
(1991) 12 GUJ CK 0008
In the Gujarat High Court

Dr. C.A. Shah

APPELLANT

Vs

Gujarat Cancer and Research Institute

RESPONDENT

Date of Decision : 20-12-1991

Acts Referred:

Constitution of India, 1950 — Article 12, 12

Gujarat University Act, 1949 — Section 51A, 51A, 51A(2)

Citation : (1992) 1 GLR 687

Hon'ble Judges : R.K. Abichandani, J;M.B. Shah, J

Bench : Division Bench

Judgement

M.B. Shah, J.—The questions which require consideration in these petitions are:

(1) Whether the respondent-"Gujarat Cancer & Research Institute" is "State" within the meaning of Article 12 of the Constitution of India?

(2) If it is not a "State", whether the termination of service of the-"petitioner who was working on a part-time basis as a Head of Gynaecology Department in the Institute and was also rendering service as a part-time Professor in the Institute is legal?

(3) Whether the respondent Institute is amenable to writ jurisdiction?

2. The last two questions would require consideration of Section 51A of the Gujarat University Act ("the Act" for brief) which provides for termination of service by way of penalty and also termination simpliciter. It would also require consideration whether the appointment of the petitioner was for a temporary period or not. If the appointment of the petitioner is held to be for a temporary period, then Sub-section (2) of Section 51A of the Act would not be applicable.

3. For deciding the aforesaid questions, it would be necessary to refer to the facts pertaining to this matter. It is admitted that the petitioner was appointed for the first time as a part-time Gynaecologist on the fixed remuneration of Rs. 500/- per month for the period upto 28th February, 1971 by the order dated 11th February, 1970 passed by the State of Gujarat for the M.P. Shah Cancer

Hospital, Ahmedabad. By the order dated 5th May, 1972 the respondent, i.e., Gujarat Cancer & Research Institute Ahmedabad, appointed the petitioner as a Full-time Assistant Professor (Gynaecology Surgeon) on a temporary basis for a period not exceeding one year in the first instance. The petitioner continued to hold the said post upto 1984. The Governing Board of respondent No. 1 decided to adopt policy of appointing part-time Professor in respect of medical personnel of the level of the Assistant Professor and above who have completed 10 years of service after post-graduate qualifications on certain terms and conditions and option was given to the petitioner to state whether he was willing to opt for the part-time appointment or not. By the letter dated 7th February, 1984 the petitioner informed the Institute to become part-time Professor with effect from 29th February, 1984. By the order dated 14th February, 1984 the petitioner was appointed as a part-time Professor and Head of Gynaecology Department with effect from 29th February, 1984 on the following terms and conditions:

1. (a) You will be appointed on contractual basis for the period of three years in the first instance with the proviso that you will be discontinued by giving three months notice on either side in case you desire to leave the Institute or vice-versa the Institute considers it not desirable to retain your service in the middle of the contractual tenure. No notice of termination shall be needed on either side on completion of the contract of three years.

(b) That further continuation to the above contract shall be given on your satisfactory performance at this Institute, and

(e) That the continuation of the contract shall be at the final discretion of the Director of the Gujarat Cancer & Research Institute, Ahmedabad.

2. You will be paid Rs. 500/- p.m. as part-time remuneration and no pay and allowances of any kind shall be made admissible to you.

3. You will not be entitled to any kind of leave except casual leave which will be 12 per year only.

4. No private practice of any kind at Hospital premises shall be permitted and in case you are found doing so you will be seriously dealt with.

5. (a) xxx xxx xxx (b) xxx xxx xxx (c) xxx xxx xxx (d) xxx xxx xxx 6. Rules regarding terms and conditions shall be subject to the addition and/or alteration by the Governing Board from time to time which shall be considered final.

4. By the order dated 6th February, 1986 the petitioner was suspended from service for a period of six weeks beginning from 7th February, 1986 to 20th March, 1986 (both days inclusive) on the basis of the recommendations made by the Departmental Inquiry Sub-committee to the Board with a warning that if he repeats such type of behaviour, his service shall be terminated forthwith. The petitioner has challenged the said order by filing Special Civil Application No. 872 of 1986.

5. At the time of admission hearing of the matter, the Division Bench of this Court passed an order on 20th March, 1986 directing the Administrative Officer of the respondent Institute to accept the joining report of the petitioner and to permit the petitioner to proceed on leave. The Administrative Officer had accepted the resumption report and the leave report of the petitioner. Subsequently (he Director of Gujarat Cancer a Research Institute passed the following order on 9th June, 1986:

Your services are no longer required by the Institute and are/is hereby terminated with immediate effect, i.e., from 9-6-1986, after duty hours. As per Clause No. 1(a) of your appointment order, a Cheque No. CHAP IF 017024 did. 9-6-1986 of three months salary, i.e., Rs. 1,500/- is also annexed herewith.

(underline added)

The aforesaid order is challenged by the petitioner by filing Special Civil Application No. 3110 of 1986.

6. At the time of hearing of the aforesaid two petitions, the learned Advocate General had not pressed Special Civil Application No. 872 of 1986.

7. The learned Advocate General submitted that the order of termination of the petitioner is illegal and arbitrary. It is of penal nature and is passed without following the procedure prescribed u/s 51A of the Act. He further submitted that the respondent-Institute is State" within the meaning of Article 12 of the Constitution as.

(i) previously M.P. Shah Cancer Hospital was administered by the State Government;

(ii) after formation of the respondent Institute the Society manages the affairs of the Institute wherein at least 3 Government nominees are required to be appointed by the Society;

(iii) it is largely aided by the Government;

(iv) Institute is discharging the functions of the State;

(v) the teaching staff of the respondent-Institute is governed by the statutory provisions, i.e., Gujarat University Act, 1949.

8. As against this, the learned Advocate appearing on behalf of the respondent submitted that the respondent Institute is not a "State" within the meaning of Ait. 12 and no writ petition is maintainable against it. The respondent is a Society registered under the Societies Registration Act, 1860, and also is a public trust registered under the Bombay Public Trust Act, 1949. The Trust receives large amount by way of donation from the public at large and that the Government institutions are not run by donations. He fervently submitted that let this Charitable Institution be permitted to discharge its functions by proper internal administration so that it can efficiently render proper service to needy

persons affected by dreaded disease (Cancer) without any red-tapism and bureaucratic set up.

9. It is admitted that the respondent-Gujarat Cancer & Research Institute came into existence in 1971 and is a registered society under the Societies Registration Act, 1860. The learned Advocate for the respondent had produced on record the Certificate of Registration dated 16th October 1971. The Institution is also registered as a Public Trust and is having Registration No. F-451-AHD. By Articles of Agreement dated 25th January, 1972 an agreement was arrived at between the State of Gujarat, Gujarat Cancer Society (a Society registered under the Societies Registration Act 1860) and the Gujarat Cancer & Research Institute. It was decided to establish a Cancer complex. Under the said agreement the Gujarat Cancer Society, Ahmedabad, transferred the ownership, control and management of the cancer complex with all immovable properties including buildings, radio I sotope, kitchen, Dharmashala on certain terms and conditions to the respondent Institute. The Institute had agreed to have at least 3 persons or persons not less than 50% of the total number of members of the governing body of the Institute nominated by the Government as members of the Governing Board of the Institute. In consideration of the said aspect the Government had agreed to pay to the Institute 100% recurring grant-in-aid annually towards running and maintenance of the Institute provided that the total amount shall not exceed the deficit (recurring expenditure of the Institute minus the income). The Government had also agreed to make available to the Institute non-recurring grant for its development and expansion from time to time. The respondent has also produced on record the Rules of the Gujarat Cancer & Research Institute which inter alia provides as under:

2. Interpretation: In these rules unless the context otherwise requires:

(7) "Institute" means the Gujarat Cancer and Research Institute and includes (1) M.P Shah Cancer Hospital, (2) Gujarat Cancer Research Centre, (3) Jethalal Ambalal Diagnostic Centre, (4) Smt. Rukshmani Balabhai Nuclear Medicine Centre and (5) The Dharmasala-cum-Guest House to be named hereafter and (6) all other allied Units named after different donors.

3 Administration and Management: (1) Subject to the provisions of these rules, the Institute shall be under the control and direction of the Governing Board which shall consist of:

(1) (a) three members to be nominated by the Society:

(b) three members to be nominated by the Government, and

(c) The Director.

Provided that to represent other interests, not more than two additional members may be co-opted by the Governing Board.

(2) The members other than the Director shall hold office for a period of three

years.

(3) An appointing authority shall have the right by notice in writing to the Governing Board to terminate the appointment of any member appointed by it.

Rule 4 further provides that the Governing Board shall select its own Chairman from amongst its members, other than the Director and the Co-opted members; the Director shall function as Secretary at the meetings of the Governing Board. The Institute is required to frame bye-laws for the general administration and management of the Institute. Rules 19 & 20 provide for funds of the Institute and acceptance of donations. Rules 19 and 20 are as under:

19. Properties and Funds Vested in the Governing Board: All the existing immovable properties of the society shall vest in the Institute and more particularly the following:

(a) Recurring and non-recurring grant made "by the Government, Union or State and/or by any local body including a sum of Rs. 10 lakhs given by the Government as Corpus Fund.

(b) Other grants, Donations and Gifts (periodical or otherwise, other than those intended to form the Corpus of the property and funds of the Institute or held for benefit of the Institute.

(c) The Income derived from immovable properties and income of the funds vested in the Governing Board and also fees, subscription and other annual receipts, and,

(d) All plants and machineries, equipments and instruments (whether Medical, Surgical, Laboratory, Workshop or of any other kind), books and journals furniture, furnishings and fixtures belonging to the Institute.

20. Acceptance of Donations etc:

The Institute may accept donations, gifts and subscriptions for specific purposes subject to such terms and conditions, if any, as may be laid down by the Governing Board.

Its accounts are to be audited as provided in Rules 21 & 22. The Institute is further required to submit Annual Report to the Government and to the Gujarat Cancer Society regarding the work of the Institute during the year accompanied by a duly audited balance-sheet.

10. For determining the controversy whether the respondent "Gujarat Cancer & Research Institute" is "State" or other Authority, we would first refer to various decisions cited at the time of hearing of this matter. The Division Bench of this Court was required to deal with the similar contention in the case of Ahmedabad Kelavani Trust v. State (1978) XIX GLR 671. In that case, this Court examined the question whether affiliated college is either a statutory body, or one of the other authorities as contemplated by Article 12 of the Constitution or a public

body. For this purpose, the Court observed as under:

We are required to examine the status, position and security of members of the academic world, namely, highly qualified Professors, Teachers and even demonstrators. And question is posed in the context of their status and position qua their employer. Submission on one hand is that relationship between College management and teacher employed by it is purely of master and servant, unadulterated and unalloyed and that, therefore, at common law, master has unfettered unabridged and unbridled power of termination at its sweet will. On the other end of the spectrum, the contention is that affiliated College is either a statutory body, or one of the other authorities as contemplated by Article 12 of the Constitution or a public body, and employment of a teacher in the College partakes the character of employment in a public utility service and therefore even if it has its origin in contract, it ultimately confers upon the teachers status and therefore, a degree of irremovability except in accordance with statutory mandate and with the concurrence of some authority other than the employer namely the College management.

After considering the relevant decisions of the Supreme Court, the Court held that Trust or Society which has established College or Institution would not be "other authority" as envisaged by Article 12 of the Constitution by holding that such College or Institution cannot be held to be Agency or Instrumentality of the Government for carrying on certain functions and activities which State was bound to carry on. The relevant observations are under:

After referring to these entries it was submitted that responsibility for providing centres of higher education rests on the State Government. It is the duty of the State Government to set up a University. It is the duty of the State Government to set up centres of higher education. If the trusts and other societies do not come forward to set up Colleges, the State Government will have to set up Colleges. If the Colleges were to be set up by Government, they would obviously be other authorities as envisaged in Article 12. He further drew our attention to the detailed observation in the Judgment of Mathew, J 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, and onwards. What constitutes "State" in its various ramifications has been examined in details. The test formulated in paragraph 111, was whether such a Corporation is an agency or instrumentality of the Government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the Corporation carrying on the business? Having minutely gone through various tests prescribed it is difficult for us to hold that governing body of the College would be other authority as envisaged by Article 12. Once College is set up. its affairs are controlled and regulated by statute. Under the statute, University is set up. University itself is a statutory body. Therefore, it is not possible to say that College, which is affiliated to the University would be other authority as

envisaged by Article 12. At any rates, even though it is operating in the field of education, which State could have done and conceding that State gives grant to it, yet it is difficult for us to say that College is agency or instrumentality of the Government for carrying on certain functions and activities which State was bound to carry on. If the trust or society had not come forward to set up a College, it is possible that Government of Welfare State may have set up a College. In fact there are still old Government Colleges in our State but on that account alone, it cannot be said that Colleges as they are constituted and manner in which they are controlled, they can be said to be other authority within the meaning of Article 12.

The Court thereafter considered the second submission whether the college is a public authority. The Court held that the private college cannot be said to be a public authority.

11. With regard to protection u/s 51A of the Gujarat University Act, 1949 the Court held that even though the relationship between teacher and management is contractual yet law steps in, when there is wrongful termination in contravention of mandatory provision of a statute, by stating that what has been done is contrary to law. The relevant observations are as under:

In *Malloch v. Aberdeen Corporation* 1971 (2) All.ER 1278, Lord Wilberforce in his judgment points out that relationship of master and servant may be one in which all requirements of or observance of rules of natural justice are excluded and this would mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, whatever the terminology used, and even though in some inter parte aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed and failure to observe them, may result in a dismissal being declared to be void. Bearing this principle in mind, we may briefly state that employment if any can be said to be by governing body and governing body has no discretion with regard to various terms of contract and body itself is created by statute, its position, power and functions and obligations are statutory. Further, this is a case where if the statutory body or public authority has to terminate services, it must be according to the procedure prescribed in Section 51A. Therefore, such an employment could never come within the compass of what is called pure master and servant relationship; and where protection is by statute, any termination in violation of the mandatory provisions of the statute can be declared void by Court. In so doing, Court does not enforce contract of personal service, but merely declares an action in violation of mandatory provisions of a statute as invalid. Corollary would be that contract is not at all terminated and contract continues to subsist. When it is said that contract of personal service cannot be specifically enforced, it means that even wrongful termination may have the effect of terminating contract and party must be left to fend for damages. Where termination is in contravention of

mandatory provisions of a statute, by which party is bound, it cannot be said that there is wrongful termination, because there is no termination in law and law does not look upon with favour its flagrant and blatant violation. Law steps in merely to state that what has been done contrary to law. That is the position here

12. The aforesaid position of law is recognised and accepted even in the subsequent judgments of the Supreme Court.

13. However, the learned Counsel for the petitioner relied upon the decision of the Supreme Court in the case of Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others, wherein the Court was required to examine whether the High Court ought to have exercised its jurisdiction when service of Headmaster of a School which was aided by the State of Punjab and whose appointment was governed by the statutory provisions and regulations was amenable to the writ jurisdiction of the High Court. The Court held it in the affirmative. The relevant observations are as under:

The matter can be viewed from a slightly different angle as well. After the decision of the Constitution Bench of this Court in Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, the aided school receiving 95% of expenses by way of grant from the public exchequer and whose employees have received the statutory protection under the 1969 Act and who is subject to the regulations made by the Education Department of the Union Territory of Chandigarh as also the appointment of Headmaster to be valid must be approved by the Director of Public Instruction would certainly be amenable to the writ jurisdiction of the High Court.

In our view the aforesaid decision nowhere lays down that the school run by the public trust is "State" or other authority as envisaged under Article 12 of the Constitution. It only lays down that if the authority is required to act in pursuance of the statutory provisions then it is amenable to the writ jurisdiction under Article 226 or Article 227 of the Constitution of India, as the case may be.

14. The legal status of an employee in a Privately managed College came up for consideration before the Supreme Court in the case of Dipak Kumar Biswas Vs. Director of Public Instruction and Others, . The Court held that privately managed College was not a statutory body because it had not been created by or under the statute and it did not owe its existence to a statute. But on the contrary it was a body which came into existence on its own and was only governed by certain provisions for the proper maintenance and administration of the institution. As the case did not pertain to termination of service by way of disciplinary action and as there was no violation of provision of any Act or regulations made thereunder, the appellant was not required to be granted a declaration that he continued to be in service of the College and he was not entitled to all the benefits flowing from the declaration. The relevant observations are as under:

The legal status of an employee in a privately managed College and whether a

contract for personal service can be specifically enforced came up for consideration before this Court in *Vaish College v. Lakshmi Narain* 1976(2) SCR 1006: AIR 1976 SC 888). The facts in that case were as follows. Vaish Degree College which was registered under the Registration of Co-operative Societies Act, was initially affiliated to the Agra University and later to the Meerut University. A Principal of the College who was appointed after obtaining formal approval of the Vice-Chancellor was terminated from service about two years later. The Principal challenged the order of termination in a suit filed by him on various grounds and he sought for a declaration regarding his continuance in service. The trial Court dismissed the suit but the Appellate Court decreed the same. In the second appeal there was a reference to a Full Bench regarding the jurisdiction of the Civil Court to entertain the suit and eventually the second appeal filed by the management was dismissed and the management came up in appeal to this Court by special leave. this Court held that the Executive Committee of the College was not a statutory body because it had not been created by or under the statute and it did not owe its existence to a statute. But on the contrary it was a body which came into existence on its own and was only governed by certain statutory provisions for the proper maintenance and administration of the institution. The Court summed up the law in the following words

"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 institutions concerned Trust owe its very existence to a statute which would be the fountain-head of its powers. The question in such cases to be asked if, 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."

The Court then proceeded to consider the next question regarding a contract of personal service being specifically enforceable. After referring to the decisions in *S.R. Tewari Vs. District Board Agra* and *Another, Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi*, *Bank of Baroda v. Jewal Lal Mehrotra* 1970 (2) MP. LJ 54 (SC) and *Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis*, the Court held as follows

"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 Article 311 of the Constitution; (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 of violation of the mandatory provisions of the statute."

The matter again came to be considered in the case of Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others, . In that case the appellant, Smt. J. Tiwari was appointed as the Headmistress of the Jwala Devi Vidya Mandir Kanpur which was a Society registered under the Societies Registration Act, 1860. Smt. J. Tiwari, who later became the Principal of the institution challenged her order of suspension in an earlier suit and her order of termination from service in a latter suit. The second suit was partly decreed by the trial Judge and he upheld that the termination of service of Mrs. J. Tiwari was not legal and awarded her a sum of Rs. 15,250/- as arrears of pay for a period of 3 years together with interest and Provident Fund contribution. The High Court confirmed the decree but held that the sum awarded to her should be by way of damages and not towards arrears of salary since Smt. J. Tiwari will not be entitled to a declaration that she continued to be in the service of the institution and to a consequent order of reinstatement. In further appeal to this Court by certificate it was contended that the institution was a statutory body and that Smt. J. Tiwari was entitled to a declaration regarding her continuance in service. This Court repelled the contention and held that the Vidya Mandir, in spite of being governed by the University regulations and the provisions of the Education Code framed by the State Government and also being aided by educational grants, still constituted only a private institution and as such Smt. J. Tiwari would only be entitled to a decree for damages, if her dismissal was wrongful and not to an order of reinstatement or a declaration that notwithstanding the termination of her services she continued to be in service.

15. From the aforesaid decision, it can be held that an employee in a privately managed College which is being aided by the educational grants would only be entitled to a decree for damages if the dismissal order was wrongful and not to an order of reinstatement or a declaration that notwithstanding the termination of services he or she continues to be in service.

16. Further, the Supreme Court in the case of Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others, , considered all the decisions in the context of the Institute of Constitutional and Parliamentary Studies (I.C.P.S.) and arrived at the conclusion that it was not a "State" within the meaning of Article 12 of the Constitution of India nor was it an instrumentality of the Government and, therefore, it was not subject to the writ jurisdiction of the High Court. The I.C.P.S. was registered under the Societies Registration Act, 1860. The Court held that it was a voluntary association mostly consisting of members of the two Houses of Parliament with some external support to fulfil the objects which were

adopted by the Society. After referring to the Constitution of the Society, in paragraphs 17 and 17A, the Court observed as under:

17. The objects of the Society were not Governmental business but were certainly the aspects which were expected to equip Members of Parliament and the State legislatures with the requisite knowledge and experience for better functioning. Many of the objects adopted by the Society were not confined to the two Houses of Parliament and were intended to have an impact on society at large.

17.A The Memorandum of the Society permitted acceptance of gifts, donations and subscription, there is material to show that the Ford Foundation, a D.S based Trust, had extended support for some time. Undoubtedly the annual contribution from the Government has been substantial and it would not be wrong to say that they perhaps constitute the main source of funding, yet some money has been coming from other sources. In later years, foreign funding came to be regulated and, therefore it became necessary to provide that without Government clearance, like any other institution, ICPS was not to receive foreign donations. No material has been placed before us for the stand that the Society was not entitled to receive contributions from any indigenous source without Government sanction. Since Government money has been coming, the usual conditions attached to Government grants have been applied and enforced, if the Society's affairs were really intended to be carried on as part of the Lok Sabha or Parliament as such, the manner of functioning would have been different. The accounts of the Society are separately maintained and subject to audit in the same way as the affairs of societies receiving Government grants are to be audited. Government usually impose certain conditions and restrictions when grants are made. No exception has been made in respect of the Society and the mere fact that such restrictions are made is not a determinative aspect.

The Court thereafter held that the Institute of Constitutional and Parliamentary Studies (I.C.P.S.) was not a "State" or "other Authority" as envisaged by Article 12 of the Constitution. However in support of his contention the learned Advocate General relied upon the decision of the Supreme Court in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, wherein the Court observed that the writ of mandamus under Article 226 of the Constitution of India can be issued to any other person or authority performing public duty and duty need not be imposed by statute. The Court in that case was required to consider the question whether the College, which was run by the public trust and which was affiliated with the Gujarat University, was required to pay revised pay-scale as per the rules and regulations framed by the University. After referring the decision in the case of *Deepak Kumar Biswas (supra)*, the Court observed that in that case the facts were quite different. The Court observed that there was no plea for specific performance of contractual service and the respondents were not seeking a declaration that they be continued in service. They were

claiming only terminal benefits and arrears of salary payable to them. Thereafter, the Court posed the question whether, the Trust can be compelled to pay by a writ of mandamus. The Court held that service conditions of the academic staff are not purely of a private character as it has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. The relevant observations are as under:

14. 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. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore is not devoid of any public character, (See : The Evolving Indian Administrative Law by M.P. Jain (1983) p. 266). So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has superadded protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

(Emphasis added)

17. The aforesaid decision in the case of Shri Anadi Makta. Sedgura S.M.V.S.J.M.S. Trust (supra) was referred by the Supreme Court in the case of Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another, . After considering all the relevant decisions the Court in paragraph 17 held that these authorities say that a College owned by a private body, though recognised by or affiliated to a Statutory University will not become a statutory body since it is not created by or under a statute. And the dismissed employee of such institution cannot get specific performance of service contract. The Court pertinently observed in paragraph 19 as under:

In educational institutions, the Court cannot focus only on the individual forgetting all the. "The court must have regard to varying circumstances in the academic atmospheres and radically changed position of the individual sought to be reinstated. The Court must have regard to interest of students as well as the institution.

Finally the Court held that reinstatement of such a person seems to be

unjustified and uncalled for. However, after considering other decisions the Court held that as the civil suit was filed in that case, it awarded salary for three years on account of damages.

18. The learned Advocate General further relied upon the decision of the Supreme Court in the case of Francis John Vs. Director of Education and Others, . In that case the appellant was appointed as a Headmaster of a school which was a recipient of the grant as per the Grant-in-aid Code. The services of the appellant as a Headmaster were terminated. His petition under Article 226 was dismissed on the ground that it was not maintainable. That order was challenged before the Supreme Court. The Court held that as per the rule of the Grant-in-aid Code which is a part of the Public Law of the land the Management of the school can terminate the services only after approval of its decision by the Director of Education who is a public functionary. While granting his approval to the decision the Director is discharging a government function as an authority constituted for the said purpose by the Government. The Management, in the circumstances, could not have terminated the services of the appellant without the communication received by it from the Director. The Court, therefore, held that in the writ petition the appellant was not seeking any relief directly against a private body but he was seeking a relief against an officer of Government who is always amenable to the jurisdiction of the Court. Therefore, the High Court was wrong in holding that the writ under Art. 226 did not lie against the impugned order passed by the Director. In our view, the aforesaid decision would not be of any relevance for deciding whether the respondent Institute is a "State" or "Other Authority" as envisaged by Art. 12 of the Constitution because the decision only lays down that against the Government officer who is discharging public function writ is maintainable under Article 226.

19. Lastly, after considering the aforesaid decisions the Supreme Court in the Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], held that a wide enlargement of the meaning of the expression "State" must be tempered by a wise limitation. The State control does not render such bodies as "State" under Article 12 because in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to control by the State and also receives a financial contribution from the State. The relevant observations are as under:

3. Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression "State". A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as "State" under Article 12. The State control, however vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and

policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State". If the Government operates behind a corporate veil, carrying out Governmental activity and Governmental functions of vital public importance, there may be little difficulty in identifying the body as "State" within the meaning of Article 12 of the Constitution.

(Emphasis added)

20. The Court thereafter considered the Memorandum of Association of the NCBRT (National Council of Educational Research and Training) and held that the object of the Institution was to assist and advise the Ministry of Education and Social Welfare in the implementation of the governmental policies and major programmes in the field of education particularly school education; it undertakes preparation and publication of books, materials, periodicals and other literature and these activities are not wholly related to governmental functions. The funds of the NCERT consist of : (i) grants made by the Government, (ii) contribution from other sources and (iii) income from its own assets. The Government control is confined only to the; proper utilisation of the grant. The Court therefore held that the NCERT is largely an autonomous body.

21. The conspectus of the aforesaid decisions and the facts narrated hereinbelow leave no doubt that the respondent-Institute is not a "State" or "Other Authority" as envisaged by Article 12 of the Constitution of India:

(1) The Institute does not owe its existence to any statute. It is creation of contract between the Gujarat Cancer Society and the State Government, therefore it is not a statutory body.

(2) It is registered under the Societies Registration Act, 1860, and under the Bombay Public Trusts Act, 1950;

(3) Its funds consist of properties belonging to Gujarat Cancer Society, gifts, donations and also grants by the Government. The Institutions owned by the State are normally not funded by gifts and donations. It is an admitted fact that donations to the Cancer Society are substantial. The Institute is entitled to receive contributions of gifts from any indigenous source without Government sanction;

(4) It is administered by the Governing Board consisting of three members nominated by the Gujarat Cancer Society, three members nominated by the Government and by the Director appointed by the Governing Board;

(5) It does not enjoy any monopoly status. Any private individual, any society or any public trust can open or start such type of cancer institution at any moment without any hindrance;

(6) As per the rules framed by the Institute, the State Government has no power to give any general directions or to have supervision over the functioning of the

Institute. Therefore, it is not subject to the directions which may be issued by the Government from time to time;

(7) The respondent Institute is not an agency or instrumentality of the Government for carrying out governmental functions.

22. Not only this, but it also should not be forgotten that it is part and parcel of the culture of this country particularly of this State to maintain Charitable Institutions, piously for the benefit of the public at large. In most of the cases these institutions are autonomous bodies functioning effectively and efficiently mainly with charitable objectives. By making it part of the bureaucratic set-up these Institutions would be affected by cancer which may be a death-blow to this type of charitable activities which are meant for the society at large. It also should be borne in mind that it is easy to destroy any Institution on minor issues but is difficult and painful to establish and sustain it.

23. Then for deciding the second question, it would be necessary to refer to Section 51A of the Gujarat University Act which reads as under:

51 A. (1) No member of the teaching other academic and non-teaching staff of an affiliated College and recognised or approved institution shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges against him and until.

(a) he has been given a reasonable opportunity of making representation on any such penalty proposed to be inflicted on him, and

(b) the penalty to be inflicted on him is approved by the Vice-Chancellor or any other officer of the University authorised by the Vice-Chancellor in this behalf. (2) No termination of service of such member not amounting to his dismissal or removal falling under Sub-section (1) shall be valid unless.

(a) he has been given a reasonable opportunity of showing cause against the proposed termination, and

(b) such termination is approved by the Vice-Chancellor or any officer of the University authorised by the Vice-Chancellor in this behalf,

Provided that nothing in this Sub-section shall apply to any person who is appointed for a temporary period.

In view of Sub-section (1) of Section 51A, a member of teaching staff of recognised or approved institution can be dismissed or removed or reduced in rank after holding an inquiry and after giving him a reasonable opportunity in respect of the charges levelled against him and of making a representation on any such penalty proposed to be inflicted on him. However, such penalty should be approved by the Vice-Chancellor or any Other-officer of the University authorised by the Vice-Chancellor.

24. Under Sub-section (2) the service of teaching staff cannot be terminated [which is not amounting to his dismissal or removal falling under Sub-section (1)] unless.

(a) he has been given an opportunity of showing cause against the proposed termination; and

(b) such termination is approved by the Vice-Chancellor or any officer of the University authorised by the Vice-Chancellor in this behalf;

Further, Sub-section (2) would not be applicable to any person who is appointed for a temporary period only.

25. The petitioner does not claim any other statutory protection except the protection u/s 51A.

26. As stated above, the petitioner was appointed first by the Government in M.P. Shah Cancer College which was previously administered by the State Government as a part-time Gynaecologist on the fixed remuneration of Rs. 500/- per month. Thereafter, the petitioner was appointed as a full time Assistant Professor (Gynaecological Surgeon) on a temporary basis for a period not exceeding one year by the respondent. That position continued till 1984. In 1984 the Governing Body of the respondent approved the proposal of making part-time appointment on certain terms and conditions of those Assistant or Associate Professors who have completed minimum 10 years of service after post-graduation. In pursuance of the said policy decision the petitioner was given an option to opt whether he wanted to be appointed as part-time Assistant Professor. The petitioner opted for being appointed as part-time Professor. Therefore, the petitioner was appointed as a part-time Professor and Head of Gynaecology Department for a period of 3 years with effect from 19th February, 1984. In pursuance of the aforesaid appointment order it can be said that the petitioner was holding two posts-one of part-time Professor and another as a Head of Gynaecology Department.

27. With regard to the second post, i.e., Head of Gynaecology Department, no relief can be granted in this writ petition because for that post there is no statutory protection. It is based only upon contract between the petitioner and the respondent. For his status as a Professor the petitioner seeks protection u/s 51A. For this purpose the question which would require determination is whether the petitioner was dismissed or removed without following the procedure as contemplated under Sub-section (1) of Section 51A, or, whether the petitioner's services were terminated in such a manner that it does not amount to dismissal or removal covered by Sub-section (1) of Section 51A. The learned Advocate General contended that the petitioner was removed from service for the alleged misconduct therefore, the procedure prescribed under Sub-section (1) of Section 51A was required to be followed and as it is not followed, the order requires to be set aside. For this purpose, reliance is placed upon the previous inquiry which was held against the petitioner and as a result of which he was suspended for a

period of six weeks. As six complaints were received against the petitioner for the malpractices (including collecting money from the patients illegally and/or compelling to take treatment at his private clinic) resorted to by him, inquiry was held by the Sub-Committee and after hearing the petitioner, the petitioner was suspended for a period of six weeks commencing from 7th February, 1986 upto 20th March, 1986. That order is-challenged by the petitioner in Special Civil Application No. 872 of 1986. The learned Counsel for the petitioner has rightly not pressed that petition because suspension period is over and also because u/s 51A the procedure prescribed therein is required to be followed only when the order of dismissal, removal or reduction in rank is passed. For a penalty of temporary suspension no such protection is afforded by Section 51A. However, with regard to the termination of the service, the learned Counsel for the petitioner vehemently submitted that there was no other reason to terminate the petitioner's service except the incident for which suspension order was passed and, therefore, the termination of petitioner's services amounts to his dismissal from service.

28. In our view, this submission is not well-founded. For the minor misconduct after holding necessary inquiry the respondent has passed temporary suspension order. If there was any intention to terminate the petitioner's services, the respondent would have passed that order at that time because the necessary inquiry was held and the petitioner was given reasonable opportunity to represent his case. The order on the face of it reveals that it was based upon the contractual condition between the parties which empowered the respondent Institute to terminate the service in the middle of the contractual tenure if so desired, by giving three months' notice. It is an admitted fact that in pursuance of the order passed by this Court in Special Civil Application No. 872 of 1986 the petitioner had submitted his formal joining report to the Administrative Officer who was present in this Court along with the leave report. The petitioner was permitted to proceed on leave without salary. These reports were submitted on 20th March, 1986. Thereafter, the petitioner received an order dated 9th June, 1986 from the Director of respondent Institute that as per Clause 1(a) of his appointment order his services were no longer required by the Institute and were terminated with immediate effect. A cheque of Rs. 1500/- for three months' salary was also sent along with that order. There is nothing on the record to suggest that the said order was passed as a measure of penalty or for the misconduct of the petitioner. However, the learned Counsel for the petitioner submitted that in the Affidavit-in-reply the respondent has used the phrase "It was not desirable to retain the petitioner in service" and, therefore, it means that the petitioner's services were terminated for misconduct and, therefore, the Institute arrived at the conclusion that it was not desirable to retain him in service. In our view, there is total mis-reading of the Affidavit-in-reply. In paragraph 9(B) the respondent has stated that "on a consideration of the assessment of the petitioner's work and conduct that though there was no question of punishing the petitioner for any misconduct it was not desirable to

retain the petitioner in service as contemplated by Clause 1(a) of the office order dated 14-2-1984". The words "not desirable" are used on the basis of contractual conditions which are already referred to in the previous paragraph. Condition 1(a) reads as under:

1(a) You will be appointed on contractual basis for the period of three years in the first instance with the proviso that you will be discontinued by giving three months notice on either side in case you desire to leave the Institute or vice versa the Institute considers it not desirable to retain your service in the middle of the contractual tenure. No notice of termination shall be needed on either side on completion of the contract of three years.

(Emphasis added)

That means that if the Institute does not desire to retain the petitioner in service, his service can be terminated by giving three months' notice. It, therefore, does not mean that the petitioner is not a desirable person. It only means that the Institute does not desire to retain the petitioner in service. Further, merely because an employee engaged for a temporary period is punished for any misconduct, there would be no presumption that any subsequent order of termination which may be passed against him is to be treated as mala fide. If that type of adverse inference is to be drawn, then no temporary employee who is punished for some misconduct can ever be terminated simpliciter when his services are no more needed. If for the misconduct an employee is already punished, there would in fact be no reasons to infer that termination simpliciter is only a device for inflicting the punishment of dismissal or removal. In the present case we do not find it necessary to go behind the order and attribute any motive to the respondent Institute in passing the impugned order. On the face of it the order does not cast any stigma and since the petitioner was appointed for a temporary period of three years with a specific condition that his service could be terminated by giving three months' notice if the Institute does not desire to retain him, there was no duty cast upon the respondent to follow the procedure prescribed in Sub-section (2) of Section 51A.

29. Further there is no dispute about the fact that the appointment of the petitioner was only for a limited period, i.e., for three years. To find out whether this period of three years can be held to be temporary period would depend upon the statutory provision and/or intent of the parties depending upon the facts and circumstances of the case. Here there is no statutory provision to the effect that three years' period would or would not be considered to be a temporary period. It is to be noted that with regard to the affiliated colleges the Legislature enacted the Gujarat Affiliated Colleges Services Tribunal Act, 1982. Section 14 provides that no college employee shall be dismissed or removed or reduced in rank nor his services be otherwise terminated by the Management of the college except by following the procedure prescribed therein. It specifically provides that nothing in the said section shall apply to any college employee who is appointed temporarily for a period less than a year. By this Act as per the Schedule the Legislature

amended Section 51A of the Gujarat University Act, 1949 by deleting the words "an affiliated college and" from Section 51A. It also amended Section 52A but no corresponding change is made in proviso to Sub-section (2) of Section 51A. This would mean that, even though the Legislature amended some portion of Section 51A and Section 52A yet with deliberate purpose no amendment was made in proviso to Section 51A(2). Further wherever the Legislature intended to specify the temporary period, it has specifically provided by doing so such as in the Gujarat Primary Education Act, the Gujarat Secondary Education Act and the Gujarat Affiliated Colleges Services Tribunal Act. No such provision specifying temporary period is made in the Gujarat University Act which at present deals with staff of the recognised or approved institution. As there is no specific meaning given to the phrase "temporary period", it has to be construed by giving natural meaning as understood in ordinary sense. Normally the "temporary period" is a relative term depending upon the intention of the parties and the nature of the work. It is also required to be considered whether the appointment was of a permanent nature or for a specified temporary period. From this angle there cannot be any hesitation in holding that the petitioner's appointment was for a temporary period of three years. Further, from the full-time post the petitioner had accepted the post of part-time Professor. The petitioner had worked as full-time Assistant Professor for ten years and he immediately opted to become a part-time Professor for a specific period as soon as option was given to him. The option was exercised for the obvious reason of having private practice. In this view of the matter, it can be said that the petitioner was appointed for a temporary period of three years and his appointment was not of permanent nature. It was liable to be terminated as per the contract between the parties. Hence, there was no necessity of following the procedure prescribed u/s 51A(2) of the Gujarat University Act of having approval of the Vice-Chancellor before such termination.

In the result, there is no substance in both the petitions and they are therefore rejected. Rule is discharged with no order as to costs.