

(1999) 07 AHC CK 0050
In the Allahabad High Court
Case No : Second Appeal No. 1329 of 1998

Maulana Azad Educational Society and others	APPELLANT
Vs	
Ram Surat Gupta and others	RESPONDENT

Date of Decision : 16-07-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18, 10, 115, 80
Constitution of India, 1950 — Article 226, 311
Intermediate Education (Amendment) Act, 1958 — Section 8(1)
Specific Relief Act, 1963 — Section 14
Uttar Pradesh High School and Intermediate Colleges (Payment of Salary to Teachers and Other Staff) Act, 1971 — Section 10
Uttar Pradesh Intermediate Education Act, 1921 — Section 16G(3)

Citation : (1999) 4 AWC 3200 : (1999) AWC 3200 : (1999) 3 UPLBEC 1934

Hon'ble Judges : J. C. Mishra, J

Bench : Single Bench

Advocate : S. U. Khan, for the Appellant; Ashok Khare, for the Respondent

Judgement

J. C. Mishra, J.—This appeal has been filed by the defendants Maulana Azad Educational Society. Usharatha and its Manager Mirza Anwar Beg against the plaintiff Ram Surat Gupta and proforma defendant against the Judgment and decree dated 19.8.98 passed by Civil Judge (Senior Division) Jaunpur dismissing the Civil Appeal No. 367 of 1984 preferred against the Judgment and decree dated 17.9.84 passed by the Munsif City Jaunpur decreeing the suit for declaration that the plaintiff is and continues to be lecturer in Economics in the institution defendant No. 1 and is entitled to the arrears of salary subject to payment of requisite court-fee from the date of working as lecturer.

2. The plaintiff respondent No. 1 Ram Surat Gupta was B.A., B. Ed. and working as a trained teacher in the institution of defendant No. 1 Maulana Azad Educational Society since 1st October. 1966. He had requisite educational qualification and was confirmed at his post as trained teacher on 6th July. 1968 : and thereafter he passed M.A. in Economics. He was appointed as lecturer in

Economics on 1st July, 1970 and allegedly performed his duties to the satisfaction of the appellants.

3. The cause of action arose in July, 1973 when he was stopped by the administration to perform his duties as lecturer. He, therefore, approached the District Inspector of Schools and sent an application on 17.7.73, a copy of which was given to the Principal of the institution. The District Inspector of Schools directed the plaintiff to perform his duties. In pursuance of this direction the plaintiff went in the institution but he was thrown out at the instruction of the Principal which said that since he had resigned his services are no more required.

4. On these allegations the plaintiff contended that he was validly appointed lecturer and had never resigned. He therefore, sought the relief of declaration that he was and continued to be lecturer in Economics.

5. The defendant No. 2 the Manager contested the suit inter alia that the plaintiff had submitted his resignation on 31.3.73 on account of his personal problems and had stated that he would not work in the institution from July, 1973. The Principal forwarded the letter of resignation to the Management in the meeting dated 24.4.73 of the Management Committee. The plaintiff was requested to withdraw his resignation but he declined. The Management reluctantly accepted his resignation and thereafter the vacancy was filled in by appointment of Abdul Husain. The appointment was approved by the District Inspector of Schools. The plaintiff did not go to the institution when the college reopened in July, 1973. The District Inspector of Schools had no power to direct the plaintiff to Join his duties as he had approved the appointment of Abdul Hussain at the vacant post of the plaintiff.

6. In view of the pleadings of the parties the following issues were framed :

1. Whether the plaintiff continues to be lecturer in Economics department.
2. Whether the plaintiff had resigned from his post.
3. Whether the suit is bad for misjoinder of the parties.
4. Whether the suit is undervalued.
5. Whether the court fee is insufficient.
6. To what relief, if any, the plaintiff is entitled.
7. Whether the defendant No. 6 continued to work as lecturer till July, 1975.
8. Whether the suit is liable to be stayed under Sections 10 and 151. C.P.C.
9. Whether the suit is bad for non-joinder of necessary parties.
10. Whether the suit is barred for want of notice u/s 80. C.P.C.
11. Whether the suit is not maintainable in view of the paragraph 45 of the Management Committee's written statement.

12. Whether the suit is bad for joinder of unnecessary parties.

13. Whether the suit is maintainable.

Parties were given opportunity to adduce oral and documentary evidence.

7. The learned Munsif decided the issue regarding under valuation of the suit against the defendants. The issues No. 7, 8 and 9 were not pressed and, therefore, they were decided against the defendants. It was held that the suit was no bad for mis-joinder of parties. The issue No. 3 regarding the suit being bad for non-Joinder of parties and issue No. 11 regarding mis-joinder of parties were initially decided against the plaintiff but as the view of the trial court was that the suit could not be dismissed on account of misjoinder or nonjoinder of the parties. It gave opportunity to remove the defects. After amendment of the plaint these issues were not pressed. The trial court held that the suit was maintainable despite appointment of Abdul Hasan defendant No. 6 as Lecturer at the post of the plaintiff. He, therefore, decided issue No. 10 against the defendants and in favour of the plaintiff.

8. The main controversy between the parties was whether the plaintiff had submitted his resignation or not. Issue No. 1 was framed on this controversy. The initial burden to prove this issue was on the plaintiff. However, as the parties had entered into evidence, the burden of proof lost its significance. Both the parties adduced oral and documentary evidence. They also submitted expert opinion regarding signature of the plaintiff on the alleged letter of resignation. The learned Munsif on appreciation of the evidence held that the plaintiff had not submitted his resignation and the letter of resignation relied on by the defendant was a forged document. He also held that plaintiff continued to perform his duties as lecturer in the Institution till the date of the institution of the suit. With these findings he decreed the suit and declared him to be continuing to be a lecture and also held him to be entitled to arrears of salary subject to payment of court fee.

9. The defendant Nos. 1 and 2 felt aggrieved preferred Civil Appeal No. 367 of 1984. The learned Civil Judge on appreciation of the evidence and consideration of the arguments advanced by the learned counsel for the parties held that the alleged letter of resignation was a forged document and the plaintiff had never submitted his resignation from the post of lecturer (economics). He also decided other issues against the defendant-appellants.

10. Felt aggrieved the defendant Nos. 1 and 2 preferred this appeal. They also impleaded the Committee of Management through the Manager Mirza Anwar Beg who is also Manager of Maulana Azad Educational Society. Usarahata as appellant No. 3 though it was neither a party either in the suit or in the appeal.

11. Both the parties agreed that this appeal may be decided at admission stage.

12. Heard Sri S. U. Khan, the learned counsel for the appellant and Sri Ashok Khare, the learned counsel for the respondent No. 1 and as agreed this appeal is

being decided at the admission stage.

13. The learned counsel for the appellant without challenging the finding regarding resignation contended that even if the plaintiff had not resigned the acceptance of resignation dated 24.4.73 amounts to dismissal/termination from service. The acceptance of resignation amounts to removal and disinclination to retain the plaintiff as a lecturer. He conceded that there was relation of master and servant between the plaintiff and as the Society or Management Committee was not a statutory authority the suit for specific performance of the agreement for service is not permissible. The learned counsel firstly referred to a decision of the Supreme Court in *Executive Committee of Vaish Degree College v. Laxmi Narain*, 1976 Lab IC 576, where it was held that a contract of personal service cannot ordinarily be specifically enforced and a Court would not give declaration that the contract subsist. An employee after having removed from service cannot be deemed to be in service against the will and consent of the employer. It was further held that this rule, however, is subject to three well recognised exceptions :

1. Whether the public servant is said to be removed from service in contravention of provisions of Article 311 of the Constitution of India.
2. Where a worker is sought to be reinstated on being dismissed under the Industrial Law and there the statutory body acts in breach of the statute :
3. Where a statutory body acts in breach or violation of the mandatory provisions of the Institution?

14. The learned counsel for the appellant contended and rightly that Managing Committee of an Educational Institution is not a statutory body and, therefore, the third exception is also not applicable.

15. In *Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others*, , it was held that rights and obligations of an employee of a private institution are governed by the terms of the contract entered into between the parties and even if the dismissal is wrongful declaration that notwithstanding the termination of service he continued to be in service cannot be granted. The learned counsel for the applicant also relied on a decision of the Supreme Court in the *Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another*, , where after considering a catena of cases it observed. There is long established rule of Courts that service contract cannot be specifically enforced. There are, however, three exceptions which have been adverted to in very many cases. In *Vaish Degree College v. Lakshmi Narain*, (1976) 2 SCC 58 at p. 71 : AIR 1976 SC 888 at pp. 897-898) after examining a large number of authorities like : *S.R. Tewari Vs. District Board Agra and Another*, ; *Executive Committee of U. P. Warehousing Corporation Ltd. v. Chandra Kiran Tyagi*, (1970) 2 SCR 150, 165 *Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi*, , *Bank of Baroda Ltd. Vs. Jeewan Lal Mehrotra*, (1973) 3 SCR 348 : AIR 1978 SC 855, the Court rounded off the conclusion :

"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 of India (ii) where a worker is ought to be reinstated on being dismissed under the Industrial Law ; and (iii) where a statutory body acts in breach or violation or the mandatory provisions of the Statute."

"This decision has been affirmed In Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others, : Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others, and reiterated in Dipak Kumar Biswas Vs. Director of Public Instruction and Others, and adverted to in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, at p. 1611. 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 not enacted by or under a statute. And the dismissed employee of such institution cannot get specific performance of service contract."

16. The learned counsel for the respondents on the contrary contended that reinstatement of a teacher removed from service in contravention of regulations under the U. P. Intermediate Education Act (2 of 1921) does not amount to enforcing any contract of personal service. He contended that regulations under the Act have statutory force. The learned counsel referred to a single bench decision of this court in Victoria High School Association Ghatia Azam Khan. Agra v. Krishna Kant Sharma, 1979 Lab 1C 837. In that case the petitioner was appointed as Demonstrator and his appointment was approved by the District Inspector of Schools. He could be removed only after prior notice. It was held that the regulations have force of law. The following observations contained in paragraph 7 are quoted below.

"Mr. Kunzru, however, contended that the declaration amounts to enforcement of a contract of personal service and could not, therefore, be granted. He relied on the cases of S.B. Dutt Vs. University of Delhi, and Vaish Degree College v. Laxmi Narain. AIR 1958 SC 888 : 1976 Lab IC 576 , in support of the said proposition. When confronted with the Full Bench decision of this Court in Aley Ahmad Abidi Vs. Dist. Inspector of Schools, Allahabad and Others, . Mr. Kunzru relied on the case of Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, . It was held by the Full Bench of this Court in Aley Ahmad's case that the Committee of Management of an Intermediate College is not a statutory body, nevertheless, "a writ petition filed against it is maintainable if such petition is for enforcement of performance of any legal obligations or duties imposed on such committee by a statute". Now, the question whether the defendant Committee of Management is a statutory body or not, may not be germane to the grant of

relief in a civil suit. Nevertheless, it cannot be disputed that a civil court is bound to enforce the law. The provisions of Regulation 25, requiring the termination of the service of a temporary teacher by giving him one month's notice or one month's pay in lieu thereof, and those of Section 16G (3) of the Intermediate Education Act, requiring the prior approval of the Inspector for giving such notice, are statutory provisions. The regulations were framed by the State Government in exercise "if the powers conferred on it by Section 8 (1) of the Intermediate Education (Amendment) Act, 1958. The power exercised by the State Government for making the regulations was legislative in character, and it cannot be disputed that the said regulations have statutory force. The case of the U. P. State Warehousing Corporation (supra) is clearly distinguishable inasmuch as the regulations in question in that case were framed by the Central Ware Housing Board in exercise of its power of regulating the conditions of service of its employees, which was not legislative in character. In granting the declaration which it did in the present case the civil court did not enforce any contract of personal service, but was only enforcing the conditions of service prescribed by Statute for teachers of recognised institutions."

17. Similar view was taken in another single bench decision in Principal, Swami Rama Nand Mahavidyalaya Inter College v. Smt. Leelawati and others. AIR 1980 All 532 . Relying on a Full Bench decision of this Court in Aley Ahmad Abidi Vs. Dist. Inspector of Schools, Allahabad and Others, it was held that though Committee of Management of an Intermediate College is not a statutory body yet a writ of mandamus could be issued to the Committee of Management if the petition is based upon a complaint that statutory obligations and duties imposed upon the Committee have been violated.

18. In Smt. Satyawati Goswami v. Smt. Uma Rani and others, AIR 1996 Su 612 the question arose whether a permanent Lecturer being appointed in accordance with the statute and entitled to statutory benefits can be removed from service and another teacher can be appointed on same post, the learned Judge after considering the authorities of the Supreme Court held that though the Committee of Management or Executive Committee which is not expressly a statutory body but even if a private body has acted in violation of statutory provisions the Court can grant specific performance. The discussion contained in paragraphs 11 to 20 is reproduced below :

"11. The next point to be determined is whether the suit is legally maintainable or not. Learned counsel for the appellant argued that in view of Section 14(b) of the Specific Relief Act, the suit is not maintainable because no specific performance of contract of personal service can be granted. Several cases were cited by the learned counsel for the appellant in support of his contention namely Ravi Roadways Vs. Asia Bi and Others, and AIR 1980 SC 1422. The leading case on the subject is the decision of the Supreme Court in Executive Committee of Vaish Degree College v. Laxmi Narain, 1976 Lab IC 576, It was held by the Supreme Court that a contract of personal service cannot ordinarily be

specifically enforced and a Court normally would not give a declaration that the contract subsists. An employee after having been removed from service cannot be deemed to be in service against the will and consent of the employer. It was further held that this rule, however, is subject to three well recognised exceptions :

1. Where a public servant is said to be removed from service in contravention of provisions of Article 311 of the Constitution of India.
2. Where a worker is ought to be reinstated on being dismissed under the Industrial Law, and where a statutory body acts in breach of the statute.
3. Where a statutory body acts in breach or violation of the mandatory provisions of the statute.

"12, Learned counsel for the appellant vehemently argued that except in the aforesaid three cases contract of personal service cannot be specifically enforced. He further contended that exceptions 1 and 2 are apparently not applicable in the instant case. According to him exception No. 3 is also not applicable because the Managing Committee of an educational institution is not a statutory body and even if termination order passed by the Executive Committee or by the Committee of Management is in violation of mandatory provisions of the statute, the decree for specific performance cannot be granted. After giving anxious consideration to the above contention, it is held that the argument cannot be accepted. The reasons are that in the first place the suit is not for specific performance of contract of personal service. In the second place, the contract alleged to have been entered by the management with the plaintiff is not a contract of personal service nor a personal contract, thirdly, it is also not a case where the plaintiff has been out of service and after dismissal she wanted declaration that she should be deemed to be in continuous service. On the other hand, she still continues in service in the L. T. grade. Consequently, it cannot be said that is a case where the courts are going to impose a teacher against the wishes of the employer and to reinstate such teacher. Further, there is no agreement of contract between the plaintiff and the management. The appointment of the plaintiff is regulated by statutory appointment. The service conditions of the teachers are governed by the Statutory Rules. The Managing Committee are under obligation to discharge the public duty to act in accordance with the statutory Rules while dealing with the teachers."

"13. In subsequent decisions the Supreme Court has always distinguished a situation where the statutory agreement is there or there is a statutory appointment. In Pandurang Dattatraya Khandekar Vs. Bar Council of Maharashtra, Bombay and Others, , the services of teachers were terminated in violation of provisions of the U. P. Intermediate Education Act. It was held by a Division Bench of the High Court that the writ petition of the petitioners was not maintainable- The Supreme Court allowed the appeal and declared that the appellants continue to be in service of the College and are entitled to all the

benefits flowing from the declaration including the salary and allowances as if there was no break in service.

"14. In *Rajendra Prasad v. Kayastha Pathshala*, AIR 1987 SC 1644, the second appeal challenging the order of suspension passed against the plaintiffs was dismissed on the ground that such declaration would tantamount to enforcing a contract of personal service. The Supreme Court set aside the judgment on the ground that the suspension of the plaintiff was in violation of the mandatory provisions of the Act.

"15. In *Integrated Rural Development Agency v. Ram Pyare Pandey*, JT 1955 3 SC 119 , the Supreme Court reaffirmed the explanation carved out in *Nandganj Sihori Sugar Co. Ltd., Rae Bareli and another Vs. Badri Nath Dixit and others*, .

"16. It is thus apparent that the Supreme Court has clearly carved out an exception to the general propositions laid down in the *Executive Committee of Vaish Degree College* case (supra) where a private body has acted in violation of statutory provisions. The exception, therefore is that generally where statutory body acts in breach or violation of mandatory provision of the Statute, the specific performance can be ordered. But statutory body is not confined to body created under the Statute but also to a body which has acted in violation of statutory provisions.

"17. There is a clear and distinct demarcation between statutory body and non-statutory body. A body is said to be a statutory body when it is created under some statute. A non-statutory body is one which is not created by any statute. A non-statutory body may be private body. A private body may employ a servant of its volition and dismiss the same provided such private body is not governed by any statute. On the other hand, if a private body whose actions are regulated by statute and which is to act according to statutory rules, it cannot terminate the services of the employee arbitrarily. A private body is governed by the provisions of the statute and being under obligation created under some statute, cannot be permitted to function arbitrarily. If such private body acts arbitrarily, its actions are covered within the exception No. 3 aforesaid.

"18. In view of this exception, if the Committee of Management or Executive Committee which is not expressly a statutory body but a private body has acted in violation of statutory provisions, the Court can grant specific performance. The Executive Committee or Committee of Management has to act in accordance with the statute. The appointment of teacher is to be made in accordance with the provisions of the statute and not on the sweet will of the management. If such appoint is contrary to the provisions of the Act and the Rules and the termination is also in violation of the Act and the Rules, declaration as well as specific performance can be ordered.

"19. In *Sachidanand Dubey and others v. Committee of Management*, 1996 Lab SC 341, the same view taken by this Court and the exceptions so interpreted was likewise interpreted.

"20. In the instant case, the main relief was a declaration that the plaintiff is permanent lecturer with effect from 5.12.1975 on the allegation that she was appointed in accordance with the Statute and was entitled to statutory benefits and that her termination order was illegal and appointment of another teacher on the same post was also illegal. Such declaration can be granted in the civil court in view of exceptions explained and interpreted above. The suit is, therefore, maintainable and it cannot be dismissed being not maintainable."

19. Similar view was taken by this Court in Sachidanand Dubey and others v. Committee of Management, Shri Sant Ram Raj Goswami and others, 1996 Lab IC 341. The discussion contained in paragraphs 30 to 42 is reproduced below :

"30. In Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , the Apex Court held "every child/citizen of this country has a right to free education until he completes the age of 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the State"..... Basic Education is primarily concerned with a child within the age limit of 14 years, exception apart getting an education is a fundamental right of child imparting Basic Education is an obligation for discharging the fundamental right.

"31. In the aforesaid decision it has also been held that "educational institutions are discharging public duties and are required to act fairly."

"32. The Constitution Bench of the Apex Court therein further held as under :

"We are certainly of the opinion that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since times immemorial. It has been treated as a charitable activity. But never as trade or business."

"33. In the present case there is no agreement or contract between the teacher and the Management. The appointment of the teacher of a Junior High School is regulated by a statutory provision and in terms exactly the appointment of a teacher in a Junior High School is a statutory appointment. The service conditions of the teachers are governed by the statutory rules. The Committee of Management are under an obligation to discharge the public duty to act in accordance with the statutory rules while dealing with the teachers of the Junior High School as they are discharging constitutional obligation of imparting basic education which is a fundamental right of a child in this country up to the age of 14 years. The very concept of enforcement of a personal contract, which was the basic philosophy for non-suiting the plaintiffs of the Executive Committee of Vaish Degree College, (1975) Lab IC 576 (supra), is not attracted in the present case. The Apex Court held that the plaintiffs in Vaish College case have failed to prove any statutory contract as such the same cannot be permitted to be

enforced. The relevant portion of the Executive Committee of Vaish Degree College case adverted to the aforesaid portion is often missed by the Court while following the aforesaid decision. The relevant portion from the Executive Committee of Vaish Degree College case (supra) which is relevant for our purpose is reproduced below :

"On a plain reading of Statute 151, it is clear that it only provides that the terms and conditions mentioned therein must be incorporated in the contract to be entered into between the College and the teacher concerned. It does not say that the terms and conditions have any legal force until and unless they are embodied in an agreement. To put it in other words the terms and conditions of service mentioned in Statute 151 have *proprio vigore* no force of law. They become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract, they have no vitality and can confer no legal rights..... The High Court also failed to consider that there was a concurrent finding of fact by all the Courts below that the plaintiff-respondent never executed any agreement with the Executive Committee of the College in the form prescribed by the statutes of the Agra University Act."

"34. In the aforesaid facts the Apex Court was of the opinion that since there is no statutory agreement between the teachers and the Executive Committee, the said provision could not be enforced. In subsequent decision the Apex Court has always distinguished a situation where the statutory agreement is there or there is a statutory appointment.

"35. In *Indra Pal Gupta Vs. Managing Committee, Model Inter College, Thora*, . Thora, J. in the matter where the services of teachers were terminated in violation of the provisions of the U. P. Intermediate Education Act and the Division Bench of the High Court having dismissed the writ petition of the petitioner therein the Hon"ble Supreme Court has allowed the appeal set aside the judgment in Division Bench and declared "That the appellants continue to be in service of the College are entitled all the benefits flowing from this declaration including the salary and allowances as if there was no break in his service."

"36. In *Rajendra Prasad v. Kayastha Pathshala*. AIR 1987 SC 1644 : 1987 Lab 1C 1305, a single Bench of this Hon"ble Court dismissed the plaintiffs' second appeal challenging the order of suspension passed against the plaintiffs on the ground that permitting the plaintiffs to continue in service in the College will tantamount to enforcing a contract of personal service. The learned single Judge has placed reliance on the decision of the Executive Committee of Vaish Degree College, 1976 Lab IC 576 (supra) for the aforesaid proposition. The Hon"ble Supreme Court set aside the judgment on the ground that the suspension of the plaintiffs was in violation of the mandatory provisions of the Act. The Court held that the High Court was wrong in refusing to grant the declaration that the order of suspension ceased to be operative w.e.f. 17.10.1975."

"37. In *Deepak Kumar v. Director of Public Instruction*. 1987 Lab IC 1012: AIR

1987 SC J 422. the Apex Court affirmed the Executive Committee Vaish Degree College case, 1976 Lab IC 576. as well as Indra Pal Gupta v. Managing Committee Model Inter College. 1984 Lab IC 900, Thora, referred earlier and expressed inability to grant relief to the plaintiffs on the ground that the termination of the services of the plaintiffs has not been proved to be in violation of any Statutory provision, regulation of procedural law. The relevant portion is quoted below (Para 3 of 1987 Lab IC) :

"No doubt his action has been held to be wrongful but even so it is not in contravention of any statutory provision or regulation or procedural rules. We are, therefore, unable to accept the appellants' contention that he should be granted a declaration that he continues to be in service of the College and that he is entitled to all the benefits flowing from this declaration."

"38. In Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another, , in the matter of suspension of a teacher of an Intermediate College, the Vaish Degree College case was pressed in the service contending that the relief for declaration of suspension to be illegal cannot be granted to the plaintiff. The court left the question open and did not express any view.

"39. In Nandganj Sihori Sugar Co. Ltd., Rae Bareilly and another Vs. Badri Nath Dixit and others, , the Apex Court affirmed the view taken in the Executive Committee of Vaish Degree College case (supra), however, clarified in absence of any statutory requirement. Courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer."

"40. In Integrated Rural Development Agency Vs. Ram Pyare Pandey, , the Apex Court again reaffirmed the explanation carved out in Nandganj Sihori Sugar Co. Ltd., Rae Bareilly and another Vs. Badri Nath Dixit and others, and placed reliance on Ridge v. Baldwin, (1963) 2 All ER 66 (para 5). The relevant portion from the said English judgment is quoted for convenience :

"So the question is a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence, it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants or the grounds on which it can dismiss them."

"41. On an analysis of the aforesaid follow up decision of the Executive Committee of Vaish Degree College case, 1976 Lab IC 576 (supra) it is apparent that the Apex Court has clearly carved out an exception to the general propositions laid down in the Executive Committee of Vaish Degree College case (supra) where a private body has acted in violation of a statutory provision.

"42. It is to emphasise again that in the present case there was no contract of personal service between the plaintiff and defendants 3 and 4 and exactly no relationship of master and servant existed. The appointments, service conditions

and termination etc. were all governed by statutory provisions. The State or Officer of the State are also necessary parties to ensure that the appointment of Junior High School Teacher is made in accordance with law and in the manner prescribed. The relationship between a teacher of Basic Junior School and its Management cannot be equated with that of servant and master on the basis of personal contract of service."

20. In view of the above discussions. I am of the view that mandamus can be issued even to private or non-statutory bodies if they are conferred with discharge of public functions. This power is also available to the civil courts and they are entitled" to award decree of declaration as also can issue mandatory injunction if the circumstances so warrant. The institutions are expected to follow the fair procedure before termination of the service of the employee.

21. The next question that has been raised by the learned counsel for the appellants is that the plaintiff was removed from service in the year 1973 and after a long gap of 25 years he cannot be ordered to be reinstated. He contended that the only permissible relief that could be granted to the plaintiff was to award damages calculated on the basis of salary from the date of removal till the date of filing of the suit subject to maximum period not exceeding three years as held by the Supreme Court in *Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another*, . In the said case, the High Court had directed the State Government and District Inspector of Schools to make payment of salary to the petitioner including D.A. and other emoluments admissible under law and reinstate the petitioner forthwith. The Supreme Court in peculiar circumstances of the case held that the reinstatement would be unwise. Firstly, it was observed that the respondent was out of teaching for over 25 years. He after teaching the subject for two years diverted his attention and sought admission in L.L.B. Degree Course. In 1968 he enrolled himself as an advocate. The Supreme Court also refused to pay arrears of salary but only awarded three arrears salary on account of damages which shall be paid by the Management and not by the Government.

22. A Division Bench of this Court in *U. P. Financial Corporation. Kanpur and others v. V. P. Sharma and another*. (1998) 1 UPLBEC 304, the order for reinstatement of the petitioner-respondent No. 1 was held to be valid. The question arose whether after reinstatement direction could be made to pay full arrears of salary/wages to him. The Division Bench left the matter open and directed the employer to hold an enquiry on the question whether the petitioner-respondent No. 1 should be given full back wages/salary from the date of order of dismissal till his reinstatement in service bearing in mind the provisions of the departmental rules/regulations/ instructions and the principles laid down in the decisions of the High Court and the Supreme Court and pass a reasoned order within 3 months of production of a copy of this Judgment before the Managing Director of the Corporation. Reliance was placed on a decision of the Supreme Court, *ratio decidendi* of which is reproduced below :

"12. This Court in its judgment in the case of Banaras Hindu University, Varanasi and others-appellants v. J. N. Tripathi- respondent, (1996) 3 UPLBEC 1976, to which one of us (Hon. C. J.) was a party, held that some of the relevant factors to be kept in mind at the time of awarding the back wages, on setting aside or quashing the order of termination, removal or dismissal are :

"(a) Ordinarily the High Court, in exercise of jurisdiction under Article 226 of the Constitution, should not direct payment of full back wages while setting aside the order of dismissal against the employee. The question should be left to be decided by the competent departmental authority on consideration of the relevant factors. In any view of the matter an order for payment of full back wages is not to be passed as a matter of course in every case in which the order of dismissal, is set aside or quashed by the High Court.

(b) It should be considered by the Court whether employee was gainfully employed during the period he has not been allowed to work on the post on account of the order of termination.

(c) The conduct of the parties shall be very relevant in awarding back wages.

(d) Likely hardship of the parties should also be taken into consideration while awarding or not awarding the back wages.

(e) The public interest should also be kept in mind while awarding back wages.

This last decision of the Division Bench is not applicable since we are not concerned with the discretionary power of the High Court in exercise of the jurisdiction under Article 226 of the Constitution. In second appeal the substantive right of the plaintiff has to be considered strictly in accordance with law.

23. The learned counsel for the respondent contended that as the Society had not followed the mandatory provisions of the institute and based on their order of removal on a forged letter of resignation the plaintiff is deemed to be continuing in service and, therefore, he is entitled to arrears of salary and emoluments which would have been paid had he continued in service. The reliance has been placed on a single Bench decision of this Court in Sachidanand Dubey and others v. Committee of Management, Shri Sant Ram Raj Goswami and others, (1996 Lab IC 341, in which relying on the following observation made by the minority decision which was not contradicted by majority judgment in Executive Committee of Vaish Degree College Shamli v. Laxmi Narain, AIR 1976 SC 868, held that the damages are no substitute for reinstatement in the economic conditions prevailing in the country and circumstances of the society. The discussion given in paragraph 53 is reproduced below :

"53. The other aspects which may require consideration in the present matter whether the plaintiffs should have been compensated by granting damages and should the relief of injunction be refused on the said ground this point has very well been considered in the minority Judgment in the Executive Committee of the

Vaish Degree College, 1976 Lab IC 576. Hon"ble Mr. Justice P. N. Bhagwati in his minority judgment held as under :

"Where, in a country like ours, large numbers of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service may have to remain without means of subsistence for a long period of time. Damages equivalent to one or two month"s wages would be poor consolation to him. They would be wholly insufficient to sustain him during the period of unemployment following upon his discharge. The provision for damages for wrongful termination of the service was adequate at the time when an employee could without difficulty find other employment within the period of reasonable notice for which damages were given to him. But in conditions prevailing in our country damages are poor substitute for reinstatement ; they fall far short of the redress which, the situation requires. To deny reinstatement to an employee by refusing specific performance in such a case would be to throw him to the mercy of the employer : it would enshrine the power of wealth by recognising the right of the employer to fire an employee by paying him damages which the employer can afford to throw away but which would be no recompense to the employee."

24. In *Kaneez Fatima v. Principal. Hamidiya Girls Inter College, Allahabad and another.* (1997) 2 UPLBEC 1037 a single Bench of this Court repelled the contention of the respondent that the plaintiff could file suit for damages and not for declaration on the strength of the observations made in *Smt. J. Tiwari v. Smt. Jwala Devi Vidya Mandir and others*, 1980 All LJ 1970, wherein it was observed that the ratio of the Supreme Court case was read in view of the facts and circumstance but it is not applicable to the cases in which public institutions performing public duty of imparting education violate the rules. It was held that a suit for declaration lies against the public authority to get declared the right and can enforce the rights after declaration. It was also observed that in the State of U.P. peculiar circumstances are prevailing and it takes long time to get the cases decided.

25. In view of the above discussion, I find that the award of damages is no substitute for reinstatement more so when the plaintiff had filed the suit without delay and he was not at fault in delayed decision of this suit and first appeal. It is salutary principle of jurisprudence that no one should be allowed to suffer due to mistake of the Court. The decisions of the Supreme Court relied on by the learned counsel for the appellants do not lay down any law that the employee could only be awarded damages and the specific performance of contract of employment could not be awarded. In the said case, damages were awarded in particular circumstance of each case. The single Bench decision of this Court is based on the observation made by Hon"ble Mr. Justice P. N. Bhagwati in *Executive Committee of the Vaish Degree College* case which was not dissented by other Hon"ble Judges of the Bench. The decision of this Court in *Kaneez Fatima*"s case referred to above applies with full force to the facts of this case, I

find that the Courts below committed no error in awarding the relief claimed by the plaintiff.

26. The learned counsel for the appellants then contended that the suit is bad for non-joinder of the Committee of Management. The learned counsel for the appellant referred to the decision of the Supreme Court. Reliance has been placed on the decision of the Supreme Court in *S.K. Saldi Vs. General Manager, U.P. State Sugar Corporation Ltd. and another*, . In that case the appellant was initially appointed in Meerut Straw Board and was transferred to M/s. Jaswant Sugar Mills on deputation, it was held that the sugar mill against whom the relief sought was not a party to the suit and, therefore, the suit was liable to be dismissed for non-joinder of necessary and proper party.

27. In the case before us, the plaintiff has impleaded the Maulana Azad Educational Society through its Manager Sri Mirza Anwar Beg as also Mirza Anwar Beg, the Manager of the Society, besides Abdul Aziz Ansari. President of the Society, as also Ali Ahmad, Vice President. In paragraph I of the plaint, it was averred that the Institution was run by Maulana Azad Educational Society and defendant No. 1 and the defendant Nos. 2 and 3 are respectively Manager and President of the Society, This averment contained in para 1 was admitted by all the defendants including the defendant Nos. 1, 2. 6 and authorised controller the defendant No. 7. In view of this admission by the defendant-appellants, it is not open to assert that the institution was not run by the defendant No. 1 through defendant Nos. 2 and 3 but by the Committee of Management. Moreover, the plea of non-joinder of the Committee of Management was not ever taken at the trial stage. In view of these facts the Courts below committed no error in rejecting the plea of non-joinder of necessary or proper parties.

28. The learned counsel for the appellants then contended that State of U. P. was necessary party as the relief of payment of salary could be awarded against it and not against the institution. It has been contended that u/s 10 of the U, P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act. 1971 (U. P. Act No. 24 of 1971), it is the State which is liable for payment of salary. Alternatively it has been contended that primary inability to pay salary to a teacher is of the State Government and the institution's liability is only secondary. It has also been contended that as required by Section 5 (2) of the said Act 80% of the tuition fee was to be deposited with the State Government which the appellant's institution was regularly paying and, therefore, the institution is not liable to pay the entire salary of the teachers. Reliance has been placed on a decision of this Court in *Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another*, . In the said case, the Supreme Court instead of awarding arrears of salary awarded damages equivalent to three years salary. It was specifically directed that the payment shall be made by the management and not by the Government. It was observed that in a case like that the Government cannot be saddled with the liability to make payment. There is no relationship of master

and servant between government and respondent and such relationship existed only between the Management and the respondent. It was further observed that so far as statutory liability to pay salary to the teachers is concerned the Government has been paying salary to Dr. Gopendra Kumar who has since been appointed as Lecturer in place of respondent. Therefore, the Management alone should pay the amount ordered.

29. The principle laid down by the Supreme Court in the aforesaid case applies with full force to the facts of the case before us. In this case also the appellants manipulated forged letter of resignation and on its basis, they removed the plaintiff-respondent from service. The appellants also appointed teachers against the vacancy created by the alleged resignation. Thus, the Government was discharging statutory liability in making payment to the lecturers who were appointed by the appellants in the vacancy created by the alleged resignation and, therefore, the Government should not be saddled with the liability of making double payment. It is for the appellants to discharge the liability as they were directly concerned with forging a letter of resignation. In these circumstances, the State of U. P. was not a necessary party and the appellants cannot escape the liability on the ground that the amount Involved is huge one and will create extra burden.

30. It has also been contended that in absence of specific relief claimed for award of salary pendants lite and future, the Courts below committed error in awarding the salary till the decision. It has been contended that the Courts cannot award this relief except by way of mesne profit in suit for recovery of immovable property as provided by the Order XX. Rules 12 and 18. C.P.C. This contention is devoid of any force as the payment of salary is necessary consequence of the reinstatement. The decision in Gopalakrishna Pillai and Others Vs. Meenakshi Ayal and Others, has no application to the facts of the case before us. In that case the dispute was with regard to immovable property and the question was whether the Court could grant mesne profits which is a discretionary relief.

31. On consideration of entire facts and circumstances I find that the decrees do not call for interference.

32. The appeal is dismissed with costs.