



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9962 OF 2017

Syed Waseem Syed Sahab,
Age : 36 Years, Occu. : Service
As Assistant Professor,
R/o Opp. Super Market, Rahim
Nagar, Near Masjid, Parbhani,
Tal. & Dist. Parbhani.

.. Petitioner

Versus

1. The State of Maharashtra,
Through its Secretary,
Higher and Technical Education
Department, Mantralaya, Mumbai.
2. The Director of Higher Education,
Maharashtra State, Pune.
3. The Joint Director,
Higher Education,
Nanded Division, Nanded.
4. Swami Ramanand Teerth
Marathwada University, Nanded,
Tal. & Dist. Nanded,
Through its Registrar.
5. Jagdamba Vidya Prasarak Mandal,
Purna, Through its President,
Shri Mohan S/o Vitthal More,
R/o Anand Nagar, Purna,
District Parbhani.
6. Rajarshi Shahu College, Parbhani,
Through its Principal.

.. Respondents

Shri S. S. Thombre, Advocate for the Petitioner.
 Shri S. P. Joshi, A.G.P. for the Respondent Nos. 1 to 3.
 Shri Vivek J. Dhage, Advocate for the Respondent Nos. 5 and 6.

**WITH
 WRIT PETITION NO. 6391 OF 2020**

1. Jagdamba Vidya Prasarak Mandal,
 Purna, Tq. Purna, Dist. Parbhani,
 (Through its President).
2. Rajarshi Shahu College, Parbhani,
 Tq. and Dist. Parbhani.
 (Through its Principal) .. Petitioners

Versus

1. Syed Waseem Syed Sahab,
 Age : 38 Years, Occu. : Service
 R/o Opp. Super Market, Rahim
 Nagar, Near Masjid, Parbhani,
 Tal. & Dist. Parbhani.
2. The State of Maharashtra,
 Through its Secretary,
 Higher and Technical Education
 Department, Mantralaya,
 Mumbai – 32.
3. The Director of Higher Education,
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4. The Joint Director,
 Higher Education,
 Nanded Division, Nanded.
5. Swami Ramanand Teerth
 Marathwada University, Nanded,
 Tq. & Dist. Nanded,
 (Through its Registrar) .. Respondents

Shri Vivek J. Dhage, Advocate for the Petitioners.

Shri S. S. Thombre, Advocate for the Respondent No. 1.

Shri S. P. Joshi, A.G.P. for the Respondent Nos. 2 to 4.

Shri Madhur A. Golegaonkar, Advocate for the Respondent No. 5.

**CORAM : S. G. MEHARE AND
SHAILESH P. BRAHME, JJ.**

**CLOSED FOR JUDGMENT ON : 12.12.2024
JUDGMENT PRONOUNCED ON : 19.12.2024**

JUDGMENT (*Per Shailesh P. Brahme, J.*) :-

. In Writ Petition No. 9962 of 2017, rule has been already issued vide order dated 11.10.2018. Rule in Writ Petition No. 6391 of 2020. Rule is made returnable forthwith. With the consent of parties heard finally at the admission stage.

2. The Writ Petition No. 9962 of 2017 is filed by employee/teacher and Writ Petition No. 6391 of 2020 is filed by the management. The facts in both the petitions are identical, therefore, they are decided by common judgment.

3. For the sake of convenience we are referring the facts and parties of Writ Petition No. 9962 of 2017 of the employee/teacher.

4. The petitioner is seeking direction to implement order dated 30.11.2016 passed by the respondent No. 3/Joint Director, Higher Education, Nanded Division, Nanded for payment of salary to him from 04.06.2010. Another direction which is solicited, is to grant affiliation to the post of Urdu subject. In

companion petition, the management seeks to challenge order dated 30.11.2016 passed by the respondent No. 3/Joint Director.

5. There is no dispute that the respondent No. 5 a minority institution, runs the respondent No. 6/college, which is affiliated to the respondent No. 4/university. As per the staff sanction, two posts were admissible for Urdu in the respondent No. 6/college. Vide letter dated 20.07.2007, the respondent No. 6 was permitted to start Urdu language on permanent non grant basis. The respondent/management got the advertisement approved from the university. Accordingly advertisement was issued for one post of lecturer for Urdu subject. The petitioner applied for the same and he was selected.

6. The petitioner was appointed vide order dated 01.06.2010 by the respondent Nos. 5 and 6 as a lecturer in a scale of Rs. 15600 – 39100 on probation of two years on certain conditions. His appointment was approved by the University vide order dated 28.02.2011. Later on permanent approval was also issued vide order dated 13.12.2011. The petitioner continued to work with the respondent No. 5/management till this date. In this backdrop for which there is no serious dispute, the parties litigate for payment of salary.

7. The petitioner demanded salary, but there was no response. He was required to approach High Court by filing Writ Petition No. 12236 of 2015. The respondent No. 5/management contested the petition. Ultimately by order dated 10.10.2016, it was disposed of with direction to the respondent No. 3/Joint

Director of Education, Nanded Division, Nanded to decide rival claims of the parties for the payment of salary. The management raised plea that an amount of Rs. 10,16,481/- was paid on different occasions.

8. In pursuance of the directions, the petitioner submitted a detailed application to the respondent No. 3. An enquiry was conducted by him and decision was rendered on 30.11.2016 holding that it was not possible to conclude payment made by the management and the management was to make the payment as the post for Urdu subject was on permanent non grant basis. The petitioner persuaded the management for payment of salary, but there was no response. Hence he filed present petition in the High Court. Simultaneously, the management filed companion petition challenging order dated 30.11.2016.

9. Learned counsel for the petitioner submits that he is entitled to receive the salary along with the arrears as per the order dated 30.11.2016. He has not been paid anything since the inception of his services. He raised specific claim before the respondent No. 3 vide his representation dated 24.10.2016. It is further submitted that the post of Urdu needs to be affiliated in view of recommendation vide letter dated 17.02.2017 issued by the respondent No. 1. He is entitled to receive an amount of Rs. 41,00,000/- approximately, which he claimed by way of his application dated 31.03.2017. Learned counsel Mr. Thombre relies on the **judgment dated 24.08.2022** passed by the coordinate Bench in the matter of **Ram Rajaram Kewte Vs.**

The State of Maharashtra and others in Writ Petition No. 3851 of 2019.

10. Learned counsel Mr. Vivek J. Dhage, appearing for the respondent Nos. 5 and 6/management and school and also for the petitioners in companion petition repels the submissions on the basis of his affidavit in reply. He maintains the stand of management that the petitioner was being paid on different occasions the total amount of Rs. 10,16,481/-. It is contended that the respondent No. 5 is a minority institution and, therefore, no writ would lie under Article 226 of the Constitution of India for the payment of salary. He further submits that the strength of the students for Urdu subject has been consistently declining from 2009-2010 upto 2017-2018. There was no sufficient work load and the petitioner was in fact discharging duties on clock hour basis. As per the principle of equal pay for equal work, the petitioner can get salary on clock hour basis for which the management is ready to pay.

11. It is further submitted that the impugned order dated 30.11.2016 passed by the respondent No. 3 is absolutely vague and in-executable. No endeavour has been made by the authority to determine the hotly disputed controversy between the parties as contemplated in the directions of the High Court. He would therefore urge to remand the matter to the respondent No. 3/authority. Mr. Dhage, learned counsel submits that the chart was submitted showing break up of the payment made to the petitioner. In support of his submissions, he places reliance on

the following judgments :

- I. Mrs. Satimbla Sharma and others Vs. St. Paul's Senior Secondary School and others reported in 2011 AIR SCW 4643.
- II. State of Punjab and others Vs. Jagjit Singh and others reported in AIR 2016 SC 5176.
- III. Paramjit Singh Vs. Director, Public Instructions and others reported in 2010(4) SCC 416.
- IV. Pramina Devi (D) through L.rs. Vs. State of Jharkhand reported in 2022(6) SCC 581.
- V. Abdul Razak Haji Ismail Vs. Director of Enforcement and others reported in 2004(4) Bom.C.R. 184.

12. The learned Assistant Government Pleader appearing for the respondent Nos. 1 to 3 submits that permission to start Urdu subject was granted on permanent non grant basis. The respondent Nos. 1 to 3 are not liable to pay anything and it is the liability of the management. It is further submitted that in pursuance of the order passed by the High Court due opportunity was extended to the parties by conducting enquiry. He supports the decision dated 30.11.2016.

13. Learned counsel Mr. Madhur Golegaonkar, appearing for the respondent/university submits that the post in question is unaided. It is the liability of the management to pay the salary to the petitioner. For this controversy no fault can be attributable to the university.

14. Having heard both the sides we propose to examine first the plea of the respondent/management regarding maintainability of petition against minority institution.

15. There is no dispute that the respondent No. 5 is a minority institution, having privileges under Article 30 of the Constitution of India. The post in question is on permanent non grant basis. In this regard the reliance is placed on the judgment of the Supreme Court in the matter of Mrs. Satimbla Sharma and others Vs. St. Paul's Senior Secondary School and others (supra). In that matter the appellants before the Supreme Court were the employees of private minority institution. They had claimed salary at par with the teacher of Government or Government aided schools by filing petition before the High Court. Learned Single Judge allowed the petition. However, the Division Bench in Letters Patent Appeal reversed the said judgment. Against the judgment of the Division Bench, matter was carried to the Supreme Court. The following observations are made by the Supreme Court, which are relevant :

9. In our considered opinion, the Division Bench the High Court has rightly held in the impugned judgment that the teachers of private unaided minority schools had no right to claim salary equal to that of their counterparts working in Government schools and Government aided schools. The teachers of Government schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, 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 schools. Similarly, such unaided private schools are not State within the meaning of Article 36 read with Article 12 of the Constitution and as the obligation to ensure equal pay for equal work in Article 39(d) is on the State, a private unaided minority school is not under any duty to ensure equal pay for equal work.

11. We also do not think that the Court could issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. In *Sushmita Basu & Ors. v. Ballygunge Siksha Samity & Ors.* [(2006) 7 SCC 680], the teachers of a recognized private school known as Ballygunge Siksha Sadan in Calcutta filed a Writ Petition in the High Court of Calcutta praying for issuance of writ of mandamus directing the authorities of the school to fix the salary of teaching and non-teaching staff of the school and to remove all anomalies in the scales of pay as recommended by the Third Pay Commission as extended to other Government aided schools and Government schools and this Court held that in the absence of statutory provision no such direction can be issued by the High Court under Article 226 of the Constitution. Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the present case, there was no statutory provision requiring a private unaided school to pay to its teachers the same salary and allowances as were payable to teachers of Government schools and therefore a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances as were payable to Government institutions.

16. The ratio laid down in the above matter is followed in the judgment of the Supreme Court in the matter of St. Mary's Education

Society and another Vs. Rajendra Prasad Bhargava and others reported in (2023) 4 SCC 498. In that matter also, appellant No. 1 before the Supreme Court was a minority private institution. The respondent No. 1 had challenged termination order before the appellant No. 2/Disciplinary Committee, which was dismissed. Then the appellant was before the High Court. The preliminary objection was raised regarding maintainability of the writ petition against private unaided minority institution. The writ petition was dismissed by the learned Single Judge. Thereafter, appeal was allowed by the Division Bench. Being aggrieved, the appellants had approached the Supreme Court. Various judgments were considered by the Court and ultimately plea of the minority institution – appellant was upheld and final conclusions were drawn as follows :

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 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.

75.5 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.

17. The judgments in the matters of Mrs. Satimbla Sharma and others Vs. St. Paul's Senior Secondary School and others and St. Mary's Education Society and another Vs. Rajendra Prasad Bhargava and others (supra), are again followed by the Supreme Court in the matter of Army Welfare Education Society New Delhi Vs. Sunil Kumar Sharma and others reported in *2024 (3) ESC 560*. The following two questions of law posed for consideration :

- (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 employees can be adjudicated in a writ petition filed under Article 226 of the Constitution ?

It was held in paragraph No. 42 as under :

42. In the penultimate para, this Court ruled as under :-

“32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not a State within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it

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

(Emphasis supplied)

18. In the matter of Mrs. Satimbla Sharma and others Vs. St. Paul's Senior Secondary School and others and St. Mary's Education Society and another Vs. Rajendra Prasad Bhargava and others (supra) one of the parties before the Supreme Court were private minority unaided institutions. Considering the law laid down in last three judgments (supra), writ court has to be satisfied that the action of such an authority, under challenge, is in the domain of public law as distinguished in the private laws. We find that there is no public element in the action complained of in the present matter. The respondent/management was not seeking to achieve the public function for the collective benefit of the public or section of it. It is not established by the petitioner that the service conditions are regulated by the statutory provisions.

19. The petitioner failed to demonstrate that there is provision in the statute or subordinate legislation that the petitioner is entitled to have salary equal to an employee working in Government or Government aided college/institution. On the contrary, we find that it is a contract between the petitioner and the respondent/management reflecting from the order of appointment having stipulation of a particular scale. By following the ratio laid down by the Supreme Court in the decisions of Mrs. Satimbla Sharma and others Vs. St. Paul's Senior Secondary School and others, St. Mary's Education Society and another Vs. Rajendra Prasad Bhargava and others and Army Welfare Education Society New Delhi Vs. Sunil

Kumar Sharma and others (supra), we have no reason to take another view. Accordingly we hold that writ petition of the petitioner/employee is not maintainable. The petitioner is not entitled to claim any relief from this Court.

20. Though employee's petition is not maintainable against private minority institution, the petition of the respondent/management is maintainable as it is challenging the enquiry proceedings of the respondent No. 3/Joint Director and its conclusions. The judicial review is permissible to examine order dated 30.11.2016.

21. In the earlier round of litigation the petitioner had made identical claim. It was opposed by the management on the ground that he was being paid Rs. 10,16,481/-. The parties were relegated to the respondent No. 3/Joint Director of Education to decide the disputed issues by resorting to opinion of handwriting expert. Accordingly, enquiry was conducted by the respondent No. 3. It was recorded that there was no mechanism to verify the signatures and the concern authority was unable to come to any conclusion regarding the disbursement of arrears as contended by the management. Simultaneously, it was held that amount of Rs. 10,17,501/- was not proved to be disbursed and the respondent/management was directed to make the payment as per rules.

22. The finding of the respondent No. 3 that he was unable to ascertain the payment as there were disputes about signatures of

the petitioner over the acknowledgment receipts does not stand to the reasons. When he was specifically directed to resort to opinion of the handwriting expert, it is incomprehensible as to why said recourse was not taken. He did not conduct the enquiry as contemplated by the directions of the High Court. His further observation castigating doubt over the disbursement of amount to the petitioner has no foundation and based on conjuncture and surmises. There is no objective scrutiny of the claim of the petitioner and the plea of the management. The order is vulnerable. The matter is required to be relegated to the respondent No. 3 for that purpose. We find that the learned counsel for the respondent Mr. V. J. Dhage is justified in contending that impugned order is vague.

23. It is clarified that the judgment in the matter of Mrs. Satimbla Sharma and others Vs. St. Paul's Senior Secondary School and others (supra) is not an impediment for the respondent No. 3 to determine the claim and the liability of the parties, being a fact finding authority. There was a contract between the petitioner and the respondent/management. The salary was prescribed in the pay band of Rs. 15600 – 39100. The services of the petitioner were approved. It is open for the respondent No. 3 to decide entitlement, liability and quantum in the context of the contract between the parties as well as governing norms of either University Grants Commission or the University as the case may be. The authority concerned can also rely on remaining judgments cited by the parties.

24. We, therefore, pass following order :

O R D E R

- i) The Writ Petition No. 9962 of 2017 is dismissed. Rule stands discharged.
- ii) The Writ Petition No. 6391 of 2020 is partly allowed.
- iii) The order dated 30.11.2016 passed by the respondent No. 3/Joint Director of Higher Education, Nanded Division, Nanded is quashed and set aside and the matter is relegated to the respondent No. 3 for *denovo* enquiry and decision.
- iv) The respondent No. 3 shall decide the claim in the wake of directions of order dated 10.10.2016 passed by the High Court in Writ Petition No. 12236 of 2015, within six (06) weeks from today by extending opportunity to the parties.
- v) Rule is made absolute in above terms in Writ Petition No. 6391 of 2020.
- vi) There shall be no order as to costs.

[**SHAILESH P. BRAHME, J.]**

[**S. G. MEHARE, J.]**

