
(2012) 07 PAT CK 0091
In the Patna High Court
Case No : CWJC No. 13936 of 2009

Jay Shankar Tiwary

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-07-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 30(1)

Citation : (2012) 4 PLJR 379

Hon'ble Judges : Ravi Ranjan, J

Bench : Single Bench

Advocate : S.K. Verma, for the Appellant; K.C. Jha for the State, Mr. Anil Kumar Singh, Surinder Kumar for the Respondent Nos. 9 and 11 and Mr. Vinay Krishna Tripathy for the Respondent Nos. 4 to 6, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Ravi Ranjan, J.—It appears that the order dated 3.7.2012 suffers from error as it has been recorded that only the petitioner, State and respondent nos. 9 and 11 have been heard, however, Sh. Vinay Krishna Tripathy, learned counsel, had also appeared in this case on behalf of respondent nos. 4 to 6 and had also been heard. The aforesaid order stands modified to the extent as above.

2. I have heard the parties on the issue of maintainability of this writ application.

3. This writ application has been filed by the petitioner for a direction to the respondents to regularize the service of the petitioner who is working as ad hoc teacher since seven years and six months in the DAV Public School, Dhanupara, Ara (Bhojpur) with all consequential benefits including the payment of salary and allowance equivalent to the school run by the State Government as well as Central Government (Kendriya Vidyalaya Sangathan) as per the recommendation of 6th Pay Commission.

4. Petitioner claims that he was initially appointed as a teacher on daily wages on 8.4.02 in the DAV Public School, Dhanupara, Ara. However, subsequently he was

continued as a teacher on the ad hoc basis under the consolidated salary of Rs. 3500/- which was revised time to time as Rs. 4,000/- and finally Rs. 5,000/- per month. Copies of the letters stand appended as Annexure-2 series. It is claimed that he has worked for more than seven years and six months and was teaching to the students of (10+2) Senior Secondary/Higher Secondary level in the said school but his grievance is that, though in accordance with bye-laws of Central Board of Secondary Education (CBSE), the school is duty bound to grant salary to the petitioner equivalent to that being paid to the teachers of the State Government school and Kendriya Vidyalaya Sangathan, however, he has not been given such benefit.

5. Notices were issued upon the respondents on 27.1.2010 and pursuant thereof respondent nos. 9 and 11 have appeared and, at the time of hearing, has raised a preliminary objection with regard to the maintainability of this writ application. It has been submitted on behalf of the aforesaid respondents that respondent nos. 7 to 11, i.e., President, DAV College Managing Committee, the General Secretary, DAV College Managing Committee, the Regional Director, DAV Public School, Bihar Zone II, the Officer on Special Duty, DAV Public Schools and the Principal, DAV Public School, Dhanupara are not the "State" within the meaning of Article 12 of the Constitution of India and, therefore, no writ application can be maintained as against them. As the relief as quoted in paragraph no. 1 are exclusively against the aforesaid respondents, this writ application would fail as writ of mandamus cannot be issued upon the aforesaid respondents. Learned counsel has placed reliance upon a decision of this Court in Raj Kumar Gupta Vs. Central Board of Secondary Education and Others . It has been submitted that in the aforesaid case, the order of termination passed by the Managing Committee of the DAV Public School, Dumra was under challenge. However, this Court has held that the Managing Committee or Regional Director or the Principal, since are not the "State" within the meaning of Article 12 of the Constitution, no writ application can be maintained by the petitioner. Learned counsel has urged that since the institution in question is a private unaided school, no writ of mandamus can be issued even for the payment of salary and allowances in parity with the teachers of the Government School or Government aided School. In support of his aforesaid contention, learned counsel has placed reliance upon a decision of Hon"ble Supreme Court rendered in Mrs. Satimbla Sharma and Others Vs. St. Paul's Senior Secondary School and Others, .

6. Per contra, it has been submitted on behalf of the petitioner that the writ application would be maintainable in view of the fact that the School is performing a public duty by imparting education and, thus, would be amenable to the writ jurisdiction of the High Court as the case would be considered on the touchstone of Article 14 of the Constitution of India. He has referred several cases in paragraph no. 10 of this writ application in support of his contention. However, at the time of hearing on the issue, learned counsel for the petitioner has placed strong reliance upon a decision of this Court dated 25.5.2007 rendered in C.W.J.C. No. 4707 of 2007 Reported in Master Vedant Dhari Sinha

Vs. The State of Bihar and Others which has been upheld in L.P.A. No. 515 of 2007 Reported in The Principal, D.A.V. Public School, B.S.E.B. Colony, New Punaichak Vs. The State of Bihar and Others, as well as the decision dated 3.10.2008 rendered in L.P.A. No. 1991 of 2006 (Jitender Singh Tyagi Versus Director of Education and Ors.). Copies of the aforesaid orders have been produced at the time of hearing.

7. On appreciation of rival contention, following issues have emerged for consideration.

(i) Whether the respondent institution and its officials are "State" within the meaning of Article 12 of the Constitution of India and, thus, writ application would be maintainable?

(ii) Whether there has been any statutory violation by the respondent institution and its officials?

(iii) Whether the writ of mandamus can be issued upon the respondent D.A.V. Institution and its officials directing them to grant the benefit of 6th Pay Revision to the petitioner after regularizing his service so that he could be given benefit of salary in parity with the teachers of Government schools?

8. Since all the questions are interrelated and intertwined, they are being considered together.

9. Learned counsel for the petitioner, apart of the submission as discussed above, has submitted that even assuming that the concerned respondents are not the "State" within the meaning of Article 12 of the Constitution of India, however, since the institution is performing the public duty by imparting education to Senior Secondary level and is affiliated with CBSE, any action taken by it would be amenable to writ jurisdiction of this Court which would be considered on the touchstone of the Article 14 of the Constitution of India as has been held by this Court in C.W.J.C. No. 4707 of 2007 Reported in Master Vedant Dhari Sinha Vs. The State of Bihar and Others . It has been informed that the decision given in the aforesaid writ application has been upheld by a Division Bench in L.P.A. No. 515 of 2007 Reported in The Principal, D.A.V. Public School, B.S.E.B. Colony, New Punaichak Vs. The State of Bihar and Others, .

10. Per contra it has been submitted that the aforesaid decision of Single Bench would not be applicable in the present case as it has been noticed by the Single Bench while considering the order dated 13.5.1999 passed by a Division Bench in C.W.J.C. No. 1358 of 1994 (R) that in the aforesaid case the legality of transfer order was in issue. Thus, that was considered to be the matter relating to the internal management of the school. Whereas in CWJC No. 4707 of 2007 Reported in Master Vedant Dhari Sinha Vs. The State of Bihar and Others the administrative action taken by the school affecting the future of a student was in issue. In the present case, the petitioner seeks direction to the Management to regularize his service and grant salary equal to the teachers of Government

School as has been agreed by them. Therefore, in my opinion, the decision rendered in Master Vedant Dhari Sinha (supra) would not be applicable in the present case as the lis is between the employee and employer of a private school. Another learned Single Bench in Raj Kumar Gupta (supra) has examined the bye-laws of CBSE as well as the contract of service of employees of DAV institution and held that CBSE has no administrative/disciplinary control over the employees of affiliated school. Learned Single Judge has also noticed the decision of this Court rendered in Chandra Nath Thakur vs. Bihar Sanskrit Shiksha Board & Anr., Chandra Nath Thakur and Others Vs. The Bihar Sanskrit Shiksha Board and Others, and has held that no writ petition against an order of termination from service of a teacher of privately managed school by the Managing Committee would be maintainable. It has further been held by learned Single Judge that at least two Division Benches of this Court have held that judgment of Apex 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, would not be applicable in case the dispute is regarding the action taken by a private Management Committee.

11. In my considered opinion, since the writ of mandamus is sought to be issued against Management Committee of the private school, the decision of this Court rendered in the Raj Kumar Gupta (supra) and decisions of the Division Bench discussed therein would be equally applicable in the present case also. Even the Division Bench of High Court of Delhi in L.P.A. No. 1991 of 2006 (relied by the petitioner) has held that writ of mandamus cannot be issued to enforce a contract pure and simple. But, if certain legal norms are applicable to the terms and conditions of service by their own force, *proprio vigore* without being incorporated in a written contract, the mandamus can be issued to enforce a breach of law and not a breach of contract. The Division Bench has noticed that, in that case, as per the statute prevailing in the State, the Director of Education had jurisdiction to issue direction to the Management of the School to withdraw the transfer order and send a compliance report which was not done. Thus, it has been held that respondent nos. 2 and 3 since are amenabi to the jurisdiction of the Director of Education as per the provision under statute, namely, Delhi State Education Act, 1973, the respondent Management would be amenable to the writ jurisdiction as they have not complied the direction of the Statutory Authority. However, in the case in hand, learned counsel could not point out any statute or law which has been violated by the respondent Managing Committee. All that has been pointed out on behalf of the petitioner is Clause 17 of Chapter V of Affiliation Bye-Laws of Central Board of Secondary Education, which is a provision for withdrawal of affiliation by the Board in case the schools are found guilty of, apart for other terms, not paying salaries and allowances to teachers and other employees at least at par with those being given by State/Union Territory institutions or if there is default or delay in payment of salaries and allowances. One Circular of the State Government has also been brought on record, namely, Bihar State, Secondary, Primary and Adult, Education

Department No. 3/Na 4-34/99 720 dated 26.7.99 (Annexure-8). Learned counsel for the petitioner has pointed out one of the terms and conditions for granting no-objection certificate by the State, laying down that same would only be granted to the private schools which are following the CBSE guidelines. It has been pointed out that as per the Clause 3 the State Government can initiate and take action for withdrawal or cancellation of no-objection granted by it to the private institution if the school is not granting pay and allowance to the teachers and non-teaching staff in parity with the teachers or non-teaching staff of Government run schools. However, even from the aforesaid provision it does not appear that the State Government and the CBSE have any administrative control over the private schools. The petitioner could not point out any statute for that purpose which discloses that the Department of State Government or the CBSE has any administrative control over the private schools or management.

12. Learned counsel for the State has categorically submitted at the time of hearing of this case that the Government is not providing any fund to the respondent-institution and it has no administrative control over it. The appointment and terms and conditions of the private schools are not governed by any statute or rules framed by the State Government. Learned counsel appearing for the CBSE has submitted that so far the withdrawal of affiliation is concerned, that cannot be done by the CBSE in case of lack of payment of salaries to teacher and employees of the private institution at par with the staff of State/ Union Territory institution, however, the CBSE does not have any obligation to look into the service condition of the petitioner as he has been appointed as on ad hoc teacher by the Management of DAV College. It has been contended that CBSE does not have any disciplinary control over the teaching and non-teaching employees of any school under its affiliation. Similar stand had been taken by Mr. Tripathi as has been noticed in Raj Kumar Gupta (supra). The Apex Court in Mrs. Satimbla Sharma (supra) has held in clear terms that the teachers of private unaided minority school has no right to claim salary equal to that of their counterparts working in Government schools and Government aided schools as teachers of Government schools are paid out of the Government funds whereas the salary of teachers of private unaided minority school are paid out of the fees and other resources of private schools. It has further been held that since the Government has no administrative control over such schools, they are not "State" within the meaning of Article 12 of the Constitution and since the right to equality under Article 14 of the Constitution is available against the "State", it cannot be claimed against unaided private minority school. The Apex Court has further held that it would not be possible for the Courts to issue mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government Schools or Government aided schools because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. It has also been held that writ of mandamus cannot be issued to the private Management for payment of equal salary and

allowances to that of Government teachers on the ground that the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulates in its bye-laws that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State Department of Education because such conditions for provisional affiliation are not statutory provisions or executive instructions, which are enforceable in law. For better appreciation the relevant passage of the aforesaid decision are reproduced as under:--

x x x x 9. In our considered opinion, the Division Bench the High Court has rightly held in the impugned judgment that the teachers of private unaided minority schools had no right to claim salary equal to that of their counterparts working in Government schools and Government aided schools. The teachers of Government Schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. x x x x x x x

x x x x 11. We also do not think that the Court could issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. x x x x x x x

x x x x 13. We cannot also issue a mandamus to respondent nos. 1 and 2 on the ground that the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in clause (5)(b) that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State Department of Education because such conditions for provisional affiliation are not statutory provisions or executive instructions, which are enforceable in law. x x x x x

13. Learned counsel for the petitioner has tried to distinguish the aforesaid decision by pointing out that the decision has been rendered in the case of private unaided minority schools whereas the petitioner's school is not a minority school. However, the aforesaid contention made on behalf of the petitioner is noted only to be rejected, inasmuch as even if it is assumed that the school is not a minority private institution, from the perusal of aforesaid passages specially paragraph nos. 11 and 13 of the aforesaid decision of the Apex Court, it would be crystal clear that the same would be applicable in case of any private unaided school. The only difference that exists in the present case is that the school concerned is affiliated to Central Board of Secondary Education whereas in the aforesaid case the institution was affiliated to the Council for the

Indian Certificate of Secondary Education. However, that difference would be of no consequence.

14. Thus, all the questions are answered in negative and in view of the discussion as above, in the considered opinion of this Court, since the respondents nos. 7 to 11 are not the "State" within the meaning of Article 12 of the Constitution of India and as has been noted above, there has been no violation of any statute or breach of any law, the respondents concerned would be not amenable to the writ jurisdiction and thus, the writ application cannot be maintained. Accordingly, it is also held that no writ of mandamus can be issued directing the aforesaid respondents to pay the petitioner's salary at par with teacher of the State Government run schools. As a result, this writ application is dismissed as not maintainable.