreme Court also considered a Full Bench decision of the Allahabad High Court in *Uttam Chand Rawat vs. State of U.P.*; (2021) 6 All LJ 393 (FB) which held that the act must fall in the domain of public law and not under common law. This is significant as the petitioner has relied on *Ramesh Ahluwalia* and *Marwari Balika Vidyalaya*.

22. The decision as to whether a private entity or unaided institution is subject to writ jurisdiction is ultimately a decision on the particular facts of the case. There is no set formula which can be applied for determining the maintainability of a writ petition against such an entity. The expanded contours of Article 226 of the Constitution making space even for private individuals discharging public duties or public functions cannot become the justification for entertaining writ petitions for disputes where the right in question is purely in the realm of private law and cannot be wedded to the public duties performed by the entity. The writ court must unearth the public law element in the act complained of.

23. Even if it is assumed that imparting of education transforms a private unaided institution to a body discharging public functions, the act complained of must have a direct or even a discernible nexus with the discharge of the public function described as such. Even activities which may have a traditional association with public duty, for instance a hospital, not be amenable to writ jurisdiction; Ref: *Ramakrishna Mission vs. Kago Kunya*; (2019) 16 SCC 303. In *Binny Limited vs. V. Sadasivan*; (2005) 6 SCC 657 the Supreme Court reiterated that a writ of mandamus can only be issued against a private body which is not “State” within the meaning of Article 12 of the Constitution if there is a public law element in the discharge of functions by the private body. The Supreme Court noted the absence of a public element in the termination of the employees by the 10 appellant and hence opined that the remedy available to the respondent was to seek redressal in civil law especially in view of the disputed questions involved in the matter.

24. The question of maintainability of the writ petition is answered against the petitioner in view of the above reasons. This Court

holds that the present writ petition against a private unaided institution / School is not maintainable since the right sought to be enforced is purely of a private contractual character.

25. WPO 2432 of 2022 is accordingly dismissed without any order as to costs”.

42. Upon reading the said judgment ***In the matter of: Dr. Nirjhar Bar (supra)***, I am also in respectful agreement therewith.

43. It is true that, the subject school imparts education. While imparting education it involves public duty and public law element is involved. However, the relationship between the petitioner and the school in the instant case is that of an employee and a private employer arising out of a private contract. If there is any breach of the covenant of employment contract his remedy does not touch any public law element for such employment dispute with the school, the school never discharges any public duty in connection with the employment of the petitioner. The petitioner has its remedy under Section 13 of the said 2008 Act where the jurisdiction of Civil Court is not a bar as already discussed above. But the petitioner cannot invoke the jurisdiction of Article 226 of the Constitution of India before this Constitutional Court, in view of the law laid down by the Hon'ble Supreme Court ***In the matter of: St. Mary's Education Society and Another (supra)***

44. In view of the foregoing reasons and discussions this writ petition fails being held to be not maintainable.

45. Accordingly this writ petition **WPA 16573 of 2019** stands **dismissed** as not maintainable, without any order as to costs.

46. However, it is made clear that this Court has not gone into the merits of the case of the petitioner pleaded in the writ petition in any manner and the petitioner shall be free to take appropriate measure for redressal of his grievance, strictly in accordance with law.

(Aniruddha Roy, J.)