

(2001) 03 AP CK 0045

In the Andhra Pradesh High Court

Case No : WA No's. 1496 and 1497 of 2000

Bharat Heavy Electricals Limited Higher Secondary School
Staff Association, BHEL, Ramachandrapuram, Medak District
and others

APPELLANT

Vs

Bharat Heavy Electricals Limited, New Delhi and others

RESPONDENT

Date of Decision : 30-03-2001

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 7
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11
Constitution of India, 1950 — Article 12, 14, 16, 21, 226
Evidence Act, 1872 — Section 115, 40, 41, 42, 43

Citation : (2001) 3 ALD 125 : (2001) 3 ALT 164

Hon'ble Judges : Satya Brata Sinha, C.J.; S.R. Nayak, J

Bench : Division Bench

Advocate : Mr. G.S. Rao, for the Appellant; Mr. S.V. Bhatt and Mr. S. Ravindranath, for the Respondent

Judgement

S.B. Sinha, CJ

1. These two writ appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. Writ Appeal No. 1496 of 2000 arise out of WP No.29998 of 1998 and Writ Appeal No.1497 of 2000 arise out of WP No.9339 of 2000.

3. The teachers working in BHEL Higher Secondary School at Ramachandrapuram, Medak district and their Union filed various writ petitions for various reliefs in the above writ petitions.

4. The relief claimed in Writ Petition WP No.29998 of 1998 (Writ Appeal No. 1496) was as follows:

"(a) to continue to run the BHEL Higher Secondary School with all the classes

from LKG to 12th Class as before as a welfare measure to the employees of BHEL as per the objectives in the Company's Memorandum of Association and in discharge of constitutional obligation under Article 45 of the Constitution of India as long as BHEL exists and declaring that the petitioners 2 to 9 herein and all other teaching staff of the BHEL and that the respondent No.3 is only an integral annexure of BHEL and that the school is one on the Departments of BHEL and direct the BHEL to continue the staff in service and to pay them the pay and allowances, gratuity, CPF etc., as already being done and extend all other benefits applicable to BHEL employees; and

(b) direct the contesting respondents to pay the petitioner the costs of this writ petition."

5. A further prayer was made in WPMP No.3278 of 1999 filed for amendment of the prayer which reads as under:

"Issue a writ of mandamus or any other appropriate writ, direction or order particularly a writ of mandamus striking down the action of the respondents in closing down the classes from 1996 onwards by not admitting students into the BHEL Higher Secondary School and instead admitting the students in to other private schools and consequential introduction of voluntary Retirement Scheme and threat of termination of services of the staff of the BHEL, Higher Secondary School is arbitrary, unfair, unreasonable, unjust, illegal, discriminatory and violative of Articles 14, 16 and 21 of the Constitution of India and issue consequential direction"

6. The relief claimed in WP No.9339 of 2000 (WA No.1497 of 2000) reads as follows:

"Issue a writ of mandamus or any other appropriate writ, order or direction striking down the order dated 23-5-2000 Annexures-P 34 collectively (i) passed by the 1 st respondent-President terminating the services of respondents 2 to 17 as they are illegal, arbitrary unjust, capricious, mala fide and violative of Articles 14, 16, 21, 41 and 45 of the Constitution of India and void and non est being without jurisdiction;

Issue consequential direction to the respondents to reinstate the petitioners 2 to 17 into their original posts with continuity of service and to pay back wages and other continuity of service and to pay back wages and other consequential benefits which they would have got had there been no order of termination.

7. The fact that the school in question was started by the BHEL (respondent No. 1 herein) as a welfare measure to its employees and residents of that locality is not in dispute. Altogether there are seven schools located in the township of Ramachandrapuram, two of which are run by the local Zilla Parishad and Panchayat Samithi. The other Schools are St. Anns High School, Bharatiya Vidya Bhavan Public School, Jyothi High School, Geethanjali High School, Vidya Bharathi High School. The school in question is affiliated to the Central Board of

Secondary Education. For the purpose of running the said school, a committee of management was appointed in the year 1964. The school was affiliated to CBSE in the year 1966. The school was managed by the committee of management upto 1983. On or about 13-10-1983 a society known as BHEL Educational Society came into being which was registered and incorporated under the Hyderabad Public Societies Registration Act and the school is now under the control of the said society.

8. A-writ petition was filed by 69 teaching and non-teaching staff of the said society for issuing a writ or order in the nature of mandamus declaring that the petitioners therein were the employees of the BHEL and for an order restraining the respondents from compelling them to serve as the employees of the society. The said Writ Petition was marked as 8428 of 1995. In the said writ petition the following relief was prayed:

"to issue a writ of mandamus or other appropriate order or direction in the nature of a writ, declaring that the petitioners herein are employees of the BHEL, as Government of India Undertaking, registered under the Indian Companies Act, and restrain the respondents from compelling the petitioners to serve as employees of the society by striking down the registration of BHEL Education Society under the Hyderabad Public Societies Registration Act as illegal."

9. Several contentions were raised in the said writ petition. Justice P. Venkatarama Reddi (as the learned Chief Justice men was) held that 117 out of 173 employees had given their option to become employees of the society.

10. The writ petition was disposed of with a direction to the respondents to ensure continuity of service, gratuity, seniority and provident fund and to constitute a trust as regards payment of the provident fund and gratuity as early as possible.

The main relief which was prayed for, however, was not granted. The petitioners in the said writ petition and some other employees preferred two appeals against the said judgment and order, which were marked as Writ Appeal Nos. 1805 and 1828 of 1999. The said writ appeals were disposed of having regard to a settlement arrived at by the parties thereto and were disposed of in the following terms:

"Both these writ appeals arise out of the order dated 13-10-1988 passed in WP No.8428 of 1995 disposing of the writ petition. The petitioners in the writ petition and some others have filed these writ appeals. The relief sought for in the writ petition is the issuance of writ of mandamus declaring that the petitioners are the employees of the BHEL and restrain the respondents in the writ petition from compelling the petitioners to serve as employees of BHEL Education Society.

During the pendency of these writ appeals, the BHEL Higher Secondary School Staff Association submitted a charter of its problems to the BHEL Education Society. Negotiations were held between the representatives of the employees

and the Education Society on all the problems of the employees and the minutes of the meeting were recorded on 18-12-1993. A copy of the minutes of the meeting discloses that some of the demands made on behalf of the employees have been conceded and some other demands have been rejected. In view of the understanding arrived at between the employees and the management of the BHEL Education Society regarding the conditions of service of the employees, no further orders need be passed in these writ appeals. They are accordingly disposed of. There shall be no order as to costs."

11. Before the learned single Judge as also before us Mr. Rao the learned Counsel appearing on behalf of the petitioners would urge that the petitioners had to arrive at the said settlement under coercion and undue influence. Our attention has been drawn to various documents to show that the teaching and non-teaching staff of the school had not only been appointed by the company but also the school had been managed for all intent and purport by it.

12. Our attention has also been drawn to various documents contained in the material papers urging that there are materials to show that in truth and substance the company was behind the scene and as such this Court in exercise of its jurisdiction under Article, 226 of the Constitution of India will pierce the veil. The learned Counsel would submit that having regard to the fact that the petitioners had filed the earlier writ petitions, they are being victimised and forced to accept the voluntary retirement scheme. It was submitted that with a mala fide intent, the management of the 1st respondent herein has started closing down classes one by one from 1997 onwards and are not taking admission of new students. According to the learned Counsel, the transfer of the management of the school is a mockery by the company inasmuch as its officers are only managing its affairs. According to the learned Counsel, the entire monthly salary of the staff would be paid to the society, which in turn would pay the same to the teachers. The learned Counsel would contend that the society has no resources of its own.

According to the learned Counsel, the learned single Judge erred in holding that the writ petition is not maintainable. Mr. Rao would urge that in terms of the conditions of the recognition of the school by the Central Board of Secondary Education, the corpus of the school could not be transferred. It was contended that in fact even the recognition was obtained without depositing any amount which concession is available inter alia to a public sector undertaking. It was submitted that even the reserve fund of the school had been provided by the company. The learned Counsel would submit that in terms and conditions of the recognition it is only the managing committee which can terminate the services of the teaching and non-teaching staff and not the society. It has been pointed out that only services of the petitioners were terminated under threat and in this connection our attention has been drawn to the following statements of the appellants in WA No.3093 of 2000:

"4. On 8-11-2000 at about 3.20 p.m. the BHEL's Senior Deputy General

Manager-cum-Secretary of BHEL Education Society (Mr. M.S. Rao) came to the school and stayed upto 6.30 p.m., pressurising the teachers and non-teaching staff to take VRS or face dire consequences. He said:

"The school would be closed by the end of April, 2001 and the present students would be adjusted in different private schools in the BHEL Township and most of the students would be sent to the Bharatiya Vidya Bhavan Public School and that already oral agreement was reached in the personnel department of BHEL in this regard. Parents would be intimidated orally regarding the same.

The BHEL Higher Secondary School Building (partly or completely) would be handed over to other institutions or the HRD Department Training School. The civil maintenance officials are coming to renovate the school building for this purpose.

All the staff would be terminated from their services if they don't opt for VRS. This benefit of VRS will not be given to those who do not opt for it. By the time the writ appeal comes for hearing the school building, furniture etc., will not be there. We know how to make your Court cases infructuous and how to overcome the Court orders. You know that some classes disappeared during the pendency of the WP 29998 of 1998 and the services of 24 teachers were terminated on 23-5-2000 without any prior notice and that the Courts could not come to your rescue. The Courts did not give any directions to us nor any relief to you till now in this regard. We will influence the Courts by spending BHEL money not to pass any orders. Even now you are not learning any lesson from what is happening or happened. We shall terminate your services at anytime, if you don't opt for VRS without notice.

Take VRS you will get at least this VRS amount. Otherwise you don't get even this if you continue the fight in Courts. The VRS scheme is again introduced and extended. (It is further extended upto 15-1 -2001) to induce the teachers to withdraw the WA). This VRS scheme is not existing anywhere in any school of BHEL or anywhere. This VRS is introduced only in this school to close down the school. If I want I will revive the school in a trice but I don't want to. By the end of April, 2001 the BHEL HSS will not be there and your job will not be there and only your Court cases and you will be there forlorn before the Courts. We will do many manipulations to achieve our goals to teach you a lesson by closing down the school and file affidavits in the Courts and the Courts cannot do anything to us."

13. It was submitted that if the company cannot run the school, the same could be handed over to the teachers.

14. In support of the aforementioned contentions strong reliance has been placed on the decisions of the Apex Court in *Subhra Mukherjee and Another Vs. Bharat Coking Coal Ltd. and Others*, *Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar Vs. Associated Rubber Industry Ltd., Bhavnagar and Another*, *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti*

Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, , Indian Overseas Bank v. IOB Staff Canteen Workers" Union 2000 (3) Supreme 344, Navnit R. Kamani and Others Vs. R.R. Kamani, .

15. Mr. Ravindranath., learned Counsel appearing for the respondent-society, on the other hand, submitted that the BHEL School Society being registered under the provisions of Hyderabad Public Societies Registration Act, the learned single Judge must be held to have rightly come to the conclusion that a writ petition against the society is not maintainable. He has pointed out that the Central Board of Secondary Education (CBSE) having not been incorporated under a statute, the terms and conditions for affiliation cannot be held to have any statutory force. Reliance in this connection has been placed on the decision of the Apex Court in The Principal and Others Vs. The Presiding Officer and Others, . Our attention was drawn to the prayers made in the writ petitions and it was submitted that the same is beyond the scope of writ jurisdiction of this Court. Referring to the decision of this Court in WP No.8492 of 1985, the learned Counsel would urge that as options had been taken from the teaching and non-teaching staff, it is idle to contend that they are not employees of the society.

16. Mr. Bhatt, learned Counsel appearing for the respondent-Company, while adopting the submissions of Mr. Ravindranath Reddy, argued that having regard to the decisions of the Division Bench of this Court in WA Nos.1805 and 1826 of 1998, arising out of WP No.8428 of 1998, it must be held that the writ petitions were not maintainable. Learned Counsel submitted that no relief having been granted as prayed for by the petitioners therein, they must be held to have been rejected and thus the rule of public policy demands that they not be permitted to be reopened after a period of 12 years. According to the learned Counsel, the principles of res judicata and constructive res judicata as also the principles embodied in Order II, Rule 2 of the CPC are attracted in writ proceedings. Reliance in this connection has been placed on the decision of the Apex Court in MSRT Corporation v. Babajan AIR 1977 SC 1012, Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , Sri Swatantra Kumar Agrawal Vs. The Managing Director, U.P. Financial Corporation, Kanpur and another, and in M/s. Munna Industries Vs. State of U.P. and others, .

17. As regards the appointments made by the company on 13-7-1988, it was submitted that a writ petition had been filed and an order of status quo was directed to be maintained and it was thought proper that the appointment of staff be made by the old School Committee. The said order of status quo, according to the learned Counsel, was operative till 13-10-1988. Our attention has been drawn to a chart showing the students-teachers ratio and it was submitted that for the said purpose the company had introduced voluntary retirement scheme. Our attention has also been drawn to the fact that even the strength of the staff of the company has come down from 10,500 to 7,000 and

further having regard to the fact that five schools have come into being, the scenario has changed and the welfare measures taken by the company also had to be changed suitably. Mr. Bhatt would urge that the writ petitions having not been filed either by an employee or the parent of any student of the school and, thus, were not maintainable.

18. The principal question which arises for consideration in these appeals is as to whether the writ petitions are maintainable?

19. For the purpose of these cases, we will proceed on the basis that the 1st respondent herein is a "State" within the meaning of Article, 12 of the Constitution of India.

20. It, however, is not in dispute that the 1st respondent is a company incorporated under the Companies Act. Its main activities are industrial in nature. It having regard to its nature of activities, cannot be said to be performing any sovereign function.

21. Establishment and running of the free school for the children of its employees was only a welfare activity of the company. It was incidental to its main function which is commercial in nature.

22. Mr. Rao, learned Counsel appearing on behalf of the appellants has not been able to show that the terms and conditions of service of the teaching and non-teaching staff of school are governed by any statute or statutory rules. It also does not appear that the Central Board of Secondary Education was created under a statute.

23. The terms and conditions laid down by CBSE for affiliation of an institution also does not have any statutory force. Even assuming that they are statutory in nature, no consequential action for not complying with the same having been provided for, the only inference that can be drawn is that in the event of violation thereof, the institution may be derecognised. By reason of such terms and conditions of affiliation, the teaching and non-teaching staff of an institution so affiliated do not derive any legal right in themselves.

Although, a school is an industry, the teachers are not workmen.

24. There cannot be any dispute whatsoever that having regard to a catena of decisions of the Apex Court and various High Courts, that in relation to those schools which are recognised in terms of the provisions of a statute, a writ will be maintainable. Primarily, such school should be aided by the Government. Even in certain cases where the terms and conditions of teaching and non-teaching staff are governed by a statute, a writ petition may be held to be maintainable even when the institution is an unaided one.

Although ordinarily in exercise of the jurisdiction under Article 226 of the Constitution, this Court can issue a writ only against the State, however, a public body exercising public function is also amenable to writ jurisdiction of this Court.

25. In the instant case, however, the BHEL School Society was founded by the respondent No.1 company which has its own independent legal existence. It was a private body. It is although financially dependant on the company, it is not financially dependant on any State Government or Central Government whose sovereign function is to impart education.

26. Any appointment made de hors any statute would not confer any legal right upon the persons so appointed to obtain a writ or order in the nature of mandamus, in *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Survarna Jayanti Mohatsav Smarak Trust and others v. V.R. Rudani*, it was held:

"If the rights are purely of a private character, no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions."

27. The Apex Court further stated that the law thus:

"The law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in English started with very limited scope and suffered from many procedural disadvantages."

28. Having traced out the development of law in England, the Apex Court observed:

"There, however, the prerogative writ of mandamus confined only to public authorities to compel performance of public duty. The "public authority" for the means every body which is created by statute - and whose powers and duties are defined by statute. So Government departments, local authorities, police authorities and statutory undertakings and corporations are all "public authorities". But there is no limitation for our High Courts to issue the writ "in the nature of mandamus". Article, 226 confers wide powers of the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English Law. Under Article 226, writs can be issued to any person or authority". It can be issued "for the enforcement of any of the Fundamental Rights and for any other purpose."

29. Following the above decision, in *Ram Saran Shastri v. State of West Bengal* 1995 (1) CHN 419, it was held:

"Admittedly, the post was not sanctioned. There is no dispute that none of the statutory requirements was followed in the appointment of the petitioner as a teacher in the school. The appointment was de hors the statute. Prayer for exercise of jurisdiction in view of the wrongs done to the petitioner not accepted. The conditions of service of the petitioner was not governed by any statute or

statutory rules. The petitioner did not receive any salary or allowances from the Government. No amount is being spent on the petitioner from the public fund. Even grant-in-aid code is not applicable in the case of the petitioner nor any breach of the conditions has occurred. No writ lies against the Managing Committee of the respondent school as the writ petition does not involve any public law element between the petitioner and the concerned respondents."

30. However, the question which arises for consideration is that as the service conditions of the teachers are not governed by a statute, whether the writ petitions will be maintainable?

31. In *Ram Saran Shastri v. State of West Bengal* (supra) a distinction has been made between the terms and conditions of the service of a teacher being governed by a statute and under a private contract.

32. In *Executive Committee of Vaish Degree College Shamli and others v. Lakshmi Narain and others* AIR 1976 SC 888, the Supreme Court held:

"17. 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 employee. 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 Article, 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."

33. In *Syed Iqbal Ali Imam Raza Vs. State of Bihar and Another* , a Bench of five Judges stated--

"26. In *Francis v. Municipal Councillors of Kuala Lumpur* (1962) 3 All ER 633 Lord Morris held:--

"When there has been a purported termination of contract of service, a declaration to the effect that the contract of service still subsisted will rarely be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court."

In *Wade and Forsyth's Administrative Law*, 1994 Edn. At page 1018, it is stated -

"In *R v. Crown Prosecution Service ex. P. Hogg* (1994) *The Times*, 24th April, the Court of Appeal upheld the refused of leave to move for judicial review sought by a prosecutor in the Crow Prosecution Service who had been dismissed during the probationary period. The relationship between the Crown as employer and a Crown Servence as employees was a private law relationship as held in *Mecloren*

v. Home Officer (199) ICR 824 and in this case it lacked the statutory underpinning discussed in R v. East Berkshire Health Authority ex. P. Salish (1985) QB. 152"

34. It may further be noticed having regard to the various decisions of the Apex Court as also the High Courts that even in relation to an employee of a society unless the mandatory provisions of a statute governing such conditions been violated, no mandamus can be issued.

In Sri Konaseema Co-operative Central Rank limited v. N. Seetharama Raju AIR 1990 AP 171, this Court has held:

"38. Sir Harry Woolf, a Lord Justice of Court of Appeal, points out the distinction in the following words:

"I regard public law as being the system which enforces the proper performance by public bodies of the duties which they owe to the public. I regard private law as being the system which protects the private rights of private individuals or the private rights of public bodies. The critical distinction arises out of the fact that it is the public as a whole or in the case of local Government the public in the locality, who are the beneficiaries of what is protected by public law and it is the individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law...."

(see page 221 of his Article "Public Law Private Law: Why the Divide? A personal view (published in "Public Law" Summer: (1986)).

The learned Law Lord state further in the same Article, at page 223:

"While public law deals only with public bodies, this does not mean that the activities of public bodies are never governed by private law. Like public figures, atleast in theory, public bodies are entitled to have a private life. There have been suggestions that in the commercial field public bodies should adopt different and higher ethical standards than private individuals, but this is not yet required as a matter of law and in relation to purely commercial transactions the same law is applicable, whether or not a public duty is involved. Prima facie, the same is true in relation to employment. The servant employed by a public body ordinarily has the same private rights as any other servant...."

The position may, however, be different pointed out the learned law Lord if such relationship is circumscribed by a statutory provision."

35. In the instant case, the teaching and non-teaching of the school do not receive any salary or allowance from the Government. No amount is being spent on them from the public fund. Neither the grant-in-aid or the State or any other statutory provisions are applicable in their cases.

36. In that view of the matter, we are of the opinion that the learned single Judge has rightly held that the writ petition against the society is not maintainable.

37. The decisions cited by Mr. Rao are distinguishable.

38. In *The Principal and Others Vs. The Presiding Officer and Others*, , the Apex Court observed:

"The fact that the school is affiliated or attached to the Board is also of no consequence and cannot justify the conclusion that the school is a recognised school. There is a significant difference between "affiliation" and "recognition". Whereas "affiliation", it may be noted, is meant to prepare and present the students for public examination, "recognition" of "a private school is for other purposes mentioned in the Act and it is only" when the school is recognised by the "appropriate authority" that it becomes amenable to other provisions of the Act, Again the fact that the school was in existence at the commencement of the Act cannot confer on it the status of a recognised school and make it subject to the provisions of the Act and the rules made thereunder. To clothe it with that status, it is essential that it should have been a recognised private school as contemplated by the Act."

39. Furthermore, this Court in WP No. 8425 of 1988 has clearly held that the petitioners were not entitled to any relief prayed for by them. Even in appeal, having regard to the understanding arrived at between the parties, the writ appeals were dismissed.

40. In that view of the matter, the principles of *res judicata* as also Order II Rule, 2 would apply in the instant case.

41. In *Mysore State Road Transport Corporation Vs. Babajan Conductor and Another*, , the Apex Court held that where a declaratory relief asked for by a party in an earlier petition was not granted, that relief would be deemed to have been refused and such relief cannot be claimed in a subsequent writ petition.

42. In *Swatantra Kumar Agraival v. Managing Director, UPFC Kanpur* (supra) a Division Bench of the Allahabad High Court held:

"5. Rule 7 of the Allahabad High Court Rules, 1952 as quoted above is explicit and unequivocal. It clearly provides that a second application on the same facts will not be entertained by the Court. It is clear that the facts of the present petition are 100% similar to the facts contained in the earlier petition. The monumental judgment of the Hon"ble Supreme Court in *Mahesh Chandra's case* (*Mahesh Chandra v. Regional Manager, UP Financial Corporation* 1992 (2) UPLBEC 1313) had already been delivered and it was the law of the land binding on all the judicial and quasi-judicial authorities in India. Therefore, if any authority has passed an order, it will be believed that it was conscious of the implications and directions contained in that judgment....."

16.1 Another leg of the argument advanced by the learned Counsel for the respondents is that provisions of Order II, Rule 2 CPC also hit the entertainment of the present petition. The law aims at avoiding multiplicity of the petitions. It requires that a party who comes to the Court, must plead all the grounds

available to it and seek all the reliefs which it can seek in the first case itself, so that the Court may decide the case once for all and the door of the Court may be slammed for ever for raising the same points in subsequent litigations. The principle is based on public policy and cannot be taken exception to otherwise.

17. When the petitioner came for the first time with the earlier petition, he could have taken all these pleas and sought all the reliefs which he has claimed in the present writ petition, in fact he did all that in the earlier petition though in a modified language but the spirit and substance were the same. He tried his luck for the first time and failed. Then the second trial of luck has begun. The law does not encourage such a litigation."

43. In *M/s. Munna Industries v. State of UP.*, (supra) it was observed:

".....The filing of successive writ petitions for the same cause of action with additional cause of action arising during the pendency of the earlier writ petitions gives rise to multiplicity of writ petitions and the multiplicity of the interim orders obtained by the parties also create problems before the respondents many a time . It is well known and settled that subsequent order which is said to be a subsequent cause of action needs no filing of fresh writ petition but by seeking appropriate amendment in the pending writ petition, such relief which may be needed in respect of subsequent order, could easily be incorporated in the pending writ petition. This is not done and successive writ petitions are filed which is adding to accumulations of number of writ petitions before this Court. The provisions of Chapter 22, Rule 7 of the High Court Rules, no doubt provides that no second application on the same facts, where an application has been rejected, shall be entertained on the same facts. This rule does not cover the situation arising presently in large number of writ petitions. We considerate necessary and appropriate that amendment in Chapter 22 of the High Court Rules are required which may require a petitioner to categorically state in the first paragraph of the writ petition that no earlier writ petition in the same matter of arising out of the same matter is pending or decided before this Court. If such statement is made by the petitioner in the writ petition, multiplicity of the writ petitions by the same parties could be avoided and for subsequent orders, if any, passed requiring a relief by the petitioner, could be added in the writ petition itself by seeking appropriate amendments."

44. In *The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others*, , it has clearly been held by the Apex Court that the principles of res judicata are applicable to writ proceedings also. It was held:

".....a Constitution Bench of this Court in *Daryao and Others Vs. The State of U.P. and Others*, held that where the High Court dismisses a writ petition under Article, 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article, 32 on the same facts and for the same relief filed by the same parties will be barred by the general

principle of *res judicata*. The binding character of judgments of Courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasized by the Constitution, is founded and a judgment of the High Court under Article, 226 passed after hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article, 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea as was observed at page 595 (of SCR) = (at p. 1467 of AIR 1961) of the reported judgment, thus:

"We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are subsequently the same."

The decision in *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, , further clarified the position by holding that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive *res judicata* underlying Explanation IV of Section 11 of the CPC was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of *res judicata*"

45. In any event in exercise of its jurisdiction under Article, 226 of the Constitution of India, this Court cannot go into the question whether the settlement had been arrived at between the parties and the management under threat or coercion.

46. Such purported threat or coercion being essentially a question of fact can only be adjudicated upon in an appropriate forum. In any event, so long as the judgment of the learned single Judge as also the judgment of the Division Bench are not set aside, this Court cannot go into such a question, more so, when such questions are being raised after a long lapse of 12 years. If the appellants were to raise the said contention, the same could have been raised before the same Bench by way of review.

47. In this view of the matter, this Court will have to accept the fact that 117 employees out of 173 had given option to become the employees of the society and, thus, it is not permissible for them now to urge contra. If they themselves opted for being the employees of the society on its formation as far back in 1985, it is too late in the day to contend that they are in truth and effect are employees of the respondent-company. They would be estopped for doing so.

48. Sir Owen Dixon, CJ of the High Court of Australia in *Thomson v. Palmer*

(1933) 49 CLR 507 observed:

"The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment, or because he has exercised against the other party rights which would exist only if the assumption were correct.....or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted."

49. Section 115 of the Indian Evidence Act lays down the principles of estoppel as a rule of evidence, as a result whereof, the petitioners have become disabled and thus precluded from alleging or proving that they did not opt for the service of the society. Reference in this connection may also be made to *Packward v. Sears* (1837) 6 Ad & EI 469. The teaching and non-teaching staff who had opted for becoming the employees of the society, are, therefore, bound by their wilful conduct.

50. In any event, having regard to the aforementioned judgments, the petitioners must be held to be estopped by record and are bound by their options. It is now well settled principle of law that where a Court or Judicial Tribunal of competent jurisdiction has finally adjudicated a subject matter in litigation, any party or privy to such a litigation, against any other party or privy thereto, and in all cases of judgment in rem, the petitioners therein or any other person thereto, would in subsequent proceedings before the Courts be estopped from disputing or questioning the previous decision of merits. Having regard to the provisions of Sections 40 - 44 of the Indian Evidence Act, unless and until any fraud or coercion or want of jurisdiction is alleged, the said judgments would be relevant apart from operating as *res judicata*.

51. The reliefs sought for in both the proceedings are absolutely identical. The privity of interest between the parties to the litigation is also the same. Thus, as the issue of fact has been tried by a Court of competent jurisdiction on previous occasion, the same would constitute estoppel by record in a subsequent trial or proceedings. Thus, in the instant case, the doctrine of issue of estoppel also can be invoked as the facts in issue in the earlier writ proceedings are identical to the

facts in issue in the present case. There doesn't arise any subsequent events, which leads to the creation of a new right between the parties.

52. It may be true that in a given case if undisputed materials have been brought on record to show that any contractor or society is a mere facade or smoke and screen, the doctrine or "piercing the veil" may be applied. But, in a case of this nature, we are afraid the said principle has no application in view of the fact that the matter has been concluded by the earlier judgments of this Court. Thus it is not for this Court to arrive at a finding contra by going into the question as to whether such settlement had been arrived at under threat or coercion or whether the teaching and non-teaching staff of the school in question were duped by the concerned authorities.

53. It is also not possible for this Court to accede to the submissions made by the petitioners to the effect that this Court in exercise of its jurisdiction under Article, 226 of the Constitution of India shall direct handing over the school to them as was done in respect of a company in *Navnit R. Kamani and Others Vs. R.R. Kamani*, . That was a case where the workers of a company presented a scheme to run a sick unit and in the facts and circumstances of that case, the Supreme Court found that the scheme presented by them was workable in preference to the scheme presented by the share holders. The respondent-society herein which is running the school has taken a policy decision to reduce the strength of the school in a phased manner and gave offer of VRS to the teachers. In our view, the said decision has no application to the facts of the present case.

54. A company or a society is entitled to take a policy decision. Such policy decision may be interfered with by the Court only when it is wholly arbitrary and violative of Article, 14 of the Constitution of India. The Court is not concerned with the merit or wisdom of such policy decision.

55. Furthermore, the Court could not have granted relief sought for herein as the same would amount to monitoring the activities of the school from day-to-day.

56. Financial viability, as is well-known, is one of the considerations for grant of such reliefs. However, such a contention cannot be raised or decided in a writ proceeding. In *Tarak Chowdhury v. State of West Bengal* 2000 (2) SLR 445, it has been held:

"7. It has not been disputed that the petitioner was appointed on an ad hoc basis. At the time of his appointment recruitment rules framed in terms of the proviso appended to Article, 309 of the Constitution of India had not been followed. The State while granting appointment to a person is not only bound to follow the recruitment rules made in terms of the proviso appended to Article, 309 of the Constitution of India but is also bound to give effect to the provisions of Articles, 14 and 16 of the Constitution of India. No right for less any enforceable right flows from such illegal appointments. The recruitment rules, inter alia, provide for grant of equal opportunity to be considered far

appointment to all eligible candidates. A person who is appointed through backdoor cannot claim permanence only because he had been working for sometime. Reference in this connection may be made to the case of Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others, and several decisions of the Apex Court following the same. It is further well known in view of several decisions of the Apex Court that only in irregular appointment can be regularised and not an illegal appointment. It is further well settled that regularisation cannot be a mode of recruitment. (See R.N. Nanjundappa Vs. T. Thimmiah and Another, and B.N. Nagarajan and Others Vs. State of Karnataka and Others, which decisions have been considered by the Apex Court in V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others, It is now also well settled in view of the recent decisions of the Apex Court in State of Madhya Pradesh and Another Vs. Dharam Bir, that the status of a person cannot be changed with the passage of time. A person who was appointed on temporary or ad hoc basis, thus cannot claim the status of a permanent servant only because he had worked for sometime. The said decision along with other decisions had been considered by this Court in a large number of cases. Reference in this connection, however, may be made to Biman Ch. Karmakar v. State of West Bengal reported in 1999 (2) CHN 289 and West Bengal Essential Commodities Supply Corporation Limited v. Md. Sarif reported in 2000 (1) CHN 210 : [2000 (2) SLR 229]. The aforementioned circular letter dated 3rd August, 1979 is not a statute. Even a policy decision cannot be adopted in derogation of a statutory rules. Even the said purported memorandum dated 3rd August, 1979 is not an executive instruction within the meaning of Article, 162 of the Constitution of India."

57. Mr. Bhat, learned Counsel appearing for the respondents is right in his submission that the welfare measure taken by the company may also vary having regard to the changed situation.

58. We are, however, of the opinion that the company and the society having undertaken welfare measures may take such steps so as to see that as far as possible the services of the teachers may be transferred to some other school on humanitarian grounds.

59. The writ appeals are disposed of with the aforementioned observations. No order as to costs.