

**(2011) 10 MAD CK 0063**

**In the Madras High Court**

**Case No :** Second Appeal No. 1329 of 2010, M.P. No. 1 of 2010 and M.P. No's. 1 to 3 of 2011

AVM Rajeswari Matric. Higher Secondary School

APPELLANT

Vs

N.R. Parameswari

RESPONDENT

---

**Date of Decision :** 31-10-2011

**Acts Referred:**

Constitution of India, 1950 — Article 226, 311, 311(2)

**Citation :** (2011) 10 MAD CK 0063

**Hon'ble Judges :** R.S. Ramanathan, J

**Bench :** Single Bench

**Advocate :** S. Kamadevan, for the Appellant; P. Sidharthan, for the Respondent

**Final Decision :** Dismissed

---

## **Judgement**

R.S. Ramanathan

1. Defendant is the appellant.

2. The respondent filed the suit for declaration that the order issued by the appellant dated 24.2.2007 is null and void and for mandatory injunction directing the appellant to reinstate the respondent/plaintiff in service with backwages. The case of the respondent/plaintiff was that she was employed in the appellant school as Teacher and she was appointed on 5.7.1996 and she was discharging her duties to the satisfaction of the appellant and she applied for maternity leave for three months from the first week of October 2006 and submitted a letter seeking for maternity leave on 10.8.2006 addressed to the correspondent seeking maternity leave from 4th October to 1st January 2007 and she was orally informed that her maternity leave was allowed and having given birth to the child on 6.10.2006, she sent a letter dated 21.12.2006 to the Correspondent of the appellant School informing that she would be joining duty from 3.1.2007. The appellant sent a letter dated 23.12.2006 stating that they have not granted any approval for her maternity leave and therefore, her service was placed under

suspension as she has discontinued to attend regular work without any leave. As she was placed under suspension from 23.12.2006, she was further directed to submit all the documentary evidence before the appellant for considering the request of the respondent/plaintiff for reinstatement and the respondent/plaintiff also submitted the medical records and also stated that she applied for maternity leave during the period and she was also orally informed about the sanction of leave and on receipt of the documents, the appellants issued a letter dated 17.2.2007 stating that they would consider the respondent as a new recruit on temporary basis and directed the respondent to join duty on 20.2.2007 and the respondent informed that she is not willing to join duty as a fresh recruit on temporary basis and she is entitled to join duty without any break in continuity of service and requested the appellant to cancel the letter dated 17.2.2007 and without considering her request, the appellant sent letter dated 24.2.2007 informing her that she has not joined duty as per the letter dated 17.2.2007 and therefore, her certificates were returned and hence, letter dated 24.2.2007 was challenged in the suit by praying for declaration that it is null and void and for mandatory injunction as stated therein.

3. The appellant contested the suit stating that the relief prayed for cannot be granted and there is no termination order and the respondent/plaintiff was not employed as a regular worker and she was employed only on temporary basis and without getting permission to go on maternity leave and without informing the appellantmanagement, she absented herself and therefore, in her place, another teacher was appointed as the studies of the student should not be affected and after considering the request of the respondent/plaintiff on seeing the medical particulars, the management, out of sympathy, decided to consider her as new recruit on temporary basis and asked her to join duty on or before 20.2.2007 and as the respondent/plaintiff did not avail the opportunity, they have returned the certificates given by the respondent/plaintiff to enable her to seek employment in any other place. It was therefore, contested that the respondent/plaintiff cannot ask for reinstatement with backwages and the suit is also not maintainable as admittedly, the respondent/plaintiff challenged the order of the so-called termination by filing appeal before the appellate authority and having availed the appeal forum as per the Rules, it is not open to the respondent to file the suit for declaration. It was further contended that there was no termination of the service of the respondent by the appellant in the letter dated 24.2.2007 and in the absence of termination, it is not open to the respondent to challenge the same.

4. The Trial Court dismissed the suit holding that there was no order of termination as per the letter dated 24.2.2007 and therefore, the respondent/plaintiff is not entitled to declaration and consequently, she is not entitled to the relief of mandatory injunction.

5. The first appellate court set aside the findings of the Trial Court and allowed the appeal and decreed the suit holding that without conducting proper enquiry,

the appellant placed the respondent under suspension and also refused to permit her to join duty and the respondent was not given reasonable opportunity before her services were terminated and the respondent has gone on maternity leave which is permitted under the statute and therefore, a person cannot be punished for having gone on maternity leave and as the service of the respondent was terminated without giving reasonable opportunity, the order of the appellant is liable to be set aside and granted decree of declaration and mandatory injunction. Hence, the second appeal.

6. The following substantial questions of law were framed at the time of admission:

1. Whether the lower appellate court is justified in decreeing the suit and directing the reinstatement with backwages, continuity of service and other attendant benefits in favour of the plaintiff holding that the proceedings dated 24.2.2007 will amount to termination of service?

2. Whether the lower appellate court is justified in maintaining the suit holding that the proceedings dated 24.2.2007 is the termination of service of the plaintiff?

3. Whether the lower appellate court is justified in granting permanent status and other benefits to the plaintiff when admittedly she was working on temporary basis before the institution of the suit?

4. Whether the lower appellate court is justified in applying the provisions of Maternity Benefits Act, 1961, the Rules and Orders applicable to the Government Servants when the appellant school is governed by the Code of Regulations applicable to the Matriculation Schools?

5. Whether the lower appellate court is justified in decreeing the suit when admittedly the respondent preferred an appeal against the alleged order of termination dated 24.2.2007 and the same is pending before the competent authority?

6. Whether the lower appellate court is justified in ordering reinstatement and other benefits to the respondent automatically holding that there is violation of principles of natural justice and without remanding the matter to the appellant for fresh consideration?

7. Mr.Kamadevan, learned counsel for the appellant submitted that the respondent was not appointed on permanent basis though she was working in the School from 1996 onwards and she absented herself without applying for leave and the management did not receive any letter as alleged by the respondent and only in December 2006, they received a letter about the date of joining duty by the respondent and thereafter, they have taken steps to conduct enquiry and also placed her under suspension and on seeing the medical records, they took a sympathetic view and permitted the respondent to join duty on temporary basis as before and the respondent did not avail the opportunity and

therefore, her certificates were returned and there is no termination order. He further submitted that as per the provisions of the Matriculation Schools Act, remedy by way of appeal to the educational authorities is provided and admittedly, the respondent has availed the opportunity and filed an appeal to the authorities and therefore, she is not entitled to file a suit seeking for a declaration and her remedy is to pursue the appeal and get the relief as per the provisions of the Act. He, therefore, submitted that the suit filed for declaration and mandatory injunction is not maintainable and the respondent is not entitled to seek the relief of declaration as the letter dated 24.2.2007 cannot be considered as a letter terminating the services of the respondent and this was rightly considered by the Trial Court and therefore, the suit has to be dismissed. He also relied upon the judgment reported in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, , Lilly Bai Vs. Chinna Thai and Others, and Superintending Engineer, Virudhunagar electricity Distribution Circle v. Murali Raja 2008 (3) CTC 395 in support of his contention.

8. On the other hand, Mr.Sidharthan, learned counsel for the respondent submitted that admittedly, the respondent was working in the appellant School from 1996 onwards and she was paid consolidated salary and they have also deducted Provident Fund and she was treated as a regular employee and she having put in more than ten years of service, it cannot be stated that the respondent was only a temporary employee and having regard to the length of service and the statutory deductions made by the appellant, the respondent must be considered as a permanent employee of the appellant School. He further submitted that the respondent submitted maternity leave letter dated 10.8.2006 through the Principal and she was also confirmed by the Correspondent that her leave was sanctioned and on that basis, she went on leave for delivering a child and that was also known to the appellant and she also sent a letter on 21.12.2006 informing the date of her rejoining the duty after the leave and only after receipt of that letter, the appellant sent a letter dated 23.12.2006 as if the respondent did not inform them about the maternity leave availed by her and placed her under suspension and without conducting enquiry, they also offered to re-employ her and in their letter dated 17.2.2007, it was stated that she would be re-appointed on temporary basis and she was informed that she may not be accommodated in the same post and she was asked to appear before the Principal with request for such appointment on or before 20.2.2007 and thereafter, sent a letter dated 24.2.2007 returning the certificates and the consequence of events would prove that the letter dated 24.2.2007 is only a termination letter, as otherwise, there was no necessity for the appellant to return the certificates. The learned counsel for the respondent further submitted that if really the respondent had absented herself without applying for leave, the appellant would have taken action immediately thereafter and they would not have kept quiet for three months and only after the respondent informed the date of joining duty as 3.1.2007, they sent a letter dated 23.12.2006 placing the respondent under suspension and even without conducting enquiry, they offered

to appoint the respondent on temporary basis and therefore, it is a clear case of violation of principles of natural justice and going on maternity leave is statutorily recognised and a female teacher cannot be penalised for availing maternity leave and it cannot be contended that the respondent is only a temporary teacher and as the service of the respondent was terminated without conducting any proper enquiry, the suit for declaration is maintainable and the respondent is entitled to join duty with continuity of service and she is also entitled to backwages. The learned counsel for the respondent also relied upon the decisions in *Municipal Corporation of Delhi Vs. Female Workers (Muster Roll)* and *Another, , J. Benjamin Vs. The Management of Bharat Earth Movers Limited, Kolar Gold Field, , Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, , The Registrar (Administration), High Court of Orissa, Cuttack Vs. Sisir Kanta Satapathy (Dead) by Lrs. and Another, and Hari Palace Vs. Labour Court and Another*, in support of his contention.

9. Mr.Kamadevan, the learned counsel for the appellant further submitted, on instructions from the appellant management, that the appellant is prepared to take the respondent into service with continuity of service without backwages, but, the learned counsel for the respondent submitted that the respondent was not employed regularly after the termination and she was employed intermittently for some time and unless the appellant takes back the respondent into service with backwages, the respondent is not willing to join duty.

10. In this case, it is not disputed that the respondent was appointed in the year 1996 and she was taking classes for kindergarten without any complaint. It was alleged by the appellant that the respondent absented herself without applying for leave and the case of the respondent was that she sent leave application seeking maternity leave to the Principal and she was orally confirmed by the Correspondent that her leave was sanctioned.

11. The appellant did not examine the Principal to rebut the case of the respondent that she sent leave letter for maternity leave through the Principal and the appellant only examined the Correspondent. Further, as submitted by the learned counsel for the respondent, if really the respondent had absented herself without applying for leave as contended by the appellant, the appellant would have taken action against the respondent immediately thereafter and they would not have waited till they received a letter from the respondent in the last week of December 2006. Further, it cannot also be accepted that the respondent was appointed on temporary basis considering the length of service and also the fact that statutory deductions were made from her salary. Therefore, having regard to the conduct of the appellant in not examining the Principal, making statutory deductions and the length of service put by the respondent, it cannot be stated that the respondent was only a temporary employee and I hold that she was a permanent employee of the School and therefore, the third substantial question of law is answered against the appellant.

12. It is admitted that the respondent was placed under suspension and even

without conducting any enquiry, the appellant sent a letter dated 23.12.2006 offering to re-appoint the respondent but, informed her that she would not be placed in the same post. Further, under letter dated 17.12.2007, it was stated that the respondent would be appointed on temporary basis. Therefore, from the tenor of the letters dated 23.12.2006 and 17.2.2007, it can be held that the appellant was not prepared to take back the respondent in service with continuity of service and they offered to re-appoint her as a new recruit. Further, under letter dated 24.2.2007, the service of the respondent was not terminated and the respondent was only informed that she failed to avail the opportunity in joining the duty as per letter dated 17.2.2007. Therefore, a reading of the three letters of the appellant, it can be held that by letter dated 24.2.2007, the service of the respondent was not terminated and even prior to that, the appellant made it clear that they are prepared to take back the respondent into service and they only offered to give her new employment. Therefore, it cannot be contended that the appellant terminated the services of the respondent by issuing letter dated 24.2.2007 and that termination is null and void. Even assuming that the services of the respondent were terminated even prior to the letter dated 24.2.2007 and not under letter dated 24.2.2007, whether the respondent is entitled to the relief of mandatory injunction can be answered having regard to the provisions of the Tamil Nadu Matriculation Schools Act and also the judgments rendered by the Honourable Supreme Court in that regard.

13. In the judgment reported in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, , the Honourable Supreme Court held as follows:

We would first deal with the important question, which has been the sheet anchor of the arguments of the learned counsel for the respondent as also the main basis of the judgment of the Full Bench of the Allahabad High Court, as to whether or not the appellant Executive Committee can be said to be a statutory body in the circumstances of the present case. It seems to us that before an institution can be a statutory body it must be created by or under the statute and owe its existence to a statute. This must be the primary thing which has got to be established. Here a distinction must be made between an institution which is not created by or under a statute but is governed by certain statutory provisions for the proper maintenance and administration of the institution. There have been a number of institutions which though not created by or under any statute have adopted certain statutory provisions, but that by itself is not, in our opinion, sufficient to clothe the institution with a statutory character. In Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, this Court clearly pointed out as to what constitutes a statutory body. In this connection my Lord A. N. Ray, C.J., observed as follows: (SCC p.435: SCC (L&S) p.115, para 25)

A company incorporated under the Companies Act is not created by the

Companies Act but comes into existence in accordance with the provisions of the Act. It is not a statutory body because it is not created by the statute. It is a body created in accordance with the provisions of the statute.

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 having come 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. The High Court, in our opinion was in error in holding that merely because the Executive Committee followed certain statutory provisions of the University Act or the statutes made thereunder it must be deemed to be a statutory body. In fact the Full Bench of the High Court relied on three circumstances in order to hold that the Executive Committee was a statutory body, viz., (i) that it was affiliated to the Agra University which was established by the statute; (ii) that there were certain mandatory provisions in the Agra University Act which were binding on the Executive Committee; and (iii) that the Executive Committee was governed by the statutes framed by the Agra University. In our opinion, none of these factors would be sufficient to alter the character and nature of the Executive Committee and convert it into a full-fledged statutory body. To begin with the Executive Committee had an independent status having been registered under the Registration of Cooperative Societies Act, 1860 and was a self- governed or an autonomous body. It was affiliated to the Agra University merely for the sake of convenience and mainly for the purpose that the courses of studies prevalent in the College may be recognised by the University.

11. Statute 14-A of the Agra University Hand-Book (1965-66) runs thus:

Each College, already affiliated or when affiliated, which is not maintained exclusively by Government must be under the Management of a regularly constituted Governing body (which term includes Managing Committee) on which the staff of the college shall be represented by the Principal of the college and at least one representative of the teachers of the college to be appointed by rotation in order of seniority determined by length of service in the college, who shall hold office for one academic year.

All that the statute of the Agra University required was that the Managing Committee of the College must co-opt the Principal of the College and one representative of the teachers of the college by rotation as members of the Committee. It is manifest that by co-opting these members the Managing Committee did not lose its independent status but continued to remain a non statutory and autonomous body. Similarly the mere fact that the statutes of the

University were adopted by the Managing Committee and it was as a matter of convention bound to follow the statutory provisions of the Act would not clothe the Managing Committee with a statutory status or character. In fact the adoption of the statutes was agreed to by the appellant Executive Committee for the better governance, administration and extension of the educational activities of the institution. In fact an identical argument which forms the basis of the judgment of the Full Bench of the High Court had been advanced before this Court and rejected outright. For instance in *Sabhajit Tewary Vs. Union of India (UOI) and Others*, the question was whether the Council of Scientific and Industrial Research which was a society registered under the Societies Registration Act, as the present appellant is, was a statutory body. It was urged that because the Council of Scientific and Industrial Research had government nominees as the President of the body and derived guidance and financial aid from the Government, it was a statutory body. A.N. Ray, C.J., rebutted these arguments and observed as follows: (SCC pp.486- 487: SCC (L&S) p.100 para 4)

The Society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that the Government appoints nominees to the Governing Body or that the Government may terminate the membership will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner.

Similar view was taken by this Court in *Kumari Regina Vs. St. Aloysius Higher Elementary School and Another*, where this Court observed as follows:

But it cannot also be gainsaid that as the Government has the power, to admit schools to recognition and grants-in-aid, it can, de hors the Act, lay down conditions under which it would grant recognition and aid. To achieve uniformity and certainty in the exercise of such executive power and to avoid discrimination, the Government would have to frame rules which, however, would be in the form of administrative instructions to its officers, dealing with the matters of recognition and aid. If such rules were to lay down conditions, the Government can insist that satisfaction of such conditions would be condition precedent to obtaining recognition and aid and that a breach or non-compliance of such conditions would entail either the denial or withdrawal of recognition and aid. The Management of a school, therefore, would commit a breach or noncompliance of the conditions laid down in the rules on pain of deprivation of recognition and aid. The rules thus govern the terms on which the Government would grant

recognition and aid and the Government can enforce these rules upon the management. But the enforcement of such rules is a matter between the Government and the management, and a third party, such as a teacher aggrieved by some order of the management, cannot derive from the rules any enforceable right against the management on the ground of a breach or non-compliance of any of the rules.

This is a case which is almost on all fours with the facts of the present case because there the case was whether the school after being recognised by the Government for the purpose of grant was bound to observe the rules.

12. In *Indian Airlines Corporation v. Sukhdeo Rai* (1971) supp. SCR 510, 514, it was observed as follows:

The fact, therefore, that the appellant-Corporation was one set up under and was regulated by Act XXVII of 1953 would not take away, without anything more, the relationship between it and its employees from the category of purely master and servant relationship.

13. The Full Bench of the Allahabad High Court, however, appears to have placed great reliance on the decisions of this Court in *Prabhakar Ramakrishna Jodh Vs. A.L. Pande and Another*, where this Court held that the Governing Body of the College in that case was a statutory body. In this connection, this Court observed as follows:

On the other hand, we are of opinion that the provisions of Clause 8 of the ordinance relating to security of the tenure of teachers are part and parcel of the teachers' service conditions and, as we have already pointed out, the provisions of the "College Code" in this regard are validly made by the University in exercise of the statutory power and have, therefore, the force and effect of law. It follows, therefore, that the "College Code" creates legal rights in favour of teachers of affiliated colleges and the view taken by the High Court is erroneous.

This case, however, is clearly distinguishable from the facts of the present case. To begin with, in *P.R. Jodh's* case (*supra*), this Court was dealing with the College Code which was itself a creature of the statute, namely, the University of Saugar Act. Under ordinance No. 20 Para 1 the Governing body was created by an ordinance passed under the University of Saugar Act. It is, therefore, clear that the statutes are the creature of the Act. Thus the distinction is that in *P.R. Jodh's* case the Governing Body was the Council of Management established under the Act while here the Managing Committee is not. It is obvious that the Governing Body was created under a statutory provision because the ordinance had undoubtedly a statutory force having been passed under the Act. Para 2(i) (c) of the College Code runs thus:

2. (i) In this ordinance, unless there is anything repugnant in the subject or context:

(c) "Governing Body" means the Council of Management established under this

ordinance for the control and general management of the College.

The Governing Body was, therefore, established under the ordinance itself and had no independent existence at all. Similarly under Para 3 of the ordinance the constitution of the Governing Body was laid down. It is, therefore, clear that not only was the Governing Body of the College established under the ordinance but even the constitution of the said Governing Body was laid down by the ordinance itself and the functions of the Governing Body were clearly defined by Para 4 of ordinance No. 20. The ordinance itself was called the "College Code" which came into legal existence by virtue of the ordinance. In other words, the position is that before ordinance No.20 was passed under the University Act, the Governing Body had no existence at all. The same, however, could not be said of the present Managing Committee which had its independent existence long before it was affiliated to the Agra University and had also its own constitution, the only exception being that two members had to be taken ex-officio in the Managing Committee. There is, therefore, world of difference between the nature and manner of the establishment of the Governing Body under the University of Saugar Act and the Managing Committee in the instant case. Furthermore, this case was noticed and discussed by a later judgment of this Court in *Vidya Ram Mishra v. Managing Committee, Shri Jai Narain College* (1972) 3 SCR 326 and was distinguished. Speaking for the Court, Mathew, J., observed as follows: (SCC PP.628-629, Paras 9, 11-12)

When once this Court came to the conclusion that the "College Code" had the force of law and conferred rights on the teachers of affiliated colleges, the right to challenge the order terminating the services of the appellant, passed in violation of clause 8(vi) (a) of the "College Code" in a proceeding under Article 226 followed "as the night the day" and the fact that the appellant had entered into a contract was considered as immaterial.

\*\*\*

On a plain reading of statute 151, it is clear that it only provides that the terms and conditions mentioned therein must be incorporated in the contract to be entered into between the college and the teacher concerned. It does not say that the terms and conditions have any legal force, until and unless they are embodied in an agreement. To put it in other words, the terms and conditions of service mentioned in Statute 151 have *proprio vigore* no force of law. They become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract, they have no vitality and can confer no legal rights.

Whereas in the case of *Prabhakar Ramakrishna Jodh v. A.L.Pande and (supra)*, the terms and conditions of service embodied in clause 8(vi) (a) of the "College Code" had the force of law apart from the contract and conferred rights on the appellant there, here the terms and conditions mentioned in Statute 151 have no efficacy, unless they are incorporated in a contract.

It is, therefore, clear that in P.R.Jodh's case the College Code was by itself a statutory Code so that the provisions of the statute operated *proprio vigore* and did not depend on the execution of the agreement between the employer and the employee in accordance with the statutes of the University. In the instant case, which is very much like the case in Vidya Ram Mishra (*supra*) the statute merely enjoined that the agreement between the employer and the employee should be incorporated according to the form and conditions prescribed by the statute and until the said agreement is executed the provisions of the Statute would not apply *proprio vigore*. The Allahabad High Court no doubt tried to distinguish Vidya Ram Mishra's case, but with due respect, we might observe that the distinction drawn by the High Court is a distinction without any difference. The High Court has not considered the two basic facts which were present in P.R.Jodh's case but which were not present in the instant case, viz., (1) that the governing body in the case dealt with by this Court in P.R.Jodh's case was in itself a creature of the statute; and (2) that in the instant case the statute did not apply *proprio vigore* but only after an agreement was executed between the employer and the employee in accordance with the terms and conditions of the statute. The High Court also failed to consider that there was a concurrent finding of fact by all the Courts below that the plaintiff/respondent never executed any agreement with the Executive Committee of the College in the form prescribed by the statutes of the Agra University Act.

14. Thus in view of the decisions of this Court regarding the circumstances under which the institution can be treated as a statutory body we are unable to agree with the view taken by the Allahabad High Court that the Executive Committee was a statutory body merely because it was affiliated to the University or was regulated by the provisions of the University Act or the statutes made thereunder. We accordingly hold that the decision of the Full Bench of the Allahabad High Court on this point is legally erroneous and must be overruled.

14. In the same judgment, the Honourable Supreme Court also considered the question whether the conduct of personal service is specifically enforced and after referring to various judgments, it was held as follows:

15. This brings us to the next point for consideration as to whether or not the plaintiff/respondent's case fell within the exceptions laid down by this Court to the general rule that the contract of personal service is not specifically enforceable. In this connection as early as 1964, in S.R. Tewari Vs. District Board Agra and Another, , this Court observed as follows:

Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well recognized exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Art. 311 continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the industrial law, jurisdiction of the

labour and industrial tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognised. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to do.

To the same effect is the decision of this Court in *Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi*, , where it was observed as follows:

From the two decisions of this Court, referred to above, the position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well-recognized exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) A public servant, who has been dismissed from service in contravention of Art. 311(2) Reinstatement of a dismissed worker under Industrial Law by Labour or Industrial Tribunals. (3) A statutory body when it has acted in breach of a mandatory obligation, imposed by statute;

16. In *Indian Airlines Corporation v. Sukhdeo Rai* (supra) this Court also observed as follows:(SCC p.193, para 3)

It is a well settled principle that when there is a purported termination of a contract of service, a declaration, that the contract of service still subsisted, would not be made in the absence of special circumstances because of the principle that courts do not ordinarily grant specific performance of service. This is so, even in cases where the authority appointing an employee was acting in exercise of statutory authority. The relationship between the person appointed and the employer would in such cases be contractual, i.e. as between a master and servant, and the termination of that relationship would not entitle the servant to a declaration that his employment had not been validly determined.

To the same effect is the decision of this Court in *Bank of Baroda Ltd. Vs. Jeewan Lal Mehrotra*, , where this Court observed as follows:

The law as settled by this Court is that no declaration to enforce a contract of personal service will be normally granted. The well recognised exceptions to this rule are (1) where a public servant has been dismissed from service in contravention of Art. 311(2) where reinstatement is sought of a dismissed worker under the industrial law by labour or industrial tribunals; (3) where a statutory body has acted in breach of a mandatory obligation imposed by statute;

17. In the *Sirsi Municipality's* case (supra) the matter was exhaustively reviewed and Ray, J., (as he then was) observed as follows: (SCC p.413: SCC (L&S) p.210, paras 15-17)

The cases of dismissal of a servant fall under three broad heads, purely by contract of employment. Any breach of contract in such a case is enforced by a

suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of founding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a case of contract of employment would be indirectly an instance of specific performance of contract for personal service. Such a declaration is not permissible under the Law of Specific Relief Act.

The second type of cases of master and servant arises under Industrial Law. Under that branch of law a servant who is wrongfully dismissed may be reinstated. This is a special provision under Industrial Law. This relief is a departure from the reliefs available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant. The third category of cases of master and servant arises in regard to the servant in the employment of the State or of other public or local authorities or bodies created under statute.

18. On a consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognised exceptions-(i) where a public servant is sought to be removed from service in contravention of the provisions of Art. 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law, and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute.

15. Therefore, in the present case also the appellant is a private management though they are coming under the provisions of the Matriculation Schools Act and therefore, even assuming that the service of the respondent was terminated, the respondent cannot seek for reinstatement of service with backwages.

16. Further, in the judgment reported in Lilly Bai Vs. Chinna Thai and Others, , the learned Single Judge considered the right of a teacher who was governed by the provisions of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 and held that a teacher cannot seek for declaration that she is entitled to continue in the same post even after termination and the learned Single Judge held that the civil suit was misconceived and as per the provisions of the Tamil Nadu Private Schools (Regulation) Act, 1973, which provides for appeal against the termination of service for any other reason and therefore, the aggrieved teacher has to apply under the provisions of the Act against the illegal termination, if any, and she cannot file a suit for declaration.

17. In the judgment in reported in 2008 (3) CTC 395, the learned Judge has held that when Act provides for appeal remedy against the termination, the party has to avail the remedy available under the Act and they cannot invoke the

jurisdiction of a civil court.

18. In the judgments relied upon by the learned counsel for the respondent, no doubt, it has been held that the dismissal can be challenged before Labour Court and the termination without any enquiry is liable to be set aside and a woman employee is entitled to maternity leave and she cannot be terminated on that ground. But, the judgment relied upon by the learned counsel for the respondent did not say that a civil suit is maintainable when appeal remedy is provided under the Act. Admittedly, the respondent filed appeal against the alleged termination before the appellate authority as provided under the Tamil Nadu Matriculation Schools Act and the Act also provides for appeal remedy against any illegal termination. Therefore, having regard to the law laid down by the Honourable Supreme Court in *Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others*, and the judgment in *Lilly Bai Vs. Chinna Thai and Others*, , I hold that civil suit challenging the order of termination and seeking for reinstatement of service is not maintainable and the aggrieved person can only maintain a suit for damages and contract of personal service cannot be enforced in a civil suit when the Act provides for appeal remedy and when the respondent, admittedly, filed an appeal, she has to pursue the appeal remedy and it is not open to her to invoke the jurisdiction of the civil court by filing a suit. Hence, substantial questions of law 4, 5 and 6 are answered in favour of the appellant and I hold that the lower appellate court committed error in decreeing the suit when the respondent had already preferred appeal against the order of termination and the lower appellate court erred in granting the relief of reinstatement of service with backwages and the lower appellate court is not justified in invoking the provisions of Maternity Benefits Act in this case.

19. I further hold that letter dated 24.2.2007 will not amount to termination of service and even prior to that, the appellant returned the certificates of the respondent and the respondent was working as permanent employee of the school and she was not a temporary employee and therefore, substantial questions of law 1 and 2 are answered in favour the appellant. Further, having regard to the answers given for substantial questions of law 5 to 6 that the respondent is not entitled to maintain a suit to enforce the contract of personal service and the Act provides appeal remedy against the illegal termination and that was also availed by the respondent and therefore, the respondent is not entitled to maintain the suit.

20. In the result, the second appeal is allowed. The judgment and decree of the first appellate court is set aside and the judgment and decree of the Trial Court is restored. As stated supra, as per the submissions of the learned counsel for the appellant, the appellant is permitted to take back the respondent into service without backwages with continuity of service and it is open to the respondent to make use of this opportunity and if he respondent expresses her willingness to join duty with continuity of service without claiming backwages, the appellant

shall take the respondent into service as per the assurance given by the appellant before this court. No costs. The connected miscellaneous petitions are closed.