

(2004) 08 AHC CK 0005
In the Allahabad High Court
Case No : Special Appeal No. 172 of 2004

Army School, Kunraghat

APPELLANT

Vs

Smt. Shilpi Paul

RESPONDENT

Date of Decision : 16-08-2004

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2004) 5 AWC 4934

Hon'ble Judges : M. Katju, Acting C.J.; Umeshwar Pandey, J

Bench : Division Bench

Advocate : Ajay Bhanot, for the Appellant; Ashok Khare, Tarun Verma and Akhilesh Shukla, for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, A.C.J.

1. This special appeal has been filed against the impugned judgment of the learned single Judge dated 6.8.2003 in Writ Petition No. 12776 of 1995.
2. We have heard learned Counsel for the parties and have perused the record.
3. Before dealing with the facts of the particular case of the Respondent in this appeal (the writ Petitioner) it is necessary to mention certain background facts. There exists a military establishment called Gorkha Recruitment Depot in district Gorakhpur. Besides the normal functions of carrying out Recruitment for the Indian Army, the aforesaid establishment is also engaged in various welfare measures and activities for servicemen and ex-servicemen. These welfare activities are undertaken without any financial support from the Government of India or State Government. They are financed entirely by raising private funds, primarily from private contributions by the officers and men of various military establishments. The administration of these welfare activities is looked after by the officers of the establishments and their families on an ex-officio basis. The aforesaid welfare work does not form part of the official or statutory duty of the

officers so engaged and hence they are entirely a private enterprise undertaken by the officers and staff of various military establishments. In such welfare activities the Government does not have any control, what to say of deep and pervasive control. Among these welfare activities are opening and running of educational institutions for the children of servicemen and ex-servicemen. Such schools had to be opened because of the transferable nature of the job of military personnel due to which their families often suffer for non-availability of good schools for their children. This created a sense of despondency and deprivation among the service personnel. Since no outside agency was equipped or willing to grapple with this problem, the leadership of the armed forces took the matter in their own hands and accordingly a number of educational institutions were set up in various military establishments. A pool of funds with private contributions from various military personnel were accordingly earmarked but there was no funding from the Government.

4. One such educational institution was established by the personnel of the Gorkha Recruiting Depot, Kunraghat, Gorakhpur. This institution was funded exclusively from private contributions and private investments made by the personnel of the Gorkha Recruiting Depot. The aforesaid school was not funded, financed or even subsidized by the Government or any Government agency. The administration of the aforesaid school was taken care of by the personnel posted in the Gorkha Recruiting Depot, Kunraghat, Gorakhpur, on an ex officio basis and such functions were not part of their official or statutory duties. This school, called G.R.D. High School, Kunraghat, Gorakhpur, was intended to provide quality education to the wards of servicemen and ex-servicemen and also employment opportunities to the families of the aforesaid class of personnel. However, as a special arrangement due to the growing requirements some teachers were also recruited from the members of the public.

5. Since there was a problem of funding of these educational institutions a high level decision was taken in the hierarchy of military leadership to set up an Army Welfare Education Society which was registered under the Societies Registration Act. The funds of the aforesaid society were generated by private contributions of service personnel, donations and investments. The Society does not receive any funds from the Government. Another source of funds are the tuition fees, library fees and examinations fees from the students. The various army schools are regulated by the bye-laws and rules of the Society. The Station Commander of a particular station of the army is ex-officio Chairman of the concerned army school. Various military personnel engaged in the management of the affairs of the society do so on an ex officio basis and such functions are non-statutory in nature. It is alleged that the Government does not have any control, much less deep or pervasive control over the affairs of the society and army schools run by it like the Army School Gorakhpur. The Government does not provide any funding for the schools of the society and they are privately funded. Hence it is alleged that the Army Welfare Society and the Army School, Gorakhpur, are not State under Article 12 of the Constitution of India. The G.R.D. High School, Kunraghat,

Gorakhpur, was also not State or its instrumentality within the meaning of Article 12 of the Constitution of India.

6. It was felt that the G.R.D. High School, Kunraghat, Gorakhpur, was not providing adequate facility to fulfil the needs for which it was created. Accordingly, a decision was taken to establish a new army school at Gorakhpur which was to be run, managed and governed by the Army Welfare Society. Simultaneously a decision was taken to close down the G.R.D. High School, Kunraghat, Gorakhpur. A copy of the order dated 16.12.1993, in this connection is Annexure-1 to the affidavit filed in the special appeal.

7. The G.R.D. High School Kunraghat, Gorakhpur, had appointed some teachers by executing service contracts of non-statutory nature. The said contracts were entirely private contracts executed between the teachers and the management and on its basis appointment letters were issued vide Annexures-2 and 3. With the closure of G.R.D. High School, Kunraghat, Gorakhpur, the aforesaid contracts became void and non est. With the opening of the Army School, Gorakhpur, a new management came into existence. The affairs of the Army School, Gorakhpur, were to be governed and regulated by the bye-laws of the society. It is alleged that the Army School, Gorakhpur, was a completely new and distinct entity from G.R.D. High School, Kunraghat, Gorakhpur. The Army School, Gorakhpur, had to conform to the infrastructure and educational standards set up and monitored by the Army Welfare Education Society centrally. In contrast, the G.R.D. High School, Kunraghat, Gorakhpur, was run on a local basis with no monitoring of any central body. Also the appointment, terms and conditions of service of teachers and staff of the Army School, Gorakhpur, were to be governed by the relevant non-statutory rules formulated by the Army Welfare Education Society. On the other hand, no such regulations governing the terms of appointment and conditions of service of the teachers of G.R.D. High School, Kunraghat, Gorakhpur, were ever in existence. The G.R.D. High School, Kunraghat, Gorakhpur, was run on the basis of day-to-day orders given by local functionaries of the school.

8. After the opening of the Army School, Gorakhpur, a recruitment process was initiated for fresh selection of the staff and teachers for the institution. The staff and teachers of the erstwhile G.R.D. High School, Kunraghat, Gorakhpur (which was closed after the setting up of the Army School, Gorakhpur) were also permitted to appear in the aforesaid selection. In this selection four teachers of the G.R.D. High School, Kunraghat, Gorakhpur, were not selected but some other teachers including the Petitioner were selected to be appointed in the Army School, Gorakhpur.

9. In the selection the Petitioner was appointed on probation for one year w.e.f. 2.5.1994 to 1.5.1995 and a contract was executed vide Annexure-4.

10. It may be mentioned that the Respondent (writ Petitioner) had been initially appointed in G.R.D. High School, Kunraghat, Gorakhpur on 2.9.1985, on

probation and she was made permanent on 10.11.1987 vide Annexure-2. However, since the G.R.D. High School which was closed down and the new Army School, Gorakhpur, was opened the Respondent was asked to appear in a fresh interview and she was appointed on probation vide appointment letter dated 29.4.1994 vide Annexure-5 to the writ petition. True copy of the agreement between the parties which was executed on 2.5.1994 is Annexure-6 to the writ petition.

11. It is alleged in the counter-affidavit that during this probation period the work and conduct of the writ Petitioner was wholly unsatisfactory as stated in paragraph 10 of the counter-affidavit to the writ petition and as mentioned in Annexure-C.A. 2. It was alleged in paragraph 10 of the counter-affidavit that there were numerous complaints against the writ Petitioner from the parents and fellow teachers and students about her rude behaviour and conduct. A warning letter dated 22.3.1995 (vide Annexure-C.A. 3) was also issued to her. In this letter it was mentioned that it was being repeatedly observed that her dealing with students and their parents is very rude. There were reports regarding her misbehaviour with parents of students of this school and her fellow teachers. Her conduct was adversely affecting the smooth functioning of the school. This letter was written by the Principal of the Army School and it was further mentioned therein that the Principal had warned the Petitioner a number of times verbally about her late coming to the school and at times missing during school hours without the knowledge of the Principal and she was advised to improve her performance and conduct. However, despite repeated warning she did not improve her work.

12. A perusal of Annexure-7 to the affidavit filed in this appeal which is a report of the Principal to the Chairman of the Society shows that not only the Petitioner's performance was unsatisfactory but she also indulged in indisciplinary activities and there was no worthwhile improvement. The Principal recommended termination of her service.

13. The writ Petitioner was shown this report against her so as to enable her to improve her work and conduct but despite this she failed to improve her performance. The second performance report of the Petitioner during the probationary period was also unsatisfactory. Hence, she was not found fit to be continued as teacher in the Army School, Gorakhpur and her service was terminated by order dated 29.4.1999 which is non-stigmatic and is a termination simpliciter.

14. During the course of her probationary period the writ Petitioner applied for maternity leave. The Rules of the Army Welfare Education Society did not permit any leave authorisation beyond 12 days during the period of probation and the writ Petitioner was advised accordingly. However, taking a sympathetic view the school authorities regularised the period of absence of one month of the writ Petitioner but subsequently she was informed by the order dated 29.4.1995, that her service was no longer required.

15. The Respondent filed a writ petition which was allowed and hence this appeal.

16. Without going into merits or demerits of the case we are of the opinion that this appeal deserves to be allowed on the short point that the Appellant is not State under Article 12 of the Constitution and hence the writ petition was not maintainable. It may be mentioned that this objection that the writ petition was not maintainable since the Army School was not State under Article 12 of the Constitution was specifically taken in paragraphs 5 and 6 of the counter-affidavit to the writ petition.

17. Paragraphs 5 and 6 of the counter-affidavit state:

5. That the deponent craves the leave of this Hon'ble Court to place/produce the bye-laws of the Society at the time of hearing of the case. It will clearly demonstrate that the Government does not have pervasive control over the institutions and therefore, the institution is not "State" within the meaning of Article 12 of the Constitution of India.

6. That the deponent advised to state that the Army School itself is a private body and is not "State" within the meaning of Article 12 of the Constitution of India. Therefore, the writ petition filed before this Hon'ble Court is wholly misconceived and is not maintainable before this Hon'ble Court.

In paragraph 4 of the counter-affidavit it is stated:

4. That the Army School is established and managed by the Army Welfare Education Society which is registered under the Societies Registration Act, 1860. The funds are generated by the Army Welfare Society in the shape of donation and also for the purposes of meeting the expenses obtained tuition fees, library fees and examination fees, etc. but the school does not receive any funds from the Government. Therefore, the Government has absolutely no control either financially or administratively over those schools. Merely some officers are involved for day-to-day management of the institutions as per Army Rules.

18. A perusal of the above averments shows that the clear case of the Army School was that it was not State under Article 12 of the Constitution because the Government has no control over it financially or administratively and it does not receive any funds from the Government. In paragraph 31 of the counter-affidavit it was stated that the writ petition has been filed against a private body and hence is not maintainable.

19. In paragraph 4 of the rejoinder-affidavit the averments in paragraphs 4, 5 and 6 of the counter-affidavit to the writ petition have been dealt with. The averment in paragraph 4 of the counter-affidavit that the Army School does not receive any fund from the Government and that the Government does not have any control, much less pervasive control over it, have not been denied in paragraph 4 of the rejoinder-affidavit. Hence, the averments in paragraphs 4, 5 and 6 of the counter-affidavit have to be deemed to be correct. Consequently we are of the opinion that the Army School is a purely private body and is not State

under Article 12 of the Constitution and hence the writ petition was not maintainable.

20. It may be mentioned that the learned single Judge in the impugned judgment had not at all dealt with this submission of the Appellant that it is not State under Article 12 of the Constitution. It appears that this was because as stated in paragraphs 60 to 64 of the affidavit filed in support of the stay application in this appeal, when the case was listed on 6.8.2003 learned Counsel for the Respondent in the writ petition (Appellant here) could not mark the case in the cause list and hence learned Counsel could not be present and was not heard and the learned single Judge decided the case ex parte. However, the plea that the Army School is not State under Article 12 was certainly there in paragraphs 4 to 6 in the counter-affidavit and should have been dealt with by the learned single Judge when he decided the petition. In our opinion, without going into this preliminary objection it was not open to the learned single Judge to have gone into merits of the case, because if the Army School is not State under Article 12 of the Constitution the matter ends there and the writ petition would have to be dismissed.

21. We could have remanded the matter to the learned single Judge for a fresh decision on this point but in our opinion that would be an unnecessary exercise because the pleadings are there in the writ petition (paragraphs 4, 5 and 6 to the counter-affidavit and paragraph 4 to the rejoinder-affidavit) and this point has expressly been taken as ground Nos. 16, 17 and 18 in this appeal. We have heard the learned Counsel for the parties, Sri. Ajay Bhanot for the Appellant and Sri. Ashok Khare for the Respondent on this question whether the Army School, Gorakhpur, is State under Article 12 of the Constitution. Hence we are deciding this issue.

22. Sri. Ashok Khare, learned Counsel for the Respondent in this appeal has relied on a decision of a learned single Judge of this Court in Smt. Rajni Sharma v. Union of India 1995 (3) UPLBEC 1664 , in which it was held that the Army School run by the Army Welfare Education Society is State under Article 12 of the Constitution. On the other hand, Sri. Ajay Bhanot, learned Counsel for the Appellant has relied on a contrary decision of another learned single Judge in V.K. Walia Vs. Chairman, Army School and Others,

23. We have carefully considered these judgments as well as the other decisions relied on by the learned Counsels for the parties. We have also considered the decision of the learned single Judge of this Court in Abu Zaid v. Principal Madrasa-Tul-Islah Sarai Mir, Azamgarh Civil Misc. Writ Petition No. 14238 of 1998, decided on 28.7.1998. In the decision of Abu Zaid v. Principal Madrasa-Tul-Islah Sarai Mir, Azamgarh (supra) the learned single Judge has held that a writ petition lies even against a private educational institution since the educational institution is discharging a public duty of imparting education which has been held to be a fundamental right by the Supreme Court. We do not agree. In our opinion every school cannot be regarded as State under Article 12 of the Constitution and a

writ petition will not lie against a purely private educational institution not receiving funds from the Government or a Government agency as it cannot be deemed to be an instrumentality of the State.

24. The test as to which body can be regarded as an instrumentality or an agency of the State has been laid down in a series of decisions of the Supreme Court and it is not necessary to refer to all of them. The latest decision is *General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrugan Nishad and Others*, . In that decision the question was whether the Kisan Sahkari Chini Mills was State under Article 12 of the Constitution and hence amenable to writ jurisdiction. The mill was a cooperative society registered under the U.P. Co-operative Societies Act, 1965. The Supreme Court held that the State had no control at all in the functioning of the mill, much less a deep and pervasive one. Hence it was held that Kisan Sahkari Chini Mills was not State under Article 12 of the Constitution. The Supreme Court referred to the Constitution Bench decision of the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, wherein it was observed:

The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of the wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the *International Airport Authority* case (*supra*) as follows:

- (1) One thing is clear that if the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government (SCC p. 507, para 14)
- (2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p. 508, para 15)
- (3) It may also be a relevant factor whether the corporation enjoys monopoly status which is State-conferred or State-protected. (SCC p. 508, para 15)
- (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)
- (5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509, para

16)

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this reference" of the corporation being an instrumentality or agency of Government. (SCC p. 510, para 18)

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority case (supra), be an "authority" and, therefore, "State" within the meaning of the expression in Article 12.

25. We agree with the view taken by the learned single Judge in V.K. Walia v. Chairman, Army School Mathura Cantt. (supra) and we do not agree with the view taken by the learned single Judge in Smt. Rajni Sharma v. Union of India (supra) since we are of the opinion that the Army School, Gorakhpur, is not State under Article 12 of the Constitution as it does not receive funds from the Government nor does the Government have any control much less deep and pervasive control over it.

26. A similar view was taken by a Division Bench of the Jammu and Kashmir High Court in Writ Petition No. 1415 of 1996, Mrs. Asha Khosa v. Chairman, Army Public School, decided on 17.2.1997, in which the Division Bench of that Court held that the writ petition was not maintainable as the Army Welfare Educational Society is not an instrumentality of the State under Article 12 of the Constitution. Against the judgment of the Jammu and Kashmir High Court a Special Appeal No. 6482 of 1997 was filed before the Supreme Court which was dismissed on 31.3.1997. We fully agree with the view taken by the Jammu and Kashmir High Court in the aforesaid decision.

27. In Integrated Rulers Development Agency v. Ram Pyare Upadhyaya 1955 Supp (2) SCC 495, it was held by the Supreme Court that the Integrated Rulers Development Agency which was a registered society not constituted under any statute and did not function by or under the authority of the Government was not State under Article 12 of the Constitution.

28. In Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , the Supreme Court observed:

Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression "State". A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of the fact that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as "State" under Article 12.

29. In the above decision it was held that the National Council of Educational Research and Training (N.C.E.R.T.) was not State under Article 12 of the Constitution as it was largely an autonomous body. It may be mentioned that in

the aforesaid case the Government was giving funds to the N.C.E.R.T. but yet it was held that N.C.E.R.T. was not State under Article 12 of the Constitution. In the present case the Army School does not receive any fund from the Government, hence there is even less reason for regarding it as State under Article 12.

30. In *Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others*, , the Supreme Court held that the Institute of Constitutional and Parliamentary Studies was not State under Article 12 of the Constitution, although the main source of income of the Society was annual grants from the Government.

31. In *Dr. Anand Kumar Gupta Vs. Rajghat Education Centre and Others*, , a Division Bench of this Court held that ordinarily no writ lies against a private body except a writ of habeas corpus vide *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, .

32. In the aforesaid decision in *Anand Kumar Gupta's* case a Division Bench (Per M. Katju, J.) observed:

The language of Article 226 is no doubt very wide. It states that a writ can be issued "to any person or authority" and "for enforcement of rights, conferred by Part III and for any other purpose". However, the aforesaid language in Article 226 cannot be interpreted and understood literally. If we take the language literally it will follow that a writ can be issued to any private person or to settle even private disputes. If we interpret the words "for any other purpose" literally it will mean that a writ can be issued for any purpose whatsoever, e.g., for deciding private disputes, for grant of divorce, succession certificate etc. Similarly, if we interpret the words, "to any person" literally it will mean that a writ can even be issued to private persons. However, this would not be the correct meaning in view of various decisions of the Supreme Court and of other Courts vide *Biran Devi Vs. Sechu Lal and Others*, ; *Gajendra Kumar Sharma v. General Manager 1999 (4) AWC 2.149* ; *1999 (3) UPLBEC 2452* and *Carlsbad Mineral Water Mfg. Co. Ltd. Vs. H.M. Jagtiani*, etc.

The correct interpretation of the aforesaid words in Article 226 is that a writ can ordinarily be issued to a person to whom writs were traditionally issued by British Courts on well established principles. Similarly, the words, "for any other purpose" have to be interpreted in the narrower sense to mean that a writ can be issued for the purpose for which writs were traditionally issued by British Courts on well established principles vide *Workmen of Pepsico India Holdings Limited Vs. Deputy Labour Commissioner, Kanpur and another*, . The British Courts did not ordinarily issue writs to private persons except a writ of habeas corpus.

No doubt the power of Indian High Courts to issue writs under Article 226 are wider than those of the British Courts vide *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, , but they are not so wide as to permit Judges to do anything they like in writ jurisdiction. There are well settled principles governing the exercise of power under Article 226 as laid down in

various decisions of the Supreme Court, and these principles have laid down several limitations to the exercise of such power. For instance, one of such limitations is that ordinarily a writ will not be issued to private body except a writ of habeas corpus.

33. In view of the above discussion we overrule the decision of the learned single Judge in Smt. Rajni Sharma v. Union of India (supra) and we also overrule the decision of the learned single Judge in Abu Zaid v. Principal Madrasa-Tul-Islah Sarai Mir, Azamgarh (supra) and we hold that the Appellant is not State under Article 12 of the Constitution. Hence the writ petition itself was not maintainable.

34. In view of the above this appeal is allowed and the impugned judgment of the learned single Judge is set aside and the writ petition is dismissed.