
(2004) 09 AHC CK 0201
In the Allahabad High Court
Case No : C.M.W.P. No. 23130 of 2004

Ashok Kumar Upadhyaya

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-09-2004

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2005) 1 AWC 196

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : R.G. Padia, Rakesh Kumar and Prakash Padia, for the Appellant; B.N. Singh, S.S.C., P.N. Rai, V.B. Singh and A.K. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Sunil Ambwani, J.—Heard Sri Prakash Padia for petitioner and Sri V.B. Singh, senior advocate assisted by Sri Ajit Kumar Singh for respondents.

2. The petitioner was appointed as Principal, Army School, Jhansi. The appointment letter dated 18.5.2001, stipulated that it will be effective from the date of joining. Lt. Col. A. N. Tripathi was earlier working as Principal. He had filed a Writ Petition No. 2170 of 2001 against an order dated 12.4.2001 terminating his services. The High Court issued an interim order staying the termination order on 31.5.2001. The petitioner's appointment, by then, was not approved by Army Welfare Education Society (A.W.E.S.), a registered body under the Societies Registration Act XXI, 1860, HQ Central Command. The petitioner was as such accommodated as a Post Graduate Teacher. Lt. Col. A. N. Tripathi resigned on 2.4.2002. The Selection Committee in its meeting on 25.9.2002, selected the petitioner. The appointment was approved by HQ, A.W.E.S. Cell, Southern Command on 21.10.2002. The petitioner joined the school on 17.9.2001 as P.G. Teacher English (Ad hoc) and was given designation as officiating Principal.

3. Para 117 (a) of the A.W.E.S. Rules provides for confirmation by the appointing authority, by a written order, after satisfactory completion of probation period. It appears that the Chairman of A.W.E.S., under a mistaken belief directed confirmation on 14.12.2002, on a minute sheet prepared by the petitioner himself treating that the petitioner had completed one year's probation period on 18.5.2002, whereas the petitioner had completed one year of actual service on 16.9.2002. There were certain complaints against the petitioner with regard to financial irregularities and there were allegations of sexual harassment by a lady teacher against the petitioner. The Management also received complaints that the petitioner was earning money in issuing transfer certificates. The petitioner was required to submit an explanation. The letters dated 2.6.2004 and 7.6.2004 directing the petitioner to participate in the enquiry were acknowledged by the petitioner. A reply was given by him on 11.6.2004 stating that he was not physically fit to participate in the enquiry. A questionnaire was sent to the petitioner on the same day on 11.6.2004. The petitioner, however, did not choose to give reply. Each of the charges was subject to enquiries. The Enquiry No. 1 dealt with the admission of unauthorised students. The Enquiry No. 2 was with regard to collection of money from cycle stand. The Enquiry No. 3 was with regard to sexual harassment of a lady teacher and the last Enquiry No. 4 was with regard to the non-payment of tuition fees of the petitioner's sons studying in the same school. The file of harassment of the lady teacher was misplaced and as such she was required to appear and made a statement on 13.6.2004. The petitioner though living in the official accommodation of the school, did not choose to attend the proceedings. The enquiry report was submitted on 13.6.2004. His services were consequently terminated on disciplinary grounds on 14.6.2004, under Clause 186 (g) (i) of the A.W.E.S. Rules. The petitioner has not preferred an appeal under Para 171 (a) of the A.W.E.S. Rules against the disciplinary committee, to COS-Comd.

4. This writ petition was filed on 19.6.2004 with a prayer to restrain respondents from interfering in his functions as Principal of the institution and to withdraw any facility including residential accommodation. By an amendment, the petitioner has also prayed for declaring Clause 5 of the appointment letter dated 18.5.2001, and provisions of Para 186 (4) (ii) of Rules and Regulations of Army Welfare Education Society, in so far as it provides the termination of services of confirmed permanent employee, without giving any enquiry and without giving any opportunity of hearing, as ultra vires to Article 14 of the Constitution of India, and Section 23 of the Indian Contract Act as opposed to public policy.

5. Sri V. B. Singh, senior counsel appearing for the respondents has raised preliminary objection to the maintainability of the writ petition. He submits that Army Welfare Education Society (A.W.E.S.), is a society registered under the Societies Registration Act, XXI, 1860. It was established for running Army Schools and for educational and technical/ vocational training facilities to meet the needs of the children of army personnel. The entire finance is arranged through the contribution from army personnel. The Central Government or any

other Government agency does not provide any finance to the society. No Governmental fund is involved in running the affairs of the society. It is purely un-aided institution. The society, according to respondents, has its own Memorandum of Articles/Bye-laws for its governance without any interference of the State authorities. All the officers discharge duties in the school in their personal capacities. It is not the State or an authority within the meaning of Article 12 of the Constitution of India, and does not perform any Governmental functions. According to the respondents, the petitioner cannot enforce his services on the school. His appointment was a contractual matter, and that the termination of the contract cannot be subjected to judicial review under Article 226 of Constitution of India.

6. Sri V. B. Singh has relied upon Division Bench judgment of this Court in Special Appeal No. 172 of 2004. *Army School Kunraghat, Gorakhpur v. Silpi Paul*, decided on 16.8.2004) and judgment of Gauhati High Court in *Miss Sujaya Roy and Ors. v. Union of India* 2000 MLJ 52 In these decisions, the status of army school was examined by the Court and it was held by this Court as well as the Gauhati High Court that the society is not a State under Article 12 of the Constitution of India and thus the writ petition is not maintainable.

7. Sri Prakash Padia, on the other hand, states that the object of the society is to impart education which comes under the domain of public duty and thus the writ petition is maintainable. He has relied upon judgment in *Sainik Schools Employees Association v. Defence Minister-cum-Chairman, Board of Governance, Sainik Schools Society, New Delhi and Ors.* AIR 1989 SC 88. In this case after examining the objects of the Sainik Schools Society from the Memorandum of the Association, it was found by the Supreme Court, that the Sainik Schools Society is "State". The entire funding is by the State Governments and the Central Government and that the overall control vests in the Governmental authority. He has also relied upon a decision of the Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, , in which it was held that the aided institutions, like governmental institutions discharge public functions by way of imparting education to the students, and therefore employment in such institutions is not devoid of any public character, and thus a mandamus cannot be refused to the aggrieved party.

8. I have examined the averments made in the writ petition as well as the aims and the character of the society. The aims and objects of the society is to augment educational and technical/vocational training facilities to meet the needs of children of army personnel including the widows and ex-servicemen, to develop co-educational army schools, public schools and technical/vocational institutions in such manner so as to impart high standard of education/vocational training, to prepare students for All India Secondary School and All India School Certificate Examinations of C.B.S.E. with common syllabus, enabling children of army personnel, who are transferred to be admitted in the mid

session, to promote development of the academic excellence, discipline, personal character, high sense of value and national integration among the children of army personnel. The objects also provide that the society shall attain financial sufficiency within reasonable period so that welfare funds allotted to educational facilities, can be utilized for other educational projects, and to undertake funds raising activities for augmenting, the resources made from welfare fund.

9. The general body of the society consist of officers, who hold the same or similar or equivalent posts, to those included in the memorandum of the society and any other person (s) affected by general body and nominated by the chairman. A three-tier command and control system, is provided to run the schools/ institutions. The Board of Governance, and its Executive Committee at Army Headquarters is the first tier. The Board of Administration at Headquarters Command is the second tier and the Managing Committee, at the station where the school is located, is the third tier. The Adjutant General is the Chairman of the Governing Body and that the other members include Ex-officio, Officers of the Indian Army. The Principal Secretary is the Principal Director, Army Welfare Education Society. The board lays down the policies, which are to be implemented by the Executive Committee. A corpus and grants of the schools/ institutions is to be provided, as decided by the Board of the Governance from the welfare funds of the Adjutant General's branch. Army Headquarters. The Board of Administration and the Managing Committee of the respective schools/ institutions manage the expenditure and other expenses of schools/ institutions.

10. 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 of indicia which have to be used with care and caution, because while stressing the necessity of a 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 summarize 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).

(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 inference 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."

11. In *Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others*, , the majority opinion of seven-Judge Bench, held that the tests formulated by *Ajai Hasia's* case are not rigid set of principles, so that a body falling in any one of them, it must, ex hypothesis be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established the body is financially, functionally or administratively dominated by or under the control of the Government. Such control must be particular to that body and must be pervasive. If it is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

12. I have given my careful consideration to the manner and method in which the society was established, the operations, control and the finances with which the society is run, and find that none of the test laid down by the Supreme Court as above are satisfied. The army school run by A.W.E.S. is thus not State under Article 12 of the Constitution. It does not receive funds from the State Government nor has any governmental control, muchless the deep and pervasive control required to be treated as the instrumentality of the State.

13. The same view was taken by Gauhati High Court in *Miss Sujaya Roy's* case. It is not necessary to cite all the cases on which reliance was placed by the parties as the matter stands conclusively controlled by the judgment of this Court in *Army School Kunraghat, Corakhpur's* case.

14. This being the legal position, the claim of the petitioner, with regard to his confirmation, the condition in Clause 5 of the appointment letter to terminate the services of confirmed employee without holding enquiry on the grounds that such is violative of Article 14 of the Constitution of India, and his claim to be reinstated in service, cannot be adjudicated in writ jurisdiction. A writ of mandamus cannot be issued to A.W.E.S., a private body. The right of the petitioner is of a private character. He is not entitled to issuance of a writ of

mandamus in enforcing his services upon the A.W.E.S., which does not perform any public duties.

15. The writ petition is dismissed with liberty to the petitioner to seek his remedies elsewhere. No order as to costs.