

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

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 19024 of 2014

Rita Ghoshdastidar

Vs.

St. Joseph & Mary's School and ors.

For the Petitioner : Mr. Soumya Mazumder,
Mr. M. Ahmedadvocates

For the Respondents : Mr. Pradip Kumar Dutta
Mr. Sujash Ghosh Dostidar
Ms. Sankari Roy
Ms. Sayori Mukhopadhyay ... advocates

Reserved on : 22.02.2024

Judgment on : 18.04.2024

Hiranmay Bhattacharyya, J.:-

1. A dismissed teacher has filed this writ petition praying for her reinstatement in the post of Assistant Teacher after setting aside the order of dismissal from service dated 25.11.2013 and to pay subsistence allowance for the period from 16.07.2012 to 25.11.2013 along with interest.
2. Petitioner was appointed as a part time teacher of St. Joseph & Mary's School (for short "the school") on a purely temporary basis and joined the said post on 05.07.1986. Thereafter, her service was confirmed as a Full time teacher. Petitioner was placed under suspension with immediate effect by a letter dated July 16, 2012 alleging that she was involved in commission of gross misconduct for which a disciplinary proceeding was contemplated against her.

3. Petitioner was served with a charge sheet dated 27.08.2012 and the charges levelled against her was that she had committed “subversive activities detrimental to the interest of the school, severely beating the students, insubordination, neglect of work or negligence in the performance of duty”. Enquiry officer submitted his report dated 24.02.2003 concluding that the charges of (i) subversive activities detrimental to the interest of the school, (ii) severely beating the students, (iii) insubordination, (iv) neglect of work and negligence in the performance of duty are proved. A second show cause notice was issued proposing to dismiss the petitioner from the post of a teacher. The Managing Committee, in its meeting held on November 25, 2013, took a decision to dismiss the petitioner from service.
4. Being aggrieved, petitioner approached this Court.
5. Mr. Majumdar, learned advocate appearing in support of the writ petition contended that the school conducted the enquiry behind the back of the writ petitioner by not serving the notices of enquiry upon the petitioner. He further contended that the entire enquiry was vitiated in view of the law laid down in **AIR 1973 SC 1183** in the case of **Ghanshyam Das Shrivastava vs. State of Madhya Pradesh** as it was conducted without making payment of subsistence allowance. He placed reliance upon a decision in the case of **K. Krishnamacharyulu & ors vs. Sri Venkateswara Hindu College of Engineering and Anr.** reported at **AIR 1998(SC) 295** in support of his contention that the service of a teacher in a school has an element of public interest in it as the school is discharging public duties and functions. He contended that the findings of the Enquiry Officer is perverse as it misconstrued a letter written by the petitioner to mitigate the situation to be a letter of apology. Mr. Majumdar contended that the allegation of not maintaining cordial relation with colleagues is different from allegation of insubordination or subversive activities as mentioned in the charge sheet. According to him, the finding of the Enquiry Officer that the charge of negligence or neglect of work stands proved is extraneous to the charges framed, which is impermissible in law. In support of such contention, he

placed reliance upon the decision in the case of **Narinder Mohan Arya vs. United India Insurance Co. Ltd.** reported at **(2006) 4 SCC 713**. He submitted that the enquiry proceeding was conducted in utter violation of the principles of natural justice and for such reason the dismissal order should be set aside and the writ petitioner should be allowed relief of full back wages from the date of dismissal till the notional date of her superannuation i.e., 02.03.2017. In support of such contention, he placed reliance upon the decision in the case of **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & ors.** reported at **(2013) 10 SCC 324**.

6. Mr. Datta, learned Senior Counsel appearing for the school seriously disputed the contentions of Mr. Majumdar. He contended that the respondent school is a society registered under the West Bengal Societies Registration Act, 1961 and is managed by its own Managing Committee. There was/is no government control in the management of the society. The school does not receive any aid or grant from the Government. The service condition of the petitioner was governed by the school's own service rules which are absolutely non-statutory in nature and, therefore, the master-servant relationship between the school and the writ petitioner is not enforceable before the writ Court. The school is affiliated with the Council for the Indian School Certificate Examination, New Delhi. It is a listed school under the Code of Regulations for Anglo Indian and other listed schools, 1993.
7. Mr. Datta contended that charge sheet was issued under Rule 1 of the Conduct, Discipline and Appeal Rules of the school. Petitioner submitted reply to the charge sheet. Petitioner prayed for an accommodation on the first day fixed by the Enquiry Officer. Subsequently, the petitioner did not appear though notices were sent through speed post. He contended that the disciplinary proceedings were conducted in accordance with the principles of natural justice.

8. Mr. Datta, learned Senior Counsel placed reliance upon the decisions of the Hon'ble Supreme Court in the case of ***T.M.A. Pai Foundation vs. State of Karnataka*** reported at **(2002) 8 SCC 481** and ***St. Mary's Education Society & Anr. Rajendra Prasad Bhargava & ors.*** reported at **(2023) 4 SCC 498** in support of his contention that the writ petitions against a private unaided educational institution is not maintainable. He concluded by submitting that the writ petition is liable to be dismissed.
9. Heard the learned advocates for the parties and perused the materials placed.
10. The respondent school has raised an objection as to the maintainability of the writ petition. Therefore, this Court shall first decide the issue of maintainability of the writ petition.
11. It is not disputed that the respondent school is a society registered under the West Bengal Societies Registration Act, 1961. It is also not in dispute that the school does not receive any aid or grant from the Government. It is a listed school under the Code of Regulations for Anglo-Indian and other Listed Schools, 1993 (for short "the Code").
12. Constitution of the Managing Committee is required to be approved by the Department of Education. Therefore, the question would be whether such regulatory power amounts to government control in the matter of management of the respondent school under the Code.
13. Regulation 4(10) of the Code defines "Listed Schools" to mean an English medium school which does not come under the purview of the definition of Anglo-Indian school, but is recognised under the Code for the purpose of presenting candidates for the Council/Board Examination under such terms and conditions as the State Board and the Department of Education may prescribe provided that such school fulfils the conditions laid down in Clause (a), (b), (c), (d), (f), (g) and (h) of Regulation 8.

14. From the definition of listed school it is evident that recognition under the Code as a listed school is only for the purpose of presenting candidates for the Council or Board Examination under the terms and conditions as the State Board and the Department of Education may prescribe. Therefore, the function of the Government to grant recognition is only regulatory in nature insofar as presenting candidates for Council/Board Examination. Apart from that the government do not have deep and pervasive control over the management of the school.
15. Regulation 21 deals with appointment. It states that appointment of all categories of staff shall be made as per the rules framed by the Founder. Regulation 21 is extracted hereinafter.

“21. Appointment :

(a) Appointment of all categories of staff shall be made as per rules framed by the Founder. Every employee, whether a teaching or a non-teaching staff, shall be engaged by a letter of appointment which shall State clearly the type of employment offered-permanent, temporary or against a leave vacancy. The letter of appointment shall describe the nature of the duties, salary and emoluments, term for which the employment is offered, the period of probation, if any, requirement of training and manner of termination of the appointment.

(b) The employee must sign the letter (copy to be enclosed) as token of acceptance.

(c) In the case of an appointment against a permanent vacancy, the terms and conditions of appointment, salary scales, allowances, initial salary, and retiring benefits shall be stated clearly in writing and shall be signed by both the parties and returned to the school. A copy of the same shall be given to the teacher for future reference.

(d) A teacher joining another school, who was confirmed in a similar post in a school recognised by an authority acceptable to the Department of Education shall be entitled to advance increments at the rate of one increment for every two years of completed continuous service in a single institution in the scale of pay of the post of the school the teacher is joining. A higher initial salary will be negotiable and will be left to the direction of Managing Committee.

(e) Ordinarily, a teacher appointed against a permanent vacancy will be placed on probation for one year from the date of appointment and such probation may be extended by NOT MORE than one year thereafter. In all cases of teachers appointed on probation, a letter terminating the service or extending the period of probation, as the case may be, shall be served to him/her, one month before the end of the probationary period failing which, the teacher will be deemed to be confirmed in that appointment.

(f) Untrained teachers will be entitled to the same scale of pay as trained teachers on condition that they will not earn any increment if they are not trained within five years from the date of appointment.”

16. The terms and conditions of appointment of the writ petitioner was purely a contract between the school and the writ petitioner. The service of the teaching and non-teaching staffs of the school are governed by the “St. Joseph & Mary’s School Service Rules, 2003”. The service of the employees of the school are not governed by any statutory provisions but the rules framed by the school which do not have any statutory flavour.
17. An unaided school cannot fall within the definition of “State” within Article 12 of the Constitution of India merely because of the fact that it is affiliated to the Council for the Indian School Certificate Examination, New Delhi.
18. The Hon’ble Supreme Court in the case of ***Binny Ltd. & Anr. vs. V. Sadasivan & ors.*** reported at ***(2005) 6 SCC 657*** held that the scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. It was further held that if the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. It was further observed in the said reported decision that a writ of mandamus can be issued against a private body which is not “State” within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution of India and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. The Hon’ble Supreme Court, however, added a note of caution by observing that for exercise of such power, there must be a public law element and it

cannot be exercised to enforce purely private contracts entered into between the parties.

19. The respondent school discharges a public duty of imparting education. The question would be whether the teachers who teach in the said educational institution gets a public interest in the performance of their duties.
20. The Hon'ble Supreme Court in **K. Krishnamacharyulu** (supra) observed that the State has obligation to provide facilities and opportunities to the people to avail of the right to education and the private institutions cater to the needs of the educational opportunities. It was held that when an element of public element is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedy provided under Article 226.
21. The teachers of unaided minority private institutes approached the Hon'ble Supreme Court raising a dispute relating to retirement age of the teachers in **S.K.Varshney vs. Principal, Our Lady of Fatima Higher Secondary School & Ors.** reported at **(2023) 4 SCC 539**. In the said reported decision, the Hon'ble Supreme Court observed that in **Sushmita Basu & ors. vs. Ballygunge Siksha Samity & ors.** reported at **(2006) 7 SCC 680**, Hon'ble Supreme Court distinguished the ratio in **K. Krishnamacharyulu** (supra) 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. The Hon'ble Supreme Court accordingly held that the writ petitions are not maintainable.
22. Regulation 20 of the Code states that all schools recognised under the Code shall pay their teaching and non teaching staff pay, house rent and medical allowances, Gratuity and Contributory Provident Fund in the scales not lower than those approved by the State Government in respect of Government aided schools affiliated to the West Bengal Board of Secondary Education or as prescribed under the relevant Provident Fund Act/Rules of

the Government of India. Code contains regulations relating to termination of service, termination of appointment of confirmed staff etc. Regulation 24 deals with the procedure for disciplinary action against confirmed staff.

23. However, Regulation 15 states that all schools approved and recognised under the Code will be managed by a Managing Committee. Regulation 17 empowers framing of Rules by the school for appointment, dismissal and service conditions, not inconsistent with the provision of Chapter IV of the Code, of school teachers and non teaching staff, including the Principal/Headmaster/ Headmistress, in the employ of the school. Regulation 18 states that the Managing Committee shall have the powers to make rules not inconsistent with the provisions of the Code, from time to time for its guidance.
24. After reading the Code as a whole, this Court finds that the Managing Committee is empowered to frame rules providing for appointment, dismissal and service conditions with a caveat that such rules shall not be inconsistent with Chapter IV of the Code. The school has framed its own Rules as permitted by the Code. The power to appoint teaching and non teaching staffs also vests with the school.
25. To the mind of this Court, the power to conduct disciplinary proceedings against the teaching staff absolutely vests with the School and such proceedings are governed by the Conduct, Discipline and Appeal Rules framed by the school. The aforesaid Rules have been framed by the school without any Government intervention.
26. As per the Code, the State only has regulatory power to safeguard the interest of the employees serving at the listed schools. Such regulatory power does not amount to government control over the management of the unaided private school.
27. The question that arises is, whether a teaching staff of an unaided educational institution can bring an action before the writ Court challenging

the decision of the institution relating to disciplinary matters, merely because of the fact that the State Government has some regulatory powers under the Code.

28. The Hon'ble Supreme Court in ***Federal Bank Ltd. vs. Sagar Thomas & Others*** reported at **(2003) 10 SCC 733** held that an employee of a private bank challenging a disciplinary action cannot be said to be trying to enforce any statutory duty on the part of the Bank. The Hon'ble Supreme Court held thus-

"33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

29. In the case on hand, the contract of service of the petitioner is purely a private contract. Such contract is neither governed or regulated by a statutory provision. The cause of action of the petitioner arises from alleged breach of such private contract. The writ petitioner herein is not trying to enforce any statutory duty on the part of the school. By applying the ratio of ***Federal Bank*** (supra), this Court holds that merely because the State has some regulatory powers, that by itself cannot be a ground to entertain and decide a writ petition at the instance of the petitioner, a teaching staff, challenging an order of her dismissal.

30. Mr. Majumdar, learned advocate tried to distinguish the decision in the case of **St. Mary's Education Society** (supra) by contending that the writ petitioner therein was not a teacher but a member of clerical staff and, therefore, the said decision do not have any manner of application to the case on hand.

31. It would be relevant to point out at this stage the issues framed by the Hon'ble Supreme Court in **St. Mary's Education Society** (supra).

"2. 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?"

"3. 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?"

32. The Hon'ble Supreme Court after considering various decisions summed up the conclusions in paragraph 75 of the said reported decision which is extracted hereinafter.

"75. We may sum up our final conclusions as under:

75.1 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.

75.2 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.

75.3 It must be consequently held that while a body may be discharging a public function or 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.

75.4. *** ”

(emphasis supplied)

33. From the aforesaid reported decision it follows that the action or decisions taken by a private body in a service dispute is not amenable to challenge under Article 226 of the Constitution if the service conditions are not governed by statutory provisions even if the private body may be discharging public function or performing a public duty. Therefore, a teacher of an unaided private school cannot challenge the order of his/her dismissal/termination before a Writ Court if the matter falls within the realm of an ordinary contract of service.
34. From the issues framed in St. Mary's Education Society (supra) it does not appear that the issue was restricted to a service dispute of a non-teaching staff of a private education institution only. The Hon'ble Supreme Court

analysed various decisions including that of ***T.M.A. Pai foundation*** (supra) reported at **(2002) 8 SCC 481** and summed up its conclusions in paragraph 75 of the said reports. Though the conclusion contained in paragraph 75.4 was relatable to a service dispute of a non-teaching staff of a private unaided school, but the conclusions under paragraph 75.1, 75.2 and 75.3 applies to teaching staff of private unaided institution also.

35. This Court is therefore, not inclined to accept the contention of Mr. Majumdar that the decision in St. Mary's Education Society (supra) cannot be applied to the case on hand.
36. The writ petitioner herein has not alleged that the service rules as well as the Conduct Discipline and Appeal Rules of the school is inconsistent with the Regulations contained in the Code. The said rules are also not under challenge in this writ petition. The disciplinary proceeding was initiated as per the Conduct, Discipline and Appeal Rules of the school. It has already been held that such rules do not have any statutory flavour.
37. To the mind of this Court the challenge thrown to the decision of the disciplinary authority has no public element involved therein. The writ petitioner is seeking enforcement of contract of personal service which is impermissible. The grievance of the writ petitioner is nothing but of personal nature. The dispute falls within the realm of private law remedy. This Court accordingly holds that this writ petition is not maintainable against the respondent school which is a private unaided institution.
38. The issue of maintainability is therefore answered in the negative and against the writ petitioner.
39. By referring to Regulation 24(f) of the Code, Mr. Datta would contend that the remedy of the petitioner lies in preferring a reference before the Arbitration Committee to be appointed by the Chairman of the State Board. In support of such contention, he placed reliance upon the orders dated 19.02.2002 and 26.02.2002 passed by a co-ordinate bench in WP 10214 (W)

of 1999. He also placed reliance upon a decision of the Hon'ble Supreme Court in the case of ***Mary Pushpam vs. Telvi Curusumary & ors.*** reported at **(2024) 1 SCR 11** to buttress his submission that the aforesaid decisions of the co-ordinate bench is binding upon this Court.

40. There is no quarrel to the proposition of law that Judicial discipline envisages that a co-ordinate bench follows the decision of an earlier co-ordinate bench and if a co-ordinate bench does not agree with the principles of law enunciated by another bench, the matter may be referred only to a larger Bench.
41. After deciding the issue of maintainability against the petitioner, this Court feels that it is for the writ petitioner to avail the remedy in accordance with law and this Court is not inclined to render any finding at this stage as to what would be the appropriate remedy. Such issue is, therefore, left open.
42. Therefore, in view of the aforesaid finding, this Court refrains from dealing with the other contentions raised by Mr. Majumdar challenging the propriety of the enquiry proceedings.
43. Accordingly, this Court refrains from making any observation with regard to the other decisions cited by Mr. Majumdar as those are on the merits of the dispute.
44. Record reveals that by an order dated July 31, 2014, the competent authority of the respondent school was directed to release subsistence allowance due and payable to the petitioner. It is not in dispute that the subsistence allowance has been paid by the school to the writ petitioner in terms of the said order.
45. The writ petition accordingly fails and the same stands dismissed without, however, no order as to costs. It is clarified that it will be open to the petitioner to avail any other remedy in accordance with law. It is also made clear that the school shall not be allowed to claim refund of the amount paid

to the writ petitioner on account of subsistence allowance in view of dismissal of this writ petition.

46. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)