

(2008) 12 DEL CK 0042

In the Delhi High Court

Case No : Writ Petition (C) No. 6448 of 2007

Smt. Saroj Devi (Widow)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 32

Law Commission Act, 1965 — Section 3(1)

Supreme Court Act, 1981 — Section 31

Citation : (2009) 156 DLT 429 : (2009) 3 ILR Delhi 412

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : G.S. Lobana, for the Appellant; Madhu Sharan and Jai Bansal for R-1, A.K. Tewari, for R-3, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—Late Subedar Ram Dhari Ram, husband of the petitioner, joined Department of Posts as a Postal Assistant on 01.09.1968. He volunteered to serve in the Army Postal Service Corps in the rank of a Warrant Officer on 03.07.1971 and earned his promotions to the rank of a Subedar. Late Subedar Ram Dhari Ram while serving in the Army Postal Service Corps had got his name registered with the Army Welfare Housing Organization ("AWHO" for short) on 01.05.2005 for allotment of a deluxe apartment at Greater Noida Scheme in Phase III by remitting an amount of Rs. 75,500/- towards the registration fee. He was, however, at Serial No. 49 in the waiting list. Subedar Ram Dhari Ram unfortunately met with a fatal road accident while serving in the unit on 13.09.2006. The petitioner was granted family pension with effect from 14.09.2006. Late Subedar Ram Dhari Ram is also survived by his son Dr. Suresh Chand. It is Dr. Suresh Chand who was made a nominee by his deceased father in the Greater Noida Scheme. Dr. Suresh Chand addressed a letter dated 18.01.2007 to the AWHO informing them about the demise of the registrant (his late father). The following queries were also made by Dr. Suresh Chand from

AWHO:

- i) Is there any preference we can get in the allotment;
- ii) In the Project under planning at Greater Noida Phase III, whether waitlisted candidates will get any preference; and
- iii) What, if anything he can do to get preference for the allotment.

2. It is the case of the petitioner that the AWHO advised Dr. Suresh Chand to withdraw his application for substitution of his name in place of his late father and to obtain refund of the amount deposited with a fresh application being put up in the name of the petitioner as a widow of the deceased Ram Dhari Ram to be considered in the new scheme at Dwarka. No response was sent in writing to the letter of Dr. Suresh Chand dated 18.01.2007 which is a fact borne out from the records of the AWHO.

3. The next communication is a letter dated 29.01.2007 by the AWHO, to the effect that Dr. Suresh Chand was a nominee of his father and certain documents should be forwarded to enable the AWHO to refund the registration fee to him, which documents were duly submitted and the refund was made on 29.03.2007.

4. The petitioner thereafter applied for a fresh registration in Dwarka Scheme on 05.05.2007 in lieu of her late husband Subedar Ram Dhari Ram. This application was, however, rejected by the AWHO under the cover of the letter of June, 2007 on the ground that the widows of Army Postal Service ("APS" for short) are not eligible.

5. It is the case of the petitioner that there was no such exclusion of the widows of the APS and in that behalf reliance has been placed on para of 12(b)(i) of AWHO Brochure. The said Clause 12(b) appears in Chapter II of the brochure dealing with the eligibility conditions and is reproduced below:

12. The following are eligible to apply:

...

(b) Widows of All Ranks

(i) Widows who are in receipt of family pension.

ii) Widows who re-marry a real brother of their deceased husband and are in receipt of family pension.

iii) War widows who re-marry any person and are in receipt of family pension.

iv) Widows who re-marry serving army personnel.

6. The petitioner made a representation dated 08.07.2007 to the Quarter Master General pointing out that had her husband not died, he would have participated in the draw and could have got the flat in the Greater Noida Scheme of AWHO and the same would have been the position if he had retired from service in

normal course. It was submitted that there was nothing to exclude the widow of such an officer especially when there is three per cent reservation for widows in the allotment of flats of AWHO. Such a reservation is provided in Chapter VI of the brochure of AWHO.

7. The representation was, however, rejected vide letter dated 10.08.2007. The stand of the respondents in the said letter is that the applicability of widows of APS was not there as per the latest Master Brochure amended up to 01.05.2007. The petitioner has thereafter filed the present writ petition seeking the following reliefs:

- i) To issue a writ of certiorari or any other appropriate writ, order or direction, quashing the impugned order dated 08.06.2007 and the order dated 10.08.2007 by which the valid and legal claim of the petitioner (a widow) for registration of her name for Army Welfare Housing Organization dwelling unit in Dwarka Scheme has been denied, illegally and arbitrarily;
- ii) To issue a writ of mandamus directing the respondents to entertain her application for AWHO Dwarka Scheme for allotment of a dwelling unit in the Special Category of widows against 3 per cent quota reserved for widows; and
- iii) To pass such order and further order which this Hon'ble Court may deem fit and proper.

8. The AWHO/R-3 has contested the matter by filing the counter affidavit. A preliminary objection has been raised about the maintainability of the writ petition against the AWHO which is a registered Society under the Registrar of Societies, Delhi within the provisions of Societies Registration Act, 1860. The object of the AWHO is to promote and provide dwelling units to serving and retired Army personnel apart from their widows on a no profit no loss basis. The Executive Committee of the AWHO is stated to be in charge of the day to day business which is chaired by the Adjutant General Army Headquarters in "Ex Officio capacity" who in turn is assisted by a team of executives. In terms of the Rules & Regulations and Bye-laws of the AWHO, land is acquired by the AWHO at concessional rates through Government, Semi-Government or private agencies. It is pleaded by AWHO/R-3 that the funds of the organization are created by the AWHO itself and the Union of India or the Adjutant General's branch has no control over the funds of the AWHO. The AWHO is stated to be a welfare Society without any member being nominated by the Government. AWHO/R-3 has further pleaded that R-1 and R-2 have nothing to do with the matter being the Union of India and the Quarter Master General and the only object of impleading them as respondents is to somehow create jurisdiction under Article 226 of the Constitution of India.

9. Insofar as the merits of the matter are concerned, the plea taken is that the widows of the APS are not eligible for being considered for registration in any housing scheme promoted anywhere in India by R-3. AWHO/R-3 has submitted that in order to obviate any misgiving relating to the interpretation of Rule 12 of

the Rules of Allotment, the Executive Committee of R-3 in its 109th meeting held on 17.10.2007 again deliberated the issue and re-affirmed the Rules that the widows of APS are not eligible for registration of dwelling units promoted by the AWHO/R-3.

10. In view of the aforesaid pleadings, in our considered view, only two aspects need to be examined:

i) Whether the writ filed by the petitioner for redressal of her grievance is maintainable under Article 226 of the Constitution of India

ii) Whether the widows of APS are excluded from the benefit of registration for dwelling units promoted by AWHO/R-3.

Whether the writ filed by the petitioner for redressal of her grievance is maintainable under Article 226 of the Constitution of India

11. The aspect of maintainability of the writ petition under Article 226 of the Constitution of India has to be considered with reference to the said Article which reads as under:

226. Power of High Courts to issue certain writs (1) Notwithstanding anything in Article 32, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any Government, within those territories directions, order or writs, including (writs the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose.

12. We have unfortunately not had the benefit of reference to any case law by both the learned Counsel for the parties. It is, however, necessary to examine the legal position in this behalf in order to appreciate the factual matrix.

13. In *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, the difference in the meaning of the word "authority" as used under Article 226 of the Constitution of India and under Article 12 of the Constitution of India has been brought out. It was observed that a writ petition under Article 226 of the Constitution of India would be maintainable even against a private body as it would fall within the definition of "any person or authority" performing a public duty and owing a positive obligation to the affected party. Such a duty on the person or authority need not be imposed by Statute so long as it is doing a public function having a public character. In the facts of the case, the writ petition had been filed under Article 226 of the Constitution of India by the retrenched teachers of a public aided college (a public trust) affiliated to the University seeking a writ of mandamus for compelling the college management to pay them terminal benefits and arrears of salary due. Such a petition was held to be maintainable. The maintainability of the writ petition was challenged on the ground that the respondent-entity was a registered trust under the Bombay Trust

Act and thus not amenable to the writ jurisdiction of the High Court. A distinction was made between enforcing the service contract and claiming terminal benefits and arrears of salary. It would be useful to reproduce the following observations:

15. 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 super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus can not be refused to the aggrieved party.

16. The Law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord Chancellor) in pursuance of Section 3(1)(c) of the Law Commission Act, 1965, requested the Law Commission "to review the existing remedies for the judicial control of administrative acts and commissions with a view to evolving a simpler and more effective procedure." The Law Commission made their report in March 1976 (Law Com No. 73). It was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act 1981. It combined all the former remedies into one proceeding called Judicial Review. Lord Denning explains the scope of this "judicial review":

At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.

The Statute is phrased in flexible terms, It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The result is that

the courts are not bound hand and foot by the previous law. They are to "have regard to" it. So the previous law as to who are-and who are not- public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing.

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

20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied,

21. 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 Statutes even though they are not public officials or statutory body. It was observed (at 778) ;

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 or 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 authorising 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).

22. 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 Act 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 whenever 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.

14. In *Binny Ltd. and Another Vs. V. Sadasivan and Others*, , the writ petition under Article 226 of the Constitution of India against private bodies was held to be maintainable though pre-eminently a public law remedy if the triple condition is satisfied. The said three conditions are:

- i) Such private body is discharging a public function;
- ii) The decision sought to be corrected or enforced is in discharge thereof; and
- iii) The public duty imposed is not of a discretionary character.

15. It was observed that the scope of mandamus is determined by the nature of the duty to be enforced rather than the identity of the authority against whom it is sought though the courts always retain the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It was held that a body is performing a public function when it seeks to achieve some collective benefit for the public or a section thereof and is accepted by the public or a section thereof as having authority to do so. Bodies, therefore, exercise public functions when they intervene or participate in social or economic affairs in the public interest though there cannot be any general definition of "public authority" or "public function" and the facts of each case would decide the point. Once again it would be useful to extract the relevant paragraphs:

10. The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy

where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the *Administrative Law* (Ninth Edition) by Sir William Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion is expressed:

A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of *ultra vires*. If for example a minister or a licensing authority acts contrary to the principles of natural justice, *certiorari* and *mandamus* are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases.

11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of *mandamus* could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on *Judicial Review of Administrative Action* (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24, it is stated thus:

A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including: rule-making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to "recognize the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is government.

12. In *Regina v. Panel on Take-over and Merges, Ex parte Datafin Plc. and Anr.* (1987) 1 QBD 815, a question arose whether the Panel of Take-over and Mergers had acted in concert with other parties in breach of the City Code on Take-over and Mergers. The panel dismissed the complaint of the applicants. Though the Panel on Take-over and Mergers was purely a private body, the Court of Appeal held that the supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties, which was supported by public law sanctions and which was under an obligation to act judicially, but whose source of power was not simply the consent of those over whom it exercised that power; that although the panel purported to be part of a system of self-regulation and to derive its powers solely from the consent of those whom its decisions affected, it was in fact operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties, and was under a duty in exercising what amounted to public powers to act judicially; that, therefore, the court had jurisdiction to review the panel's decision to dismiss the applicants' complaint; but that since, on the facts, there were no grounds for interfering with the panel's decision, the court would decline to intervene.

13. Lloyd L.J., agreeing with the opinion expressed by Sir John Donaldson M.R. held :

I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If at the end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.

14. In that decision, they approved the observations made by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* (1985) A.C. 374, 409 wherein it was held :

...for a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of "the prerogative." Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank

15. It is also pertinent to refer to Sir John Donaldson M.R. in that *Take-Over Panel* case :

In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to is jurisdiction.

16. The above guidelines and principles applied by English courts cannot be fully applied to Indian conditions when exercising jurisdiction under Article 226 or 32 of the Constitution. As already stated, the power of the High Courts under Article 226 is very wide and these powers have to be exercised by applying the constitutional provisions and judicial guidelines and violation, if any, of the fundamental rights guaranteed in Part III of the Constitution. In the matter of employment of workers by private bodies on the basis of contracts entered into between them, the courts had been reluctant to exercise the powers of judicial review and whenever the powers were exercised as against private employers, it was solely done based on public law element involved therein.

16. This view was expressly stated by this Court in various decisions and one of the earliest decisions is *The Praga Tools Corporation v. Shri C.A. Imanuel* and

Ors. In this case, the appellant company was a company incorporated under the Indian Companies Act and at the material time the Union Government and the Government of Andhra Pradesh held 56 per cent and 32 per cent of its shares respectively. Respondent workmen filed a writ petition under Article 226 in the High Court of Andhra Pradesh challenging the validity of an agreement entered into between the employees and the company, seeking a writ of mandamus or an order or direction restraining the appellant from implementing the said agreement. The appellant raised objection as to the maintainability of the writ petition. The learned Single Judge dismissed the petition. The Division Bench held that the petition was not maintainable against the company. However, it granted a declaration in favour of three workmen, the validity of which was challenged before this Court. This Court held at pages 589-590 as under:

...that the applicant for a mandamus should have a legal and specific right to enforce the performance of those dues. Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or any inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. 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 [Cf. Halsbury's Laws of England (3rd Ed.), Vol.II p 52 and onwards].

The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company.

18. It was also observed that when the High Court had held that the writ petition was not maintainable, no relief of a declaration as to invalidity of an impugned agreement between the company and its employees could be granted and that the High Court committed an error in granting such a declaration.

19. In *VST Industries Limited v. VST Industries Workers' Union and Anr.* (2001) 1 SCC 298, the very same question came up for consideration. The appellant-company was engaged in the manufacture and sale of cigarettes. A petition was filed by the first respondent under Article 226 of the Constitution seeking a writ of mandamus to treat the members of the respondent Union, who were

employees working in the canteen of the appellant's factory, as employees of the appellant and for grant of monetary and other consequential benefits. Speaking for the Bench, Rajendra Babu, J., (as he then was), held as follows :

7. In *de Smith, Woolf and Jowell's Judicial Review of Administrative Action*, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law, e.g., the activities by private bodies may be governed by the standards of public when its decisions are subject to duties conferred by statute or when by virtue of the function it is performing or possible its dominant position in the market, it is under an implied duty to act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarized the position with the following propositions :

(1) The test of a whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.

(2) The principles of judicial review *prima facie* govern the activities of bodies performing public functions.

(3) However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.

20. Applying the above principles, this Court held that the High Court rightly held that it had no jurisdiction.

21. Another decision on the same subject is *General Manager, Kisan Sahkar Chini Mills Limited, Sultanpur, UP v. Satrugan Nishad and Ors.* The appellant was a

cooperative society and was engaged in the manufacture of sugar. The respondents were the workers of the appellant and they filed various writ petitions contending that they had to be treated as permanent workmen. The appellant challenged the maintainability of those writ petitions and applying the principles enunciated in VST Industries" case (supra), it was held by this Court that the High Court had no jurisdiction to entertain an application under Article 226 of the Constitution as the mill was engaged in the manufacture and sale of sugar which would not involve any public function.

22. In Federal Bank Limited v. Sagar Thomas and Ors. the respondent was working as a Branch Manager of the appellant Bank. He was suspended and there was a disciplinary enquiry wherein he was found guilty and dismissed from service. The respondent challenged his dismissal by filing a writ petition. The learned Single Judge held that the Federal Bank was performing a public duty and as such it fell within the definition of "other authorities" under Article 12 of the Constitution. The appellant bank preferred an appeal, but the same was dismissed and the decision of the Division Bench was challenged before this Court. This Court observed that a private company carrying on business as a scheduled bank cannot be termed as carrying on statutory or public duty and it was therefore held that any business or commercial activity, whether it may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money which do have an impact on the economy of the country in general, cannot be classified as one falling in the category of those discharging duties or functions of a public nature. It was held that that the jurisdiction of the High Court under Article 226 could not have been invoked in that case.

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England 3rd ed. Vol. 30, page-682,

a public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit.

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government or Government authorities at all levels is increasingly employing contractual techniques to achieve its regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce the contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.

32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not a State within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties.

17. The personnel of the Army services carry out the important function of defending the borders and perform all linked services thereof. In fact, there have been periodic reviews by the Government to see how best the conditions of serving and retired personnel as also of the widows of the Army personnel could be ameliorated. The problem of housing is an all pervading one. Local bodies and Housing Organizations have taken up projects for development of housing for benefit of different sections of the Society. AWHO has been set up and is geared towards providing such housing facility for the benefit of the three categories of people being; serving and retired Army personnel as also the widows of the Army personnel. The need of such persons is acute. It is not disputed that the Adjutant General by designation is the head of the AWHO and land at concessional rates is sought from the Government and other bodies for housing projects. The object is thus apparent to provide housing at reasonable rates to these three categories of people.

18. The mere fact that AWHO/R-3 is a Society registered under the Societies Registration Act, 1860 does not imply that it is outside the purview of Article 226 of the Constitution of India so long as it is performing a public function having a public character. Providing housing to a section of society consisting of serving or retired Army personnel or widows of Army personnel at concessional rates is

certainly such a public function. AWHO/R-3 can hardly be permitted to plead that the function of allotment is discretionary and it can do whatever it wants. In fact, the brochure of AWHO/R-3 itself lays down the guidelines for making such allotments which are done by draw of lots from eligible persons. It is in discharge of this function that the decision was taken to reject the application of the petitioner only on the ground that the widows of APS are not entitled to dwelling units promoted by AWHO/R-3.

19. We are thus of the considered view that the triple criteria as laid down in *Binny Ltd. and Anr. v. v. Sadasivan and Ors*'s case (*supra*) is fully satisfied in the facts of the present case.

20. In view of the aforesaid pronouncement we do not consider it necessary to go into other judgments on this point. If the parameters as enunciated aforesaid are applied to the facts of the present case, we have no doubt that the present writ petition under Article 226 of the Constitution of India would be maintainable.

21. It has rightly been emphasized that the focus has to be on the nature of activity rather than the entity. It may be possible to plead that if the AWHO/R-3 enters into a contract for construction of dwelling units and there is a breach of terms, a writ may not be the remedy under Article 226 of the Constitution of India. The allocation of flats for housing as per the eligibility criteria is not a purely contractual function so as to non suit the petitioner. It is not necessary that a duty has to be statutory. AWHO/R-3 is thus performing a public function of seeking to achieve collective benefit for a section of the public and providing such housing to the personnel.

22. We thus hold that the present writ petition under Article 226 of the Constitution of India is maintainable.

Whether the widows of APS are excluded from the benefit of registration for dwelling units promoted by AWHO/R-3.

23. The petitioner has annexed a copy of the brochure of the AWHO. The relevant portion has been quoted above where a specific provision has been made for widows of all ranks. It appears that only on receipt of the application of the petitioner, some re-examination took place and widows of APS personnel were sought to be excluded.

24. Learned Counsel for the R-3/AWHO has sought to rely upon the new brochure now published where the provision referred to aforesaid has been substituted and instead of widows of all ranks the provision now is made for widows of all ranks of Regular Army. There is no explanation forthcoming as to how the brochure annexed by the petitioner would not apply and the counter affidavit does not deal with this aspect. In the 109th Executive Committee meeting of R-3 held on 17.10.2007, this matter was taken up and circulated on 28.11.2007. The application made by the petitioner was of 05.05.2007.

25. We must also note that the stand of the petitioner that the withdrawal of the

earlier registration by the son of the petitioner from Greater Noida Scheme was under advise from R-3 to move a fresh application in the name of the petitioner as a widow of the deceased to be considered for the draw in respect of new Dwarka Scheme. This plea finds support from the letter of the son of the petitioner dated 18.01.2007 which expressed the intention to seek allotment and that too at the earliest and in the most expedient manner. There is no reply to this letter but in terms of the communication dated 29.01.2007, AWHO/R-3 only talked about the refund of the amount. Action of R-3 has resulted in a situation where the son and wife of the deceased officer of APS are sought to be deprived of their right of allotment. In the case of the petitioner such denial is contrary to the brochure annexed as Annexure P-8. In this behalf, we consider it appropriate to extract paras 4.7 and 4.8 of the writ petition and the response thereto in the counter affidavit. The same are reproduced below:

Paras 4.7 and 4.8 of the Writ Petition

4.7 Unfortunately her application for registration for Dwakra Scheme -2007 was rejected by the AWHO on the grounds that APS widows are not eligible although there is no rule/regulation debarring widows of APS personnel for registration with AWHO as per their own prospectus.

4.8 That according to para 12(b)(i) of the prospectus of AWHO, the widows of all ranks are eligible who are in receipt of family pension and the petitioner is in receipt of family pension since 14.09.2006.

Response to Paras 4.7 and 4.8 in the Counter Affidavit

Contents of para 4.7 of the petition are correct and therefore need no reply. Contents of paragraph No. 4.8 are false insofar as the eligibility of the widows of the APS personnel are concerned and, therefore, emphatically denied. Clarification to this effect has been given to the petitioner by the Respondent No. 2 and further re-affirmed by the 109th Executive Committee Meeting held on 17.10.2007 annexed hereto as Annexure R3-2. Contents of Paragraphs No. 4.8 and 4.10 of the petition not being within the knowledge and records of the replying respondent are therefore emphatically denied.

26. The respondents thus really do not dispute that there was no rule/regulation debarring the widows of APS nor dispute the clause in the brochure but only refer to the subsequent clarification as per the 109th Executive Meeting held on 17.10.2007.

27. We are thus of the considered view that the application of the petitioner for Dwarka Scheme could not have been rejected and ought to have been included in the draw of lots.

28. The draw of lots has, however, been held which creates its own complications. However, this does not imply that the petitioner can be deprived of fruits of success of the present petition or R-3 be permitted to perpetuate this illegality.

29. In view of the aforesaid, a writ of mandamus is issued directing R-3 to include the name of the petitioner in the category of widows of Army Personnel as per the seniority of her application dated 05.05.2007 in Dwarka Scheme and if necessary hold a supplementary draw for the same.

30. The writ petition is accordingly allowed with costs of Rs. 5,000/- against R-3.