
(2002) 02 DEL CK 0031

In the Delhi High Court

Case No : Letters Patent Appeal No. 525 of 1999

Dr. Sanjay Gupta

APPELLANT

Vs

Dr. Shroff's Charity Eye Hospital

RESPONDENT

Date of Decision : 21-02-2002

Acts Referred:

Citation : (2002) 7 AD 580 : (2002) 62 DRJ 368 : (2002) 4 SLR 788

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : S.K. Taneja and Pragati Neekhria, for the Appellant; Raj Birbal J.R. Midha, G. Mishra and Niraj Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—Whether a writ petition would be maintainable against the respondent herein, is the question involved in this appeal.

2. The appellant who was working as a Second Medical Officer with the respondent hospital, filed the writ petition No. 5198/97 praying for the following reliefs:

"a) issue a writ of certiorari quashing the clause whereby the management has reserved the right to terminate the services of its employees by giving one month's notice simplicities in the service conditions of its employees;

b) issue a writ of mandamus thereby directing the respondent not to alter the service conditions of the petitioners, unilaterally to the prejudice of the petitioners;

c) issue a writ of mandamus to the respondent directing them to dispense with the unfair practice of keeping their employees under contract for many years without regularization;

d) to issue of writ of mandamus directing the respondent to regularize the services of the petitioner No. 2."

3. The writ petition has been filed inter alias on the ground that as the functions of the hospital area of public importance, the writ petition would be maintainable against it.

4. The learned single Judge relying on a decision of the full bench of this court in Sanghi Technologies Pvt. Ltd. Vs. Union of India and Others, dismissed the writ petition by reason of the impugned judgment without going into the merit of the matter holding that the writ petition was not maintainable.

5. The learned counsel appearing on behalf of the appellant, however, would submit that even if the respondent hospital is not a State within the meaning of Article 12 of the Constitution of India, a writ petition would be maintainable as the respondent hospital has been discharging duties of public nature and in support of the said contention, reliance has been placed on Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., and Kuldeep Mehta Vs. Union of India and Others, .

6. The learned counsel for the respondent on the other hand, would submit that the respondent is a charitable institution which is not financially or otherwise dependent on the State. The learned counsel would contend that the action of termination of service of the appellant was taken by way of a policy decision. The hospital is being managed by 12 trustees and none of them is a nominee of the government or statutory body. It is contended that the hospital is run in terms of a scheme framed in 1960 wherein it is stipulated that it will never be dependent upon any financial assistance of the government. The hospital is primarily being run on the revenue generated by it from its general clinical and OPD activities and donations received from various non-governmental agencies.

7. It was contended that pursuant to a policy decision adopted by the Board of Trustees, they intended to engage full time doctors. The appellant herein was having private practice. He was offered full time employment which having been declined by him, the impugned order of termination of his service was passed.

8. The question is as to whether a writ petition against a private person would be maintainable or not. There cannot be any doubt that a writ petition will not be maintainable in relation to a matter which does not involve public law character.

9. It is not in dispute that the respondent is a private organization. The terms and conditions of the service by and between the appellant and the respondent are purely private in nature. The same do not have any public law character.

10. In Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , the apex court although held that for the purpose of Article 226, the expression "any person or authority" should not be confined only to statutory authorities and instrumentalities of the State by they must cover any person or body performing

public duty but the nature of duty must be judged in the light of positive obligation owed by the person or authority to the effected party. Only in relation to a positive obligation, mandamus cannot be denied. The apex court further held:

"20. In *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, , this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the Statute even though they are not public officials or statutory body. It was observed (at p. 778) (of 1969 SCR 3) : (At pp. 1309-10 of AIR):

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities. (See Halsbury's Laws of England (3rd Ed. Vol. II p. 52 and onwards)."

21. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative Action 4th Ed. P. 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, Therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

11. A mandamus can issue only when there exists a legal right in the petitioner and a legal obligation on the respondent. The terms and conditions of service by and between the appellant and the respondent as noticed hereinbefore, are not governed by any statute. The respondent does not owe any public duty in relation to the appellant.

12. If the termination of services of the appellant by the respondent was illegal, his remedy was to file a suit for damages. A writ petition shall not be maintainable to enforce a contract qua contract even for enforcement of a contract of service. Section 14(b) of the Specific Relief Act, 1963 forbids specific performance of the contract which is dependent on personal volition of the employer.

13. In Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , the apex court held that for the purpose of imparting education, an educational institution has a supplementary sovereign function to perform vis-a-vis the State having regard to the fact that right to education is implicit and flows from the right to life guaranteed by Article 21 of the Constitution of India as also Articles 41, 45 and 46, as contained in Part IV of the Constitution of India.

14. The apex court opined that a writ petition would be maintainable on the ground that such institutions perform supplementary and sovereign function. It was noticed that the institutions aided by the government are required to abide by the rules and regulations that may be framed by the government and/or recognized by the affiliating authorities in the matter of recruitment of teachers and staff, their conditions of service, syllabus, standard of teaching and so on. It was further held as under:

"In particular, in the matter of admission of students, they have to follow the rule of merit and merit alone -- subject to any reservations made under Article 15. They shall not be entitled to charge any fees higher than what is charged in Governmental institutions for similar course. These are and shall be understood to be the conditions of grant of aid. The reason is simple: public funds, when given as grant -- and not as loan -- carry the public character wherever they go. Public funds cannot be donated for private purposes. The element of public character necessarily means a fair conduct in all respects consistent with the constitutional mandate of Articles 14 and 15. All the Governments and other authorities in charge of granting aid to educational institutions shall expressly provide for such conditions (among others), if not already provided, and shall ensure compliance with the same."

15. The case of the appellant herein even does not come within the purview of the tests laid down in Unni Krishnan JP (supra).

16. In the decision of a Division Bench in Kuldip Mehta Vs. Union of India and Others, , this court observed that the court may exercise its writ jurisdiction not only against a state, an instrumentality of a State or association or body of individuals or even an individual when a citizen is wrong, it was observed that, if a right is infringed under Part III of the Constitution or any other law which the law validly made might confer.

17. The appellant herein has failed to show that the terms and conditions of service are governed by any statute or statutory rules.

18. A Full Bench of this court, however, in Sanghi Technologies Pvt. Ltd. Vs. Union of India and Others, , categorically held:

"How then to find out if a person or body falls within the ambit of "other authority" is the prime question.

No decipherable test or significant criteria to identify "other authority" was laid down till the decision in Ramana Dayaram Shetty Vs. International Airport

Authority of India and Others, came, where some tests were evolved. In *Som Prakash Rekhi v. Union of India*, , the Court, besides others, referred and relied on two earlier pronouncements of the Constitution Benches on the amplitude of "other authorities" in Article 12 and came to the conclusion that "other authorities... under the control of the Government of India in Article 12 is comprehensive enough to take care of Part III without unduly stretching the meaning of "the State" to rope in whatever any autonomous body which has some nexus with Government". The Supreme Court analysed its earlier decision in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , and culled out the following tests to decide whether a company or society or other authority is a State for the purpose of this Article:

(i) If the entire share capital of the Corporation is held by the Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of the Government.

(ii) existence of deep and pervasive control of the State may offer an indication that the Corporation is a State agency or instrumentality;

(iii) if the financial assistance by the Government is so much as to meet almost entire expenditure of the Corporation, it would be some indication of the same being impregnated with Governmental character;

(iv) monopoly status of a Corporation may be another indication of its being a State.

(v) if the functions of the Corporation are of public importance and closely related to governmental functions, it would be relevant factor in classifying the Corporation as an instrumentality or agency of the Government;

(vi) specifically, if a department of Government is transferred to a Corporation, it would be a strong factor supportive of its inference of the Corporation being an instrumentality or agency of the Government."

19. This court is bound by the afore-mentioned Full Bench decision.

20. In *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, , the apex court has clearly held that:

"If a corporation is found to be a mere agency or surrogate of the Government, "in fact owned by the Government, in truth controlled by the government and in effect an incarnation of the government," the court must not allow the enforcement of Fundamental Rights to be frustrated by taking the view that it is not the government and Therefore not subject to the constitutional limitations. We are clearly of the view that where a corporation is an instrumentality or agency of the government, it must be held to be an "authority" within the meaning of Article 12 and hence subject to the same basic obligation to obey the Fundamental Rights as the government."

21. Yet again, in *Chander Mohan Khanna Vs. The National Council of Educational*

Research and Training and other[OVERRULED], , the apex court held as under:

"5. The object of the NCERT as seen from the above analysis is 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. The NCERT undertakes several kinds of programmes and activities connected with the co-ordination of research extension services and training, dissemination of improved educational techniques, collaboration in the educational programmes. It also undertakes preparation and publication of books, materials, periodicals and other literature. These activities are not wholly related to governmental functions. The affairs of the NCERT are conducted by the executive Committee comprising of Government servants and educationists. The Executive Committee would enter into arrangements with Government, public or private organizations or individuals in furtherance of the objectives for implementation of programmes. The funds of the NCERT consist of: (i) grant made by the Government, (ii) contribution from other sources, and (iii) income from its own assets. It is free to apply its income and property towards the promotion of its objectives and implementation of the programmes. The Government control is confined only to the proper utilization of the grant. The NCERT is thus largely an autonomous body."

22. In *Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others*, the Supreme Court held:

"In a Welfare State, as has been pointed out on more than one occasion by this Court, Governmental control is very pervasive and in fact touches all aspects of social existence. In the absence of a fair application of the tests to be made, there is possibility of turning every non-governmental society into an agency or instrumentality of the State. That obviously would not serve the purpose and may be far from reality. A broad picture of the matter has to be taken and a discerning mind has to be applied keeping the realities and human experiences in view so as to reach a reasonable conclusion. Having given our anxious consideration to the facts of this case, we are not in a position to hold that ICPS is either an agency or instrumentality of the State so as to come within the purview of "other authorities" in Article 12 of the Constitution."

23. We, having regard to the ratio laid down in the afore-mentioned decisions, are clearly of the view that the writ petition against the respondent would not be maintainable.

24. In any event, the action of the respondent cannot be said to be unreasonable. No writ will lie for directing reinstatement where the post itself had been abolished. In *M. Ramanatha Pillai Vs. The State of Kerala and Another*, , the apex court held as under:

"36. The abolition of post may have the consequence of termination of service of a government servant. Such termination is not dismissal or removal within the meaning of Article 311 of the Constitution. The opportunity of showing cause

against the proposed penalty of dismissal or removal does not Therefore arise in the case of abolition of post. The abolition of post is not a personal penalty against the government servant. The abolition of post is an executive policy decision. Whether after abolition of the post the Government servant who was holding the post would or could be offered any employment under the State would Therefore be a matter of policy decision of the Government because the abolition of post does not confer on the person holding the abolished post any right to hold the post.

39. The right to hold a post comes to an end on the abolition of the post, which a Government servant holds. Therefore, a Government servant cannot complain of a violation of Article 19(1)(f) and Article 31 of the Constitution when the post is abolished."

25. In *T. Venkata Reddy and Others Vs. State of Andhra Pradesh*, , it was held:

"23. It is next contended that by abolishing the posts of part-time village officers and by throwing the petitioners out of the posts held by them, Article 21 of the Constitution had been violated. It is hardly necessary to deal with this point elaborately since the petitioners are not being deprived of their right to life and liberty by the abolition of the posts of part-time village officers or by their ceasing to be holders of those posts."

26. In *Joyachan M. Sebastian Vs. Director General and Others*, , it was held as under:

"7. It is now settled legal position that on abolition of the post, the holder of the post has no right to continue on the post. Instead of retrenching him as surplus, the Government have accommodated him in the available vacancy and, Therefore, it must be deemed to be a fresh appointment for the purposes of seniority. After joining in Salem in Tamil Nadu, he made a request for transfer to Trivandrum and it is at his request that he was transferred. Consequently, on his undertaking in the application that he would not claim his seniority at Salem Station, the transfer was effected at his request. It is settled legal position that he would take his seniority as junior most among the confirmed employees in the transferee region."

27. For the reasons aforementioned, we are of the opinion that no case has been made out for entertaining the writ petition which has rightly been dismissed by the learned Single Judge. This appeal is Therefore dismissed. There shall, however, be no orders as to costs.