

(1990) 05 OHC CK 0019

In the Orissa High Court

Case No : O.J.C. No's. 357 of 1983 and 3116 of 1985

Antaryami Rath

APPELLANT

Vs

State of Orissa and Others
 Khirod Chandra Pathi Vs
Mg. Committee, Bhanra Panchayat High School and Another

RESPONDENT

Date of Decision : 17-05-1990

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1990) 70 CLT 642 : (1992) 2 LLJ 37

Hon'ble Judges : B.L. Hansaria, C.J;P.C. Misra, J

Bench : Division Bench

Advocate : J.K. Rath, in O.J.C. No. 357/1983 and Mira Das, in O.J.C. No. 3116/1985, for the Appellant; Addl.S.C. and P.K. Misra in O.J.C. No. 357/1983, Addl.S.C. and R.N. Misra in O.J.C. No. 3116/1985, for the Respondent

Final Decision : Dismissed

Judgement

B.L. Hansaria, C.J.—These two writ petitions require answer of two important questions. These are:- (1) Whether the Managing Committee of a "private educational institution" is amenable to writ jurisdiction of this Court, and (2) Whether an order of reinstatement can be passed even if it is found that the service of a teacher of such an institution has been illegally terminated.

2. To answer the aforesaid two questions, let the broad facts of the two cases be noted.

In so far as the petitioner in O.J.C. No. 357/83 is concerned, he was appointed against a trained graduate post in Panchayat High School some time in August 1981. This school is admittedly a "recognised educational institution" as defined u/s 3(k) of the Orissa Education Act, 1969, hereinafter called, "the Act". In January, 1983, however, the petitioner received a letter from the Secretary of the Managing Committee stating that he had been relieved of his duties on the ground of negligence in duty and misconduct. No enquiry had been held before terminating the service of the petitioner, but the matter was discussed in the

Managing Committee and a decision was taken to terminate the service of the petitioner.

The petitioner in O.J.C. No. 3116/85 was appointed as an Assistant Teacher in Bhanra Panchayat School in February, 1983 - the school having received recognition only in November, 1982. The petitioner soon joined his duties. His service was, however, terminated with effect from November 28, 1985 on two grounds, namely, that he had misappropriated the school cash and was in unauthorised long absence. In the present case also, there was admittedly no enquiry before terminating the service of the petitioner, but in this case also the Managing Committee had deliberated over the matter and decided to terminate the service of the petitioner.

3. The prayer of the petitioners in both the cases is to set aside the order of termination which give the consequential relief of reinstatement. The same had been opposed by the school authorities on two grounds, namely, (1) they are not amenable to the writ jurisdiction of this Court and (2) in any case, order of reinstatement cannot be passed in a case of the present nature.

4. Let the first question be examined first.

It may be stated at the outset that none of the two institutions with which we are concerned is an aided institution. Had the position been otherwise, the answering of the first question would not have posed any problem in view of the long line of decisions of this Court starting from *Kalavati Punjabi v. Inspector of Schools, Koraput Circle* (I.L.R.) 1973 Cut 1004, nay from *Ramesh Chandra Sahu Vs. N. Padhy, Principal, Khallikote College*, , and ending with *Krushna Chandra v. Director of Education* 1987 (2) OLR 66. This apart, in view of the recent decision of the Supreme Court in *Francis John Vs. Director of Education and Others*, , there can be no manner of doubt that writ petition is maintainable against schools receiving grant-in-aid where termination of the service of a teacher is challenged. This proposition has not been assailed and as such it is not necessary to advert to it further. The question, however, is whether a writ petition is maintainable in the case of a non-aided educational institution which has merely been recognised by the Government. To be more precise, the question is whether a "private educational institution" within the meaning of Section 2(j) of the Act or its Managing Committee is amenable to the writ jurisdiction of this Court.

5. That the institutions of the above type do not come within the writ jurisdiction of this Court is sought to be brought home to us by learned counsel appearing for the opposite parties by drawing our attention to what was stated in paragraph 5 of *Ambika Prasad v. Assam Engineering College* 1989(1) O.L.R. 440 wherein a Division Bench of this Court stated as below:-

"5. It is beyond dispute that private colleges which are not receiving grant-in-aid from the State either partially or in full do not come within the definition of "the State" under Article 12 of the Constitution of India."

This observation cannot assist the opposite parties inasmuch as even if these institutions be not part of "the State" within the meaning of Article 12 of the Constitution, the same is not clinching in view of what has been recently stated by the apex Court in *Shri Andi Mukta Sadguru v. V.R. Rudani* 1989 II LJT 324). As is known, the definition of "the State" in Article 12 includes "other authorities". The word "authority" has also been used in Article 226 of the Constitution. In the aforesaid case, the following was stated in paragraph 20 regarding the use of the word "authority" in the two Articles (p.330):

"19. 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."

The Bench thereafter noted the view taken in *Praga Tools Corporation v. C.A. Imanul* 1969 I LJT 23) that a mandamus can issue against a body or person to carry out the duties placed on them by statutes even though they are not public officials or statutory body. It was further observed as below in paragraph 22 (p.330):

"... we may point out that mandamus cannot be 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. (Judicial Review of Administrative Act, 4th Ed., p. 540). 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 water-tight 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."

6. We have quoted the aforesaid observations of the apex Court, though it has dealt with the question of maintainability of the writ petition while dealing with the same relating to the issue of a writ of mandamus, whereas we are primarily concerned with the issue of a writ of certiorari, to show two things:- (1) the word "authority" has to be viewed differently while dealing with Article 226; and (2)

judicial control affecting the rights of the people should not be put into a water-tight compartment.

7. In view of the above, the observation made in paragraph 5 of *Ambika Prasad* (supra) cannot stand in our way of answering the first question. As it was stated in *Rudani* that while considering the word "authority" in Article 226, it would not be confined only to statutory authorities but would cover any other person or body performing public duty, let it be seen whether in the present case private educational institutions are performing public duty or not. As to this, there cannot be any doubt inasmuch as the functions discharged by educational institutions have to be regarded as in the nature of public duty as they perform the most useful social function of imparting education and that too in accordance with the curriculum prescribed by respective statutory bodies. There can, therefore, be no denial that they discharge a most important public function. This would show that private educational institutions should be amenable to the writ jurisdiction of this Court on the ground that they are performing public duty.

8. The above apart, it has been the consistent view of this Court, right from the decision of *Kalavati's* case (supra) that the institutions with which we are concerned are governed by a set of statutory rules; and the view taken in *Padmanava Padhy v. The Governing Body of the D.A.V. College, Koraput and Anr.* 1977 (1) C.W.R. 7 which was approved in *S.P. Gantayat v. Principal Regional Engineering College, Warangal, A.P.* 1977 (2) C.W.R. 874, both of which were cited with approval in *Krushna Chandra v. Director of Public Instruction*, (supra) has been that the bodies like the one with which we are concerned have to be regarded as statutory bodies and for this reason are amenable to the writ jurisdiction of this Court. Though some of these decisions, namely, *Padhmanava Padhy* and *Krushna Chandra* dealt with aided educational institutions, from what has been stated later, it would be found that this distinction has no material bearing on the question under examination. We have said so because the view regarding the statutory status of these bodies was taken because of certain provisions finding place in the Act, to which reference shall be made presently, which apply both to aided educational institutions as well as to non-aided educational institutions.

9. The first decision in point of time being that of *Kalavati Punjabi* (supra), let us see what was stated therein. That case was concerned with the termination of the service of a teacher serving in *Aeronautics D.A.V. School*. This school was regarded as an existing institution in view of the definition of the expression "existing educational institutions" as given in Section 3(f) of the Act according to which such an institution means any aided, recognised or government educational institution established before the commencement of the Act and continuing as such at such commencement. So, this expression has not made any distinction between aided and non-aided educational institutions because it takes within its fold even recognised educational institutions. Reference was then made in *Kalavati* to Section 7(1) of the Act which states that every private

institution has to have a Managing Committee. Here again, it may be pointed out that the requirement of having a Managing Committee is confined not to an aided institution but includes an unaided institution also inasmuch as the expression "private educational institution", as defined in Section 2(j) of the Act, means, "any educational institution which is not established and maintained by the Government of Orissa, the Union Government or the Government of "any other State". The next provision to note was Section 10(1) of the Act which of course deals with conditions of service of staff of aided institutions. As we are not concerned with such an institution, we are not referring to the provisions of that section. Finally, Section 27 of the Act was noted which deals with the power to make rules, of which Sub-section (4) reads as below:-

"Until rules are made under this section, the rules contained in the Orissa Education Code which were in force immediately prior to the coming into force of this Act shall, in so far as they are not inconsistent with the provisions of this Act or the Constitution, be deemed to be rules under this Act."

After having said so, some rules finding place in the Orissa Education Code were noted and a conclusion was arrived at that, as the rules had been violated in that case, the order of termination was bad in the eye of law.

10. We may now refer to Padmanava Padhy (supra) in which case this Court examined the legality of the order of removal passed against a Lecturer of the D.A.V. College, Koraput. In that case, one of the arguments advanced was that the relief of restoration of service could not be obtained in a proceeding under Article 226 of the Constitution, and reliance was placed, inter alia on two decisions of the Supreme Court reported in *Executive Committee of Vaish Degree College v. Lakshmi Narain* 1976 II LLJ 16) and *Arya Vidya Sabha, Kashi and Another Vs. Krishna Kumar Srivastava and Another*,). This Court, however, did not accept the contention by pointing out that the college in question was deemed to have been established in accordance with the Act and its administration was controlled by the statute and the rules made thereunder as also by the Statutes of the University. The facts involved in *Vaish Degree College* were regarded as different because of which it was stated that the ratio of that decision did not throw any light. While granting relief in this case, reliance was also placed on the decision rendered in *Kolavati Punjabi* (supra). Though it has been brought to our notice that the decision in *Padmanava Padhy's* case was reversed by the Supreme Court in *Governing Body of Dayanand Anglo Vedic College Vs. Padmanabha Padhy and Others*,) reference to this decision would show that the reversal was not on the point of maintainability of the writ petition, but because of some factual aspects of the matter.

11. The decision in *Padmanava Padhy's* case was cited with approval in *S.P. Gantayat* (supra). As already noted, the decisions rendered in *Padmanava Padhy* and *S.P. Gantayat* were cited with approval in *Krushna Chandra* (supra).

12. Mr. P.K. Misra and Mr. Deepak Misra appearing for the opposite parties

strenuously contend that the aforesaid decisions of this Court have no application to a case of the present nature inasmuch as we are called upon to decide the first question qua a private unaided educational institution, whereas, as already pointed out, some of the aforesaid judgments dealt with the cases of aided educational institutions. But, as already observed, this distinction has no bearing in so far as the question of maintainability of the writ petition is concerned, inasmuch as the ratio of the aforesaid decisions is not founded on the fact that the institutions in question were receiving aid from the Government, but is based on the provisions finding place in the Act which we have already noted.

13. Apart from the provisions already noted, we may refer to what has been stated in Section 4(4) of the Act according to which all existing educational institutions shall be deemed to have been established in accordance with the provisions of the Act. This would go to show that all "existing educational institutions", not to speak of those which had been established after the commencement of the Act, must be subjected to the provisions of the Act. For this purpose, the question whether the institution is an aided one has no relevance. We are, therefore, of the view that the aforesaid decisions would apply to the cases of non-aided educational institutions also.

14. Mrt. P.K. Misra, however, urges that in view of what has been stated in Vaish Degree College (*supra*) it cannot be held that private educational institutions are statutory bodies. It is contended by the learned counsel that the tests which have been laid down in Vaish Degree College to regard a statutory body are not fulfilled in the case of private educational institutions. This is sought to be brought home to us by stating that a distinction has to be made in this connection between an institution which is not created by or under a statute but is governed by certain provisions of the statute for proper maintenance and administration of the institution, as observed in paragraph 10 of the aforesaid decision. What has been further stated in paragraph 10 and which is strongly relied upon is as below Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others,):

"It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which, after coming into existence, is governed in accordance with the provisions of the statute. In other words, the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountain head of its powers. The question in such cases to be asked is, if there is no statute, would the institution have any legal existence? If the answer is in the negative, then undoubtedly, it is a statutory body, but if the institution has a separate existence of its own, without any reference to the statute concerned but is merely governed by the statutory provisions, it cannot be said to be a statutory body."

15. It is contended by Mr. Misra that if the aforesaid tests are applied in the present case, it would be found that the two institutions in question cannot be said to owe their existence to any statute and as such the institutions cannot be

regarded as statutory bodies. We would however demur to accept the submission in view of the provisions finding place in Section 4(4) of the Act and in view of what was stated by this Court in *Kaalavati Punjabi* and *Krushna Chandra* in particular. The views expressed in *Padmanava Padhy* and *S.P. Gantayat* also run counter to the submission of Mr. Misra.

16. We have said as above because Section 4(4) of the Act states that all existing educational institutions shall be deemed to have been established in accordance with this Act. This shows that the existence of the institutions of the type with which we are concerned owe their origin in the eye of law to Section 4(4) of the Act. But for this provision, they would not have any legal mask to bear. This is what was noted in paragraph 4 of *Kalavati*. In paragraph 9 of *Krushna Chandra*, it was also pointed out that the Act conferred a statutory status on all the existing educational institutions u/s 4(4) thereof as being deemed to have been established in accordance with the Act.

17. In *Padmanava Padhy*, the Governing Body of the D.A.V. College was regarded as a statutory body because of the provision in Section 7 of the Act which speaks about constitution of Managing Committee or Governing Body, as the case may be, for every private educational institution. Not only this, even the college itself was regarded as a statutory body. This view had been taken after noting the decision of the Supreme Court in *Vaish DA.V. College* and the *Arya Vidya Sabha*. The judgment rendered in *Padmanava Padhy* was cited with approval in *S.P.Gantayat* both of which were subsequently referred with approval in *Krushna Chandra*.

18. The above apart, in so far as a Managing Committee is concerned, there is no doubt that it owes its existence to the Act inasmuch as it is the creation of Section 7 of the Act which has stated that every private educational institution shall have a Managing Committee constituted in accordance with the rules made in that behalf. There is nothing before us to show that de hors the provisions of Section 7 of the Act there is any provision following which the Managing Committees of the schools with which we are concerned had been constituted.

19. While on this subject, it would be in the fitness of things to refer to *Shankuntala Sahawala Vs. The Director of Public Instruction II, Hyderabad and Others*,), a Full Bench decision, in which the judgment rendered by the apex Court in *Vaish Degree College*, which was followed in *Arya Vidya Sabha, Kashi v. K.K. Srivastava*, (supra) had been considered whereafter it was stated that although a private institution registered under the Co-operative Societies Act or the Companies Act or the Non-Trading Societies Registration Act is a public body, it is not open to the High Court to issue a writ or direction against such a body for breach of any administrative or executive instructions. It was further pointed out in this connection that so long as a private institution is not governed by the statutory rules, no writ or direction can be issued against it. As in the present case even the rules contained in the Orissa Education Code have been given statutory force because of what has been stated in Section 27(4) of the Act and

as the institutions in question have to be regarded as public bodies for the reasons already given, we are of the view that a writ petition is maintainable in a case of the present nature.

20. Because of all the above, we would answer the first question in favour of the petitioners.

21. This takes us to the second question. As to this, the contention advanced by Mr. P.K. Misra is that an order of reinstatement cannot be passed in a case of the present nature because the same is not comprehended within one of the three exceptions accepted by the apex Court where an order of reinstatement can be passed despite what has been laid down in Section 14 of the Specific Relief Act, 1963. The three exceptions which have been recognised in this regard, as pointed out in paragraph 19 of *Vaish College (supra)*, are as follows *Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others*,):

(1) Where a public servant is sought to be removed from service in contravention of Article 311 of the Constitution of India;

(2) Where a worker is sought to be reinstated on being dismissed under the Industrial Law; and

(3) Where a statutory body acts in breach of violation of the mandatory provisions of the statute.

22. Admittedly, in the present case, it is only the third exception which can apply. Let us, therefore, see whether this exception has its application in the present cases.

23. Mr. P.K. Misra has first contended in this connection that as private education institutions are not statutory bodies, the aforesaid exception cannot come into play. This part of the submission of Mr. Misra cannot be accepted in view of what has been held above. But then, this is not the end of the matter inasmuch as for a case to be covered by the third exception, the statutory body must act in breach of violation of the mandatory provision of the statute. On this aspect of the exception, the submission of Mr. Rath is that as the rules incorporated in the Orissa Education Code have been given statutory status by Section 27(4) of the Act, violation of any rule contained in this Code would also amount to violation of a mandatory statutory provision. The force of the contention of Mr. Rath cannot be denied. Even so, it cannot be held that in the present case there was any breach of the mandatory provision of the statute inasmuch as what the relevant part of Rule 287(28), to which alone our attention has been invited by Mr. Rath, lays down in this connection is as below:-

"Every teacher on appointment shall be required to undertake to give a month's notice before resigning his post and no teacher shall be discharged without such notice except in case of gross misconduct or absence without leave. If a permanent teacher is discharged, the reasons for his discharge must be recorded

in the resolution of the Managing Committee discharging him and must be communicated to him forthwith..."

24. The aforesaid shows that Rule 287 (28) does not contemplate any inquiry even in case of discharge on misconduct or absence without leave which were the two reasons of termination in the present cases. It may be stated that in so far as the petitioner in O.J.C No. 357/83 is concerned, he was appointed temporarily as per Annexure 1 because of which the requirement that the reason for discharge must be recorded in the resolution of the Managing Committee would not apply. This apart, from the affidavit filed by opposite party No. 4 it would appear that in fact the matter had been discussed in the Managing Committee, and because of the negligent manner in which he was performing duty, the Committee decided to terminate the service of the petitioner. There is thus no infraction of the aforesaid rule in this case. As to the petitioner in O.J.C. No. 3116/85, it may be pointed out that the matter had been put up before the Managing Committee and the Committee after deliberation of the matter decided to terminate the service of the petitioner, which resolution was duly communicated to him. Thus, there is no violation of the aforesaid rule in this case also.

25. In the aforesaid view of the matter, it is not necessary to examine the further contention advanced by Mr. Misra that even if there be any violation of any rule relating to the grant-in-aid or of recognition framed by the Government, the enforcement of the same will be a matter in between the Government and the school, and not between the aggrieved teacher and the management. This submission has been advanced by the learned counsel because of what has been laid down in *Kumari Regina v. St. Eloysius Higher Elementary School* (A.I.R.) 1971 SC 1922.

26. Before concluding, we may refer to two other decisions referred by Mr. Misra in this context, the same being; (1) *Deepak Kumar Biswas v. Director of Public Instruction* 1987 I LLJ 576) and (2) *Rudani*(supra). In both these decisions, it was held that in a case where none of the aforesaid three exceptions is attracted, relief of reinstatement cannot be granted. Instead, the persons would be entitled to damages if a case for the same was made out. We may also state that though in the case of *Deepak Kumar Biswas* and in some other decisions referred in paragraph 14 of this judgment, some amount of damages were awarded even by the apex Court, the same had been done following filing of suits by the aggrieved persons. We do not think if it would be open to a writ Court to award damages in cases of the present nature.

27. From what has been stated above, it would be clear that in the present cases there was no violation of any mandatory provision of the statute. The petitioners are, therefore, not entitled to the relief of reinstatement. We would, therefore, answer the second question against the petitioners. There being no possibility of granting them any other relief in the present proceedings, we are constrained to dismiss the applications. There would, however, be no order as to costs.

28. Per P.C. Misra, J.

I agree.