

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH
AT SRINAGAR**

Reserved on: 26.09.2022
Pronounced on: 11.10.2022

WP(C) No.2197/2021

SHOWKAT AHMAD RATHER & ORS. ...PETITIONER(S)

Through: - Mr. Shafqat Nazir, Advocate.

Vs.

GOVERNMENT OF J&K & ORS ...RESPONDENT(S)

*Through: - Mr. Sheikh Mushtaq, AAG
Mr. Altaf Haqani, Sr. Adv. with
Mr. Shakir Haqani, Advocate.*

**CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR,
JUDGE.**

JUDGMENT

1) The petitioners, twelve in number, came to be engaged as Teachers in Muslim Educational Institute, Higher Secondary School, Pampore-Pulwama, from time to time between 9th March, 2009, to 16th April, 2014. It is submitted that due to outbreak of Covid-19 pandemic, the respondent Education Institute was closed as a precautionary measure and the petitioners were called upon to conduct the classes online. While the petitioner were regularly taking online classes, the respondent Institute did not pay them any salary for the months of March to July, 2020 and paid only

60% of salary for the months of August to September, 2020. Similarly, for the months of October and November, 2020, 25% of the salary of the petitioners was withheld whereas from December, 2020, onwards no salary was paid to the petitioners.

2) Having failed to persuade the school management to release their salary, the petitioners approached the Hon'ble Lieutenant Governor's Grievance Cell with a formal complaint. The petitioners also approached the respondents with their grievance, in response whereof respondent No.3 vide its communication dated 23rd January, 2021, requested the District Development Commissioner, Pulwama, to constitute a high-Level committee to address the grievance of the petitioners. In the meanwhile, the complaint lodged by the petitioners before the Hon'ble Lieutenant Governor's Grievance Cell was also taken cognizance of by the authorities. To look into the complaint of the petitioners, the Additional Deputy Commissioner, Pulwama, constituted a committee of officers. The petitioners also made a complaint before the Divisional Commissioner, Kashmir. To put it briefly, the grievance of the petitioners is that when the salary due to them was not paid by the respondent Institute, they made

applications, representations and complaints to different authorities to intervene in the matter. This was not taken by the respondent Institute in good taste and, accordingly, the respondent Institute vide orders impugned issued on different dates dispensed with the services of the petitioners as Teachers. The impugned orders are placed on record by the petitioners as Annexure-A to the writ petition.

3) On being put on notice, the respondents have taken a preliminary objection to the maintainability of this petition. It is submitted that the respondent-Institute is a private unaided Educational Institution governed by its own rules dealing with recruitment and conditions of service of its employees and, therefore, no writ lies to enforce such non-statutory terms of contract of service. It is contended by respondents No.4 and 5 that a writ petition under Article 226 of the Constitution of India is not a remedy for enforcing a private contract for personal service.

4) Having heard learned counsel for the petitioners and perused the material on record, I am of the considered view that the preliminary objection raised by the respondents to the maintainability of the petition merits acceptance. It is trite law that a writ of mandamus under Article 226 may be

issued even against a private body which is not a state within the meaning of Article 12 of the Constitution of India and the High Court can exercise judicial review of the action of such body challenged by a party provided there is public law element. The writ jurisdiction cannot be exercised to enforce a pure private contract entered into between the parties. The term “**any person or authority**” used in Article 226 of the Constitution cannot be read ‘*ejusdem generis*’ to the term “authority” used in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Articles 32 and 226 of the Constitution of India. However, Article 226 confers powers on the High Courts to issue writs even for enforcement of non-fundamental rights. The words “any person or authority” used in Article 226 of the Constitution are not to be confined only to statutory authorities and instrumentalities. The writ under Article 226 would lie against any other person or body performing public duty. It is not the form of the body concerned that is much relevant. What is relevant, however, is the nature of duty imposed on such body. Mandamus cannot be denied on the ground that duty to be enforced is not one that is imposed by the statute. It may be sufficient if the public duty sought to be enforced is imposed by charter, common law, custom or even contract.

5) In view of the settled legal position, there is not even an iota of doubt that unaided private Educational Institutions do perform public duty of imparting education to children and, therefore, amenable to writ jurisdiction under Article 226 of the Constitution of India. Simply because a private unaided institution is amenable to writ jurisdiction does not mean that every dispute concerning such private institution also becomes *ipso facto* amenable to writ jurisdiction. The right which emanates from private law cannot be enforced by invoking the writ jurisdiction irrespective of the fact that such institution is discharging public functions. For issuance of writ of mandamus to an authority, it must be demonstrated that such authority is not performing a public duty but doing a particular thing in a particular manner and it has failed in the performance of such public duty. There must be a public element or integral part thereof in the action of such authority.

6) The issue has been recently considered by the Supreme Court in the case of **St. Mary's Education Society and another vs. Rejendra Prasad Bargava and others**, 2022 SCC Online SC 1091. The Supreme Court

after surveying the law on the subject summed up its conclusion in para 69 which is set out below:

“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 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.

- (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 nonteaching 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 nonteaching 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 nonteaching 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.

[Emphasis by me]

7) In view of the clear dictum of law laid down in the aforesaid judgment, I have absolutely no doubt in my mind that though an educational institution like the respondent Institute may be imparting public duty yet unless the act complained of has direct nexus with the discharge of public duty, no writ would lie to enforce such act. The recruitment and service conditions of Teachers in the respondent Education Institute are, admittedly, non-statutory in character and fall purely in the realm of private contract. There is no public element involved in the discharge of

duties by the petitioners governed purely in terms of their contract of employment. Mere fact that respondent Institute is recognized by the Government or is affiliated to a statutory board will not alter the position. An unaided private educational institution may qualify to be a “Public authority” amenable to writ jurisdiction of High Court, however, a mandamus will not be issued unless action of such authority complained of falls in the domain of public law as distinguished from private law.

8) The Hon’ble Supreme Court in the case of **K. K. Saksena v. International Commission on Irrigation and Drainage**, (2015) 4 SCC 670, has made beautiful observations, which, for facility of reference, are set out below:

“43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a 'State' within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. Reason is obvious. Private law is that part of a legal system which is a part of Common Law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is 'State' under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law”

9) Equally noteworthy are the observations made by the Supreme Court in paragraph (34) of the judgment in **St. Mary's Education Society and another** (supra), which I find apt to reproduce hereunder:-

“34. Thus, where a teacher or nonteaching staff challenges action of Committee of Management that it has violated the terms of contract or the rules of the Affiliation Byelaws, the appropriate remedy of such teacher or employee is to approach the CBSE or to take such other legal remedy available under law. It is open to the CBSE to take appropriate action against the Committee of Management of the institution for withdrawal of recognition in case it finds that the Committee of Management has not performed its duties in accordance with the Affiliation Byelaws.

10) In view of the aforesaid, the legal position is now well concretized and unambiguously stated. The contrary judgments relied upon by learned counsel for the petitioners have all been considered and adequately distinguished. Absent violation of any statutory provision or breach of public duty on the part of respondent Institute, this petition, which is essentially for enforcement of a private contract of service, is not maintainable. In view of this Court arriving at the conclusion that the writ petition is not maintainable, no decision is being rendered on merits of the controversy.

11) For the foregoing reasons, this petition is found not maintainable and the same is, accordingly, dismissed. It

shall, however, remain open to the petitioners to work out their remedies as may be available to them under law.

(Sanjeev Kumar)
Judge

Srinagar
11.10.2022
“Bhat Altaf, PS”

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No