
(2009) 01 MP CK 0026
In the Madhya Pradesh High Court

Anirudh Dwivedi

APPELLANT

Vs

The State Chief Commissioner, Bharat Scout and Guide and
Another

RESPONDENT

Date of Decision : 29-01-2009

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 32

Citation : (2009) ILR (MP) 2191 : (2009) 2 MPLJ 166

Hon'ble Judges : R.S. Jha, J

Bench : Single Bench

Judgement

R.S. Jha, J.

The petitioner had initially filed this petition being aggrieved by order dated 30.6.1999 passed by the respondents rejecting the petitioner's application claiming difference of pay during the period of suspension on the ground that the issue in that respect would be decided on completion of the departmental enquiry. However, during the pendency of the petition, as an order terminating the petitioner from service has been passed on 13.9.2002, the petitioner by way of amendment has also challenged the aforesaid order.

The facts, leading to the filing of the present petition, are that the petitioner was initially engaged by the respondents as an Assistant State Organizing Commissioner. A departmental enquiry was initiated against him by issuance of a charge-sheet on 26.10.1998. On 20.4.1999 and 26.4.1999, Annexures P-4 and P-5, the petitioner was informed that the departmental proceedings had been cancelled. The petitioner filed an application claiming difference of salary for the period under which he was placed under suspension, which was rejected by the impugned order dated 30.6.1999 and, thereafter a new Inquiry Officer was appointed by the respondents on 8.7.1999 who initiated fresh proceedings against the petitioner on 7.8.1999. This Court, by an interim order dated 4.10.1999, issued a direction to the effect that the departmental enquiry instituted against the petitioner shall continue but final orders therein shall not

be passed. However, during the continuance of the aforesaid interim order, the respondents have passed a final order in the departmental enquiry on 13.9.2002 and dismissed the petitioner from service and ordered recovery of a sum of Rs. 60,000/- with interest @ 10% per annum. The aforesaid order is also subject matter of the present petition.

At the very outset, the learned Counsel for the respondents has raised a preliminary objection as to the maintainability of the petition on the ground that the respondents not being a State or its instrumentality and being a private body and the issue raised before this Court being of a private nature, a writ under Article 226 of the Constitution of India, as filed by the petitioner, is not maintainable and in support thereof has relied upon the judgment of this Court rendered in the case of Dr. (Smt.) Mradula Sharma v. State Chief Commissioner, M.P. Bharat Scouts and Guides and Ors. Misc. Petition No. 631/1994, wherein a Single Judge of this Court has held that the respondents Bharat Scouts and Guides is not a State within the meaning of Article 12 of the Constitution of India. The learned Counsel for the respondents has also relied upon the decision of the Supreme Court in the cases of Sushmita Basu and Others Vs. Ballygunge Siksha Samity and Others, , G. Basi Reddy Vs. International Crops Research Instt. and Another, , Serbjeet Bhatia v. GOC-IN-HQ Central Command, Lucknow (UP) and Ors. 2004 (2) MPLJ 125 and Yashwant Singh Sikarwar v. Teresian Carmel Education Society and Ors. 2008 (4) MPLJ 611.

On the other hand, learned Counsel for the petitioner has relied upon a judgment of this Court rendered in the case of D. L. Sharma v. M.P. Bharat Scouts and Guides and 3 Ors. M.P.656/1993 decided on 28.4.1995 wherein it has been held that the respondent Bharat Scouts and Guide is amenable to the writ jurisdiction of this Court. The learned Counsel for the petitioner has also relied upon the judgment of the Supreme Court in the cases of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, and Binny Ltd. and Another Vs. V. Sadasivan and Others, in support of his submission.

From a perusal of the judgment of this Court rendered in the case of Dr. (Smt.) Mradula Sharma (supra) it is apparent that this Court by applying the test laid down by the Supreme Court in the case of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, held that the respondent Society is not a State under Article 12 of the Constitution of India, and on that count dismissed the petition filed by the petitioner therein.

In the case of D. L. Sharma (supra), another Single Judge of this Court, while quoting a passage from the judgment of the Supreme Court in the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , has also taken a view that the respondent is not a State within the meaning of Article 12 of the Constitution of India, but thereafter has gone further to state that it may not be an instrumentality of the State but it is still regulated by certain norms prescribed by the State

Government for grant-in-aid as well as regulating recruitment in the respondents' institution and after extensively referring to the M.P. Bharat Scouts and Guides Association Revised Assistance Grant-in- Aid Rules, 1980 (hereinafter referred to as "the Rules of 1980") has held that as the respondents were bound to follow the service rules of the State Government applicable for the purposes of recruitment and termination of employees, the respondent Society could not be permitted to play fast and loose and act arbitrarily or whimsically with its employees by passing arbitrary or illegal orders and on this count entertained and allowed the petition by quashing the impugned order of termination.

It is an admitted fact that the respondent is a Society registered under the provisions of Society Registration Act, 1860. It is also admitted by the learned Counsel for both the parties that the respondent/society is not a State within the meaning of Article 12 of the Constitution of India nor is it an instrumentality of the State or a statutory body being owned and controlled by the State Government. In view of the aforesaid facts and in the light of the tests laid down by the Supreme Court in the case of *Ajay Hasia (supra)* as elaborated in *Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others*, I am in full agreement to the conclusion recorded by this Court in the cases of *Dr. (Smt.) Mradula Sharma (supra)* and *D. L. Sharma (supra)* that the respondent/society is not a State within the meaning of Article 12 of the Constitution of India. However, in view of the extensive arguments made by the learned Counsels appearing for both the parties, I proceed to decide the issue as to whether the respondent is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India in spite of the fact that it is not the State within the meaning of Article 12 of the Constitution of India as was held by this Court in the case of *D. L. Sharma (supra)*.

I have carefully perused the documents filed by the petitioner including the Memorandum of Association of the respondent Society and the Rules of 1980. Clause 3(a) and 3(b) of the Memorandum of Association lay down the definition and purpose for which the respondent Society has been established, which reads as under:

3(a) Definition: The Bharat Scouts and Guides is a voluntary non-political, educational movement for young people, open to all without distinction of origin, race or creed, in accordance with the purpose, principles and method conceived by the Founder Lord Baden-Powell in 1907.

(b) Purpose: The purpose of the Movement is to contribute to the development of young people in achieving their full physical, intellectual, social and spiritual potentials as individuals, as responsible citizens and as members of the local, national and international communities.

A perusal of these clauses makes it clear that the object and purpose for which the respondent Society has been established is for the educational movement of the young people and to contribute to the development of young people in

achieving their full physical, intellectual, social and spiritual potentials so that they become responsible citizens.

It is also an admitted fact that the respondents are receiving grant-in-aid from the State in accordance with the Rules of 1980. Under Rule 6 of the Rules of 1980, it is stipulated that the grant given to the respondents shall be utilized for the purposes of the aims and objects as stated in the Memorandum of Association; Rule 7 lays down that the grant given to the respondent Society would be of four types; maintenance grant, building grant, equipment grant and special grant; Rule 13 lays down that the conditions of appointment, qualification, pay, conditions of service, dismissal, termination, reversion, suspension and other punishments, disciplinary action, leave, allowances, etc, of the officers and employees of the respondent Society would be governed by the Rules framed by the State of M.P. applicable to Government employees; Rule 17 apply the rules of reservation to the respondents; Rule 24 lays down that the maintenance grant would be to the extent of 90% and in cases where expenditure is less, 100%; and Rule 37 lays down that the salary and other allowances to the employees of the respondents shall be paid through the grant. Other provisions of the rules extensively prescribe the manner, purpose and procedure in which the grant shall be utilized and further prescribes the kind of grants and for strict monitoring and auditing of the grant by the State.

In view of the aforesaid, it is clear and in fact not disputed that the respondent Society is an aided Society and is duty bound to follow and apply the service rules applicable to Government servants as framed by the State of M.P., specifically the M.P. Civil Service (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as the Service Rules of 1966) with which we are concerned in the present petition. Keeping in mind the aforesaid aspects, the preliminary objection raised by the respondents has to be adjudged.

In the case of Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others (supra) the issue of entitlement of terminal benefits to teachers of a college that was run by a private Trust traveled to the Supreme Court and the finding of the High Court regarding amenability of the Trust to the writ jurisdiction of the High Court under Article 226 of the Constitution of India, was assailed therein and the Supreme Court while deciding against the petitioner Trust held that a writ under Article 226 of the Constitution of India can be issued even to authorities who are not State under Article 12 of the Constitution of India, in case they are performing some public duty or function and went on further to hold that a writ of mandamus cannot be denied to a petitioner when public duty is cast upon an authority either by some statute, charter, common law, customs or even contract in the following terms in paras-17 to 22:

17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The "public authority" for them means everybody which is created by statute - and whose powers and duties are

defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all "public authorities." But there is no such limitation for our High Courts to issue the writ "in the nature of mandamus". Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to "any person or authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose".

Article 226 reads :

226. Power of High Courts to issue certain writs.-

(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

* * *

The scope of this article has been explained by Subba Rao, J., in *Dwarkanath v. ITO*: (SCR pp. 540-41)

This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself.

The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as

well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied.

In *Praga Tools Corporation v. C.A. Imanuel* this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body.

It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities.

Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states:

To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.

In the case of *Vidya Dhar Pande Vs. Vidyut Grih Siksha Samiti and Others*, , a private educational institution receiving grant was held amenable to writ jurisdiction of the High Court even though it was not a "State" on the ground that it was bound to follow the regulations framed by the Board of Secondary Education M.P. and as such the termination of its employee in breach of the regulations could be assailed by filing a writ petition before the High Court and while doing so the Supreme Court also followed its previous judgment rendered in the case of *Indra Pal Gupta Vs. Managing Committee, Model Inter College, Thora*, , in the following terms in paras 15 and 16:

15. In *Indra Pal Gupta Vs. Managing Committee, Model Inter College, Thora*, the

appellant was appointed on probation for one year as Principal of Model Inter College, Thora, District Bullandshah in accordance with the procedure prescribed by the Intermediate Education Act, 1921 (U.P. Act No. 2 of 1921) and the Regulations made thereunder. The period of probation was however, extended by the Managing Committee of the said Model Inter College for a further period of one year. On April 27, 1969 the Managing Committee adopted a resolution to terminate the services of the appellant in consideration of the report of the Manager of the College to the effect that due to his unsatisfactory services, it would not be in the interest of the Institution to permit him to continue as probationer any longer. The service of the appellant was thus terminated without complying with the mandatory procedure laid down in Regulations 35 to 38 which provided for forming a subcommittee to enquire into the allegations against the Principal and to frame definite charges against the Principal and to give him opportunity of hearing. It was held that the order of termination made in breach of the provisions of the said Regulations which were made in pursuance of the provisions of the said Act, is illegal and invalid and as such the same was quashed. The appellant was further declared to be in service of the College.

On a conspectus of these decisions the irresistible conclusion follows that the impugned order of termination of the appellant from the post of Principal of the Higher Secondary School in breach of the Regulation 79 framed under the said Act is illegal and as such the same is liable to be quashed as the Regulations have got statutory force. The appellant is liable to be re-instated in the service as Principal of the said College. We also hold that the Higher Secondary School in question though run by a private trust receives 100% grant from the Government as is evident from the affidavit sworn on behalf of the appellant and as such it is amenable to the writ jurisdiction for violation of the provisions of the said Regulations in passing the impugned order of termination of service of the appellant. We, therefore, set aside the order passed by the High Court which, in our opinion, is unsustainable and direct the respondents to re-instate the appellant in the service of the said College. Considering the facts and circumstances of the case we are of the opinion that the ends of justice would be met by directing the respondents to pay to the appellant a sum equal to 50% of the salaries and allowances from the date of termination till his re-instatement in service as it appears that the appellant was not in employment during this period. The appeal is, therefore, allowed with costs.

Similarly in the case of K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, the Supreme Court held that a writ against a nonaided private educational institution which is not a "State" within the meaning of Article 12 of the Constitution of India was maintainable on the behest of its employees seeking parity in pay-scale with employees of a Government institution when such claim is based on government instructions thereby creating an enforceable right in them.

In the case of Manmohan Singh Jaitla Vs. Commissioner, Union Territory of

Chandigarh and Others, , the Supreme Court held that an aided school receiving 95% of expenses by way of grant from the Government would fall within the expression of "Other authorities" under Article 12 of the Constitution of India and in such circumstances if a teacher of the aided school is terminated by invoking terms of contract of service on the ground that his services are no more required in order to circumvent the mandatory statutory obligation of holding an inquiry before dismissing the teacher as required by the Punjab Aided Schools (Security of Service) Act, 1969, then the action would be amenable to the writ jurisdiction of the High Court.

In the case of Francis John v. Director of Education and Ors. 1989 Supp (3) SCC 598, the Supreme Court again reiterated that private schools which are receiving aid from the Government under the Grant-in-aid Code which is promulgated not merely for the benefit of the management but also for the benefit of the employees of the School for whose salary and allowances the Government was contributing from the public funds under the Grant-in-aid Code cannot escape from the consequences flowing from the breach of the code and in such circumstances is amenable to jurisdiction of the High Court under Article 226 of the Constitution of India.

In the case of Kamlesh Kumar v. Pansheel Shiksha Samiti and Anr. W.P No. 4970/1997 and Dr. Ramshankar Dwivedi v. The State of M.P. and 6 Ors. W.P No. 4494/1997, decided by a Division Bench of this Court on 9.7.1998 on the matter being referred to a Division Bench of this Court for deciding the question whether a writ petition would lie against a private unaided registered Society imparting education under Article 226 of the Constitution of India, this Court, after referring to the judgment of the Supreme Court in the case of Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others (supra) and the judgment in the case of Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , held as follows in paras 7 and 9:

7. Therefore, in view of the ratio laid down in the case of Unni Krishnan J.P. (supra) it is settled that the writ petition against private unaided bodies which are discharging public duty in imparting education is maintainable.

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So far as writ petition against private institutions which are imparting education as a public duty is concerned, it has been held to be maintainable by this Court also in the case of Ratan Prasad Kushwaha and Ors. v. North Coalfields Limited and Ors. 1994 M.P.L.S.R. 174 had the occasion to deal with this matter and their Lordships relying on the earlier judgment given by the Supreme Court in the case of Unni Krishnan J.P. (supra) has held that:

Private unaided schools run by society registered under Societies Registration Act, whether amenable to writ jurisdiction of High Court and whether they are "State" within the meaning of Article 12 of the Constitution of India. Held, Article

226 of the Constitution of India covers not only the obligation of this Court to enforce fundamental rights in part III of the Constitution of India but also other legal rights or public duties.- High Court has jurisdiction U/Art.226 of the Constitution of India - Further held that imparting education is the function of the state which may be discharged either through state owned or recognized education institutions.

It is worth noting that though the judgment in the case of Unni Krishnan J.P. (supra) has been overruled, in part, by the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , the aforesaid dictum of the Supreme Court in Unni Krishnan J.P. (supra) quoted and relied upon by this Court in the case of Kamlesh Kumar (supra) has not been disturbed or set aside.

What is immediately apparent from a perusal of the aforesaid judgments is that the High Court in exercise of powers under Article 226 of the Constitution of India, has power to issue any direction, order or writs to any person or authority, including in appropriate cases the State, for the enforcement of any of the fundamental rights or for any other purpose and that the term "authority" used under Article 226 of the Constitution of India must receive a liberal meaning and cannot be confined only to mean the State, statutory authorities and instrumentalities of the State but would also include such a person or body who is performing any public duty or public function involving some public law element and if some duty or obligation by whatever means is also imposed upon it creating a positive right in some effected party then a writ in the nature of mandamus cannot be refused to such an effected party. It has further been held that the positive obligation may be created or imposed by a statute, charter, common law, custom or even contract. It has also been held that the remedy under Article 226 of the Constitution of India is a public law remedy and can be used for the enforcement of various rights of the public or to compel authorities and even private bodies to discharge their duties and obligations and to act within their bounds and can be used to do justice when there is wrongful exercise of power or a refusal to perform duties imposed upon it. The only restriction on the invocation of the remedy is that it is generally not available against private wrongs or cases which are purely governed by private contracts. In other words, what has been laid down by the Supreme Court is that the nature or form of the person or authority is not material for the purposes of Article 226 of the Constitution of India but it is the function or duty that it is performing and the obligation or duty imposed upon it that is relevant and, therefore, any person or authority who is performing some public duty or public function involving some public law element is amenable to writ jurisdiction of the High Court and secondly, where any duty or responsibility is cast or conferred by whatever means i.e. by statute, charter, common law, custom or even contract, upon any person or authority creating a positive right in any individual to claim due performance thereof by seeking a writ of mandamus, the Court shall not deny the same under Article 226 of the Constitution of India only on the ground

that the authority is a private body.

In the case of *Binny Ltd. and Another Vs. V. Sadasivan and Others*, though the writ petition filed by Binny, Ltd., which is a private company, was allowed holding that it was neither an authority or instrumentality of the State nor was it performing any public function or duty involving public law element nor was it bound by any rules or regulations, the Supreme Court had the occasion to elaborate on the meaning of the words "public function" and it was held therein that when a body seeks to achieve some collective benefit for the public and is accepted by the public as having authority to do so or where the body is intervening or participating in social or economic affairs in public interest it would be performing a public function in the following terms in paragraph 11 which reads as follows:

11 Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is 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. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on *Judicial Review of Administrative Action* (5th Edn.) by departmental enquiry Smith, Woolf I Jowell in Chapter 3, para 0.24, it is stated thus :

A body is 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. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and

tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the State, Charities, selfregulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to "recognize the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is Government

The Supreme Court, after summarizing the law in the aforesaid case also held that a writ of Mandamus under Article 226 can be used for enforcement of various rights of the public or to compel authorities to discharge the duties and to act within their bounds even if the authority concerned is a private body or person provided the private body is discharging some public function and the denial of any right is in connection with the public duty imposed upon such body even in cases where the duty cast on the body is statutory or otherwise and some public law element is involved in the action and the Supreme Court has further gone on to state that the question as to whether the authority is a public authority or is performing a public function has to be decided on the facts of each case and for this purpose in paragraph 29 of the aforesaid judgment which is profitably quoted as under :

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is preeminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. 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. 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. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England, 3rd Edn., Vol. 30, 8. 682,

1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit.

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

In the instant case, the respondent Society is not engaged in any private business or enterprise but is involved in undertaking activities for the non-political educational movement of young people so as to contribute to their development in achieving their full physical, intellectual, social and spiritual potentials as individuals, as responsible citizens and as members of the local, national and international communities which incidentally is also the obligation and object of all State activities and, therefore, the activities of the respondents are in fact supplementing the public obligations of the State. Though the respondent authority is not an educational institution in the usual sense but as is evident from its own aims and objects, it is involved in imparting education in a different way and its activities, which require extensive interaction and dialogue with the public at large, are in the public field and involve the public law element as they educate, train and motivate young people to achieve their full physical, intellectual, social and spiritual potential as individuals and as responsible citizens of the country and members of the local, national and international community. From the aforesaid it is clear that the respondent authority is seeking to achieve some collective benefit for the public and is accepted by the public as having the authority to undertake the aforesaid activities by educating and training young persons and giving them certificates as scouts or guides and it is, therefore, seeking to achieve some collective benefit and is participating in the social affairs in public interest and in such circumstances, I have no hesitation in holding that the respondent authority is performing a public function. In addition, the respondent is receiving full Grant-in-aid from the State Government under the provisions of the Rules of 1980 and the grant is spent for the purposes of effectively implementing and achieving their objects of furthering this educational movement as well as for maintaining and expanding their establishment and that under the Rules of 1980 they are duty bound to comply with, implement and apply the service rules and regulations framed by the Government of M.P. to its own employees. In fact it can be stated without any hesitation that a duty and obligation is cast upon it to implement these rules and a consequent right is created in its employees to claim implementation of these rules in case the respondent Society violates them.

In view of the aforesaid facts and circumstances of this case, the respondent Society which is performing public functions, is receiving full Grant-in-aid and is also bound to follow the provisions of the Service Rules of 1966 while taking action against its employees is, without any doubt, amenable to the jurisdiction of this Court under Article 226 of the Constitution of India and has rightly been

dragged before this Court by the petitioner claiming a writ of mandamus for ensuring due compliance of the rules and in such circumstances it cannot be said that the writ, filed by him against the respondent Society, is not maintainable.

The reliance placed by the learned Counsel for the respondents on the judgments of the Supreme Court, namely *Sushmita Basu and Others (supra)* and *G. Bassi Reddy (supra)* is in fact misconceived inasmuch as the aforesaid judgments dealt with unaided institutions who were not performing any public function or duty nor were they bound by any statutory provisions and in such circumstances it was held by the Supreme Court that the institutions therein were not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India, whereas in the present case it is an admitted fact that the respondent Society is an aided Society being given government grant under the Rules of 1980, is performing a public function and is also duty bound to follow and implement the rules relating to Government servants in respect of its employees. For the same reasons the judgments of this Court, relied upon by the learned Counsel for the respondents namely *Serbjeeet Bhatia (supra)* and *Yashwant Singh Sikarwar (supra)* are also not relevant for the purposes of the issue involved in the present petition.

In view of the aforesaid facts and circumstances, I am in respectful agreement with the view taken by this Court in the case of *D.L.Sharma (supra)* which is also in line with the subsequent judgments of the Supreme Court referred to in the preceding paragraphs and hereby conclude that the present writ petition filed by the petitioner for enforcing due compliance of the rules of 1966 against the respondent-society which is performing a public function involving public law element is maintainable. The preliminary objection, raised by the learned Counsel for the respondents, is accordingly rejected. I now proceed to decide the petition on merits.

In the instant case, it is contended by the learned Counsel for the petitioner that the respondent authorities, after having cancelled the departmental enquiry initiated against the petitioner by orders dated 20.4.1999 and 26.4.1999, could not have started an enquiry afresh as there is no such power or provision in the Service Rules of 1966. It is secondly contended by the learned Counsel for the petitioner that even otherwise, in case the respondent authorities wish to continue the enquiry against the petitioner, they could have done so only from the stage it had been left by the previous Inquiry Officer, but the respondent authorities, after appointing a new Inquiry Officer by order dated 7.8.1999, re-examined the prosecution witnesses and conducted a de novo enquiry which is not permissible under the Service Rules of 1966. It is further contended that the impugned order of termination suffers from perversity and total non-application of mind inasmuch as the two witnesses namely; *Shri Sudhakar Karmalkar* and *Shri Shiv Narayan Giri*, who have been relied upon by the Disciplinary Authority for imposing penalty upon the petitioner, have given absolutely diverse statements in the departmental proceedings inasmuch as the previous

statements given by them before the first Inquiry Officer in April 1999 are in absolute divergence with the statements given before the second Inquiry Officer in October 1999 and while the first statement made by them were supporting the case of the petitioner, the second statement given by them were against the petitioner and the Disciplinary Authority relying on the two statements, imposed a punishment of dismissal upon the petitioner which smacks of total non-application of mind. Lastly, it is contended by the learned Counsel for the petitioner that the impugned order of punishment dated 13.9.2002 deserves to be quashed inasmuch as this Court by interim order dated 4.10.1999 had enjoined the authorities from passing a final order, but the respondent authorities in total disregard and disobedience of the Court's order have passed final order dismissing the petitioner from service.

Per contra, it is submitted by the learned Counsel for the respondents that the departmental proceedings has been conducted against the petitioner in accordance with the Service Rules of 1966 after giving him due and proper opportunity of hearing. It is submitted that due to clerical error in the order dated 20.4.1999 it was communicated that the inquiry stood cancelled whereas in fact the authorities had only cancelled the order dated 24.2.1999 appointing Shri Anirudh Dwivedi as Inquiry Officer and on noticing the mistake, the respondent authorities had issued a corrigendum letter on 8.7.1999 and, therefore, the contention of the petitioner that a departmental enquiry was conducted inspite of the fact that it had been cancelled is misplace and misconceived. It is further submitted that the respondent authorities appointed a different Inquiry Officer by order dated 7.8.1999 who gave notice to the petitioner and thereafter conducted the inquiry in accordance with the rules by examining the prosecution and defence witnesses and, therefore, as due opportunity was given to the petitioner, no fault can be found with the procedure adopted by the second Inquiry Officer nor can any fault be found with the impugned order of punishment issued by the Disciplinary Authority which is in accordance with the rules. Lastly, it is submitted by the learned Counsel for the respondents that the impugned order of punishment dated 13.9.2002 was issued, after passing of the interim order by this Court in the present petition, as no hearing took place for a considerable period of time nor was the writ petition decided and the interim order passed by this Court had ceased to be operative by a flux of time in view of the provisions of Article 226(3) of the Constitution of India and, therefore, the contention of the learned Counsel for the petitioner deserves to be rejected.

I have heard the learned Counsel for the parties at length. It is apparent from a perusal of the orders dated 20.4.1999, 26.4.1999 and 7.8.1999 that the respondents had wrongly mentioned in the previous order that the departmental enquiry stood cancelled whereas the real intent and import was cancellation of the order of appointment of the Inquiry Officer and, therefore, I do not find any merit in the submission of the learned Counsel for the petitioner that the respondents could not continue the enquiry as it had been cancelled by them. I

also do not find any fault with the order of the respondents dated 7.8.1999 appointing a different Inquiry Officer.

However, as is apparent from a perusal of Rule 14 (22) of the Service Rules of 1966, a succeeding Inquiry Officer must act on the evidence recorded by his predecessor until and unless he records an opinion that further examination of any witness, who has already been examined, is necessary in the interest of justice and in that case he may recall, examine, cross-examine and re-examine such witnesses. In the instant case the succeeding Inquiry Officer totally ignored the evidence and proceedings recorded by his predecessor and started enquiry afresh by again examining all the witnesses without recording any opinion as required by Rule 14(22) of the Service Rules of 1966 that it was necessary in the interest of justice to recall or re-examine these witnesses.

It is also apparent from a perusal of Annexure P-14 which are the statements of Shri Sudhakar Karmalkar and Shri Shiv Narayan Giri recorded by the previous Inquiry Officer and their statements Annexure P-16 recorded by the succeeding Inquiry Officer that they are in diametrical opposition and it is, therefore, apparent that the respondent authorities with a view to nullify and wipe out the evidence recorded by the previous Inquiry Officer which was in favour of the petitioner, adopted the procedure of appointing a new Inquiry Officer and recording fresh evidence during the pendency of the enquiry which procedure is not contemplated under the Service Rules of 1966. The succeeding Inquiry Officer could only continue the enquiry from the stage it had been left of by his predecessor by recording further evidence, but could not have commenced the enquiry afresh by recording fresh statements of the witnesses who had already deposed before the previous Inquiry Officer in favour of the petitioner.

From a perusal of Rule 14 of the Service Rules of 1966 it is clear that the enquiry once initiated cannot be abandoned in between by adopting the procedure of appointing a new Inquiry Officer and, thereafter conducting a de novo enquiry only because the evidence recorded in the previous enquiry is not to the liking of the higher authority. What the Rule contemplates is that an Inquiry Officer once appointed shall record evidence and thereafter on the basis of the oral and documentary evidence on record, submit his report to the Disciplinary Authority. Rule 14(22) of the Service Rules of 1966 provides for a situation where the Inquiry Officer is succeeded by another Inquiry Officer during the course of enquiry and in such circumstances the succeeding Inquiry Officer is required to take up and proceed with the enquiry from the stage it was left by his predecessor unless and until he expresses an opinion that further examination of the witnesses already examined is necessary in the interest of justice. In any case, the Inquiry Officer or the Disciplinary Authority has no power or authority to totally disregard the evidence already recorded by the previous Inquiry Officer as has been done in the instant case.

In view of the aforesaid, I am of the considered opinion that the procedure adopted by the respondent authorities while conducting the enquiry against the

petitioner is in gross violation of the procedure prescribed under the Service Rules of 1966. Even on merits it is apparent that the two witnesses namely: Shri Sudhakar Karmalkar and Shri Shiv Narayan Giri had deposed in favour of the petitioner before the previous Inquiry Officer and it was only to nullify the aforesaid statements that the respondents adopted the procedure of appointing a new Inquiry Officer and conducted a fresh enquiry wherein both the witnesses recorded statements which were diametrically opposite to their previous statements. In my considered opinion he could not have done so as such a course of action is not permitted under the provisions of the Service Rules of 1966.

From a perusal of the record of the present petition it is also clear that this Court granted interim relief in favour of the petitioner on 4.10.1999 and the Process Fee for issuance of notice to the respondents was paid by the petitioner on 5.10.1999. On a perusal of the acknowledgement of the notice which is on record it is also clear that the notice was received by the respondent Bharat Scouts and Guide through its Secretary, Shyamla Hills, Bhopal, on 13.10.1999. On receiving the notice, the respondents filed a return in December 1999 alongwith an application for urgent hearing, but chose not to file any application for vacating stay. In fact from a perusal of the record it is evident that the respondents have filed an application for vacating stay only on 24.3.2008 after receiving notice of initiation of contempt proceedings against them by this Court in respect of the violation of the interim order by finally disposing of the departmental proceedings by issuance of order dated 13.9.2002 dismissing the petitioner from service. In such circumstances, it is apparent that the interim order passed by this Court was still in operation on the date the impugned order of dismissal was passed by the respondent authorities and did not cease to exist with the passage of time as prescribed by Article 226(3) of the Constitution of India, as no application for vacating stay was filed by the respondents as required by the said Article, support of which has been taken by the respondents in para-5 of the impugned order dated 13.9.2002 and, therefore, the contention of the learned Counsel for the respondents in this regard is totally misconceived and deserves to be rejected.

In view of the aforesaid facts and circumstances, I am of the considered opinion that the impugned order of punishment dated 13.9.2002 deserves to be and is hereby set aside on account of the fact that the enquiry conducted by the respondent authorities was not in accordance with and is in fact in violation of the procedure prescribed by Rule 14 of the Service Rules of 1966 and on account of the fact that it was passed inspite of the existence of interim orders passed by this Court.

As a result thereof, the matter is remitted back to the respondent authorities for continuing the enquiry from the stage it was left of by the previous Inquiry Officer and to further proceed thereunder in accordance with the Service Rules of 1966. It is clarified to avoid any conflict that the enquiry shall proceed as if the

witnesses examined by the previous Inquiry Officer had already been examined and thereafter the remaining witnesses, if any, shall be examined by the Inquiry Officer except in case the Inquiry Officer records an opinion as required by the proviso to Rule 14(22) of the Service Rules of 1966. To expedite the matter, it is directed that the authorities shall complete the enquiry with the co-operation of the petitioner, as far as possible, within a period of six months starting from 1st of March 2009.

To avoid any further litigation, it is clarified that as a result of the setting aside of the impugned order and remission of the matter back to the respondent authorities to enquire from the stage it was left of by the previous Inquiry Officer, the petitioner shall be entitled to the benefit of Rule 9(4) of the Service Rules of 1966 and the law laid down by the Division Bench Judgment of this Court in the case of Gurmit Singh v. Zonal Manager, Punjab and Sindh Bank, Bhopal and Anr. (2008) 3 MPLJ 642.

The petition is, accordingly, allowed to the extent indicated above and is remitted back with the aforesaid observations. In the facts and circumstances of the case there shall be no order as to the costs.

(R.S. JHA) J U D G E 29.01.2009

mms/-

Add above para 7 page 5 :

It is an admitted fact that the respondent is a Society registered under the provisions of Society Regisrikaran Adhiniyam. It is also admitted by the learned Counsel for both the parties that that the respondent/society is not a State within the meaning of Article 12 of the Constitution of India nor is it an instrumentality of the State or a statutory body being owned and controlled by the State Government.

On examining the aforesaid facts in the light of the tests laid down by the Supreme Court in the case of Ajay Hasia (supra) as elaborated in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, , I am in full agreement to the conclusion recorded by this Court in the cases of Dr. (Smt.) Mradula Sharma (supra) and D. L. Sharma (supra) that the respondent/society is not a State within the meaning of Article 12 of the Constitution of India. However, in view of the extensive arguments made by the learned Counsels appearing for both the parties, I proceed to decide the issue as to whether the respondent is amenable to writ jurisdiction of this Court under Article 226 of the Constitution of India in spite of the fact that it is not the State within the meaning of Article 12 of the Constitution of India as was held by this Court in the case of D. L. Sharma (supra).

Add above para 17:

In the case of Binny Ltd. and Another Vs. V. Sadasivan and Others, though the

writ petition filed by Binny, Ltd., which is a private company, was allowed holding that it was neither an authority or instrumentality of the State nor was it performing any public function or duty involving public law element nor was it bound by any rules or regulations. The Supreme Court had an occasion to elaborate in the meaning of the words "public function" and it was held therein that when a body seek to achieve some collective benefit for the public and is accepted by the public as having authority to do so or where the body is intervening or participating in social or economic affairs in public interest it would be performing a public function in the following terms in paragraph 11 which reads as follows:

11 Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is 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. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (5th Edn.) by departmental enquiry Smith, Woolf I Jowell in Chapter 3, para 0.24, it is stated thus:

A body is 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. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule

making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the State, Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to "recognise the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is Government

The Supreme Court, after summarizing the law has also held that the writ of Mandamus on the Article 226 can be used for enforcement of various rights of the public or to compel authorities to discharge the duties and to act within their bounds even if the authority concerned is a private body or person provided the private body is discharging some public function and the denial of any right is in connection with the public duty imposed upon such body even in cases where the duty cast on the body is statutory or otherwise and some public law element is involved in the action and the Supreme Court has further gone on to state that the fact whether the authority is a public authority or is performing a public function has to be decided on the facts of each case and for this purpose, paragraph 29 of the judgment is profitably relied upon and quoted as follows :

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. 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. 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. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England, 3rd Edn., Vol. 30, 8. 682,

1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit.

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

Add the following page page 18 at (X) -

It is, therefore, clear that the respondent-authority is seeking to achieve some collective benefit for the public and is accepted by the public as having the authority to undertake the aforesaid activities by training young persons and giving them certificates as scouts or guides and are, therefore, participating in the social affairs in public interest and in such circumstances, I have no hesitation in holding that the respondent-authority is performing a public function.