

(1999) 12 BOM CK 0051
In the Bombay High Court
Case No : Writ Petition No. 545 of 1985

Sudhakar Karegaonkar

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 08-12-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 21, 226, 32
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 11, 13, 2, 9

Citation : (2000) 4 BomCR 113

Hon'ble Judges : B.H. Marlapalle, J;A.S. Bagga, J

Bench : Division Bench

Advocate : Pradeep Deshmukh, for the Appellant; S.K. Kadam, A.G.P. and S.R. Barlinge, for the Respondent

Judgement

B.H. Marlapalle, J.—We seldom come across such a case while exercising our writ jurisdiction under Article 226 of the Constitution of India. The petitioner who was working as a peon under an educational society has approached this Court seeking a mandamus against his employer society to implement the order passed by the School Tribunal u/s 11 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short the M.E.P.S. Act) in an appeal filed u/s 9 of the said Act.

2. The respondent No. 3 (the Nanded Education Society at Nanded) is a society registered under the Bombay Public Trusts Act, and is running educational institutions like schools, colleges etc. at and around Nanded. The petitioner came to be employed as a peon on or about 3-6-1971 by the respondent No. 3 with a technical break at the end of each academic years. However, the petitioner's service was made permanent with effect from 1-4-1977 and he was given the pay-scale of Rs. 250/- p.m. on 30-7-1977. It appears that from time to time the petitioner was making representations to the employer with a request to transfer him to one of the Schools or colleges run by it and his request was not conceded to. On 17-12-1983 he made an application in writing to his employer requesting

to transfer him to one of the colleges run by it and he stated that if his request was not considered, he should be relieved from the service with effect from 1-1-1984. The said request was not decided till 31-12-1983 and he continued to work for the society even after 1-1-1984 as the employer did not relieve him on 1-1-1984 as was requested in his representation dated 17-12-1983. Realising the practical difficulties in real life, by letter dated 10-1-1984 he requested his employer to treat his letter dated 17-12-83 as cancelled and withdrawn. The management had not replied either on the letter dated 17-12-83 or the subsequent withdrawal application dated 10-1-84 and all of a sudden on 19-3-1984 he was informed that he was relieved from service pursuant to his letter dated 17-12-1983 and it appears that the said letter was treated as a letter of resignation. The petitioner therefore, approached the School Tribunal by filing an appeal u/s 9 of the M.E.P.S. Act. The management opposed this appeal on the grounds that (a) the appeal was not tenable as the appellant-petitioner was not an employee of a private school as defined under the M.E.P.S. Act, (b) even otherwise there was no case of termination of service at the hands of the management and hence, there was no cause of action to file an appeal. Both these preliminary objections were negatived by the Tribunal and the Tribunal by its judgment and order dated 28th September 1984 (in Appeal No. 42/84) allowed the appeal and held that the action of the management in removing the appellant on the plea of resignation was illegal and the said action of the management was set aside with a further direction to reinstate the appellant-petitioner as a peon with effect from 19-3-1984 with back wages. It was further made clear that the management was at liberty either to retain the petitioner in its office or transfer him to any of the Schools/Colleges run by it.

3. This judgment and order of the Tribunal was not challenged by the respondent-society and instead it preferred to file a review application before the Tribunal. The said application was registered as Misc. Application No. 6/ 84 and it was rejected by an order dated 29-4-1985 mainly on the ground that there was no specific power vested with the Tribunal to review its own order under the scheme of the M.E.P.S. Act. This order of the Tribunal was also not challenged by the respondent society at any time in appropriate writ proceedings and therefore, the order of reinstatement with back wages became final. The employee went on approaching the respondent society with a request to implement the order of the Tribunal for his reinstatement and payment of back wages and his efforts were futile. He appears to have submitted an application u/s 11(3) of the M.E.P.S. Act before the Tribunal seeking recommendations to the State Government directing to deduct the amount of salary payable to the petitioner from its grants. The employee did not hear anything further either from the management or from the School Tribunal and therefore, as a last resort, he approached this Court in the instant writ petition which was admitted by the Division Bench 21-2-85 and the rule was restricted only to prayer Clause (c) which reads thus :---

"It is therefore, prayed that a writ of mandamus or an order or direction in the nature of writ of mandamus be issued ordering the respondent No. 3 society to

follow, act upon and accordingly take the petitioner in the service immediately pursuant to the judgments and orders at Exhibits "A" and "B" to the above petition."

4. It must be noted at this stage that during the pendency of this petition, the petitioner had also approached the School Tribunal in Misc. Application No. 2/91 filed u/s 13 of the M.E.P.S. Act and the respondent management opposed the said application solely on the ground that the petitioner's prayer for directions to implement the order of reinstatement passed by the Tribunal was already a subject matter of the instant petition pending before this Court. This contention of the management was upheld and by order dated 20-4-1992 the School Tribunal dismissed the application u/s 13 of the M.E.P.S. Act filed by the petitioner.

5. The following legal questions are raised for our consideration,

(a) whether the appeal filed by the petitioner u/s 9 of the M.E.P.S. Act was maintainable.

(b) whether the instant petition is required to be dismissed on the ground of alternate and efficacious remedy available u/s 11(3) and section 13 of the M.E.P.S. Act,

(c) whether a writ of mandamus can be issued by this Court under Article 226 of the Constitution of India against the respondent society to implement the order passed by the Tribunal.

6. Section 2 of the M.E.P.S. Act, deals with the definitions and Clause 7 of the said section defines the term employee which means any member of the teaching and non-teaching staff of a recognized school. Clauses 9, 12 and 20 which are relevant for the present purpose set out the definitions of the term head of a school, management and private school respectively and hence, the said clauses are reproduced as under :---

"(9) "Head of a school" or "Head" means the person, by whatever name called, incharge of the academic and administrative duties and functions of a school conducted by any management and recognised or deemed to be recognised under this Act, and includes a Principal, Vice-principal, Head master, Head mistress, Assistant head master, Assistant head mistress or superintendent thereof.

(12) "Management" in relation to a school, means,

(a)

(b)

(c) in any other case, the person or body of persons, whether incorporated or not any by whatever name called, administering such school.

(20) "private school" means a recognised school established or administered by a

Management, other than the Government or a local authority."

7. It has been contended by the respondent society that the petitioner was working all along in its office and he was not posted in any school or college run by it and therefore, he did not fall within the definition of an employee as set out under the M.E.P.S. Act, and therefore, his appeal was not maintainable u/s 9 of the said Act. It is also urged before us that the order passed by the School Tribunal granting relief in favour of the petitioner by exercising its power u/s 11(1) of the M.E.P.S. Act, is a nullity in law and therefore, it was not binding on the society to implement the said order.

8. In its written statement filed before the School Tribunal opposing the appeal of the employee on the grounds of its tenability the respondent management did not state that (a) the non-teaching employees working in the office were not transferable to any of its educational institutions, either a college or a school, (b) that the service conditions of such non-teaching staff in the office of the society were governed by a separate set of rules and not by the terms and conditions as were applicable to the employees in the Schools under the provisions of the M.E.P.S. Act as well as the M.E.P.S. Rules, 1981, (c) the salaries of such employees in the office of the society were paid not from the grants received from the Government towards such educational institutions but from its own funds, (d) and the society was not running educational institutions alone but it was running some other institutions engaged in activities other than educational activities. It was incumbent upon the management to not only come out with such specific pleas, but also to prove such pleas by way of leading evidence before the School Tribunal to prove its case that the petitioners was an employee of the society alone and he had no connection whatsoever with any of the Schools or colleges run by it specially when it was the case of the petitioner that on and off he used to be posted for attending duties in any school or college run by the said society.

9. If a private institution which falls within the term management as defined u/s 2(12) of the M.E.P.S. Act, is not running any other institution other than an educational institution, it cannot be accepted, per se, that an employee working in the office of such a society is not governed by the conditions of service prescribed under the M.E.P.S. Act or the rules framed thereunder. Merely taking a stand that the appellant was not covered under the provisions of M.E.P.S. Act, was not sufficient to oust the jurisdiction of the Tribunal u/s 9 read with section 11 of the said Act. So long as the respondent society is engaged in running only educational institutions and has not prescribed separate set of rules to govern the service conditions of the employees working in its office, it ought to be held that such employees are performing the work in connection with such educational institutions as are run by the society and the employee aggrieved by any action of the management may have an option either invoking a remedy under the M.E.P.S. Act, the Maharashtra Universities Act, 1994 or under the Industrial Disputes Act or the Maharashtra Recognition of Trade Unions and

Prevention of Unfair Labour Practices Act, 1971. The choice, however, to elect the remedy shall be solely with the employee and if he has elected any of these remedies, the jurisdiction of the authorities created by any of the said statutes cannot be ousted at the behest of the management unless it is proved by cogent evidence that the employee had some other alternate and equally efficacious remedy. It was strange to note that the management did not specify as to what was the remedy available to the employee and it merely confined to say that the remedy provided under the M.E.P.S. Act, was not available to the employee. Such an attitude on behalf of an institution which is engaged in a noble activity of running educational institutions requires to be deprecated. Undoubtedly, the appeal filed by the employee u/s 9 of the M.E.P.S. Act was tenable before the Tribunal and the contention of the society in this regard must fail.

10. The employee had, by his subsequent application dated 10-1-1984, withdrawn his earlier application dated 17-12-83 which was not acted upon by the management till then and in spite of this letter all of a sudden on 17-3-1984 the management informed him that he was relieved from its service in pursuance of his resignation letter dated 17-12-1983. When the employee had withdrawn that letter specifically by his application dated 10-1-1984 and before the management had intimated its decision on the said letter dated 17-12-83, the letter did not continue to exist any time after 10-1-1984. The said alleged resignation letter stood withdrawn on 10-1-1984 itself and it did not exist as on 17-3-1984. The discontinuation of the employment of the petitioner in such circumstances was nothing short of the termination of his service and it is well settled by a catena of decisions that even a forced resignation also amounts to termination of service. We therefore, hold that the employee had a cause of action to file an appeal before the School Tribunal and the said appeal was maintainable.

11. Section 11(3) of the M.E.P.S. Act, empowers the Tribunal to recommend to the State Government that any dues directed by it be paid to the employee by deducting from the grants due and payable to such a management running the educational institutions. In the case of *Mohammedi Fida Hussain v. State of Maharashtra and others* 1986 MH LR 1250, this Court while interpreting the provisions of the said section held that the remedy provided thereunder is as effective as that of more unorthodox execution and it is an independent remedy which can be exercised by the employee pointing out the failure of the school management to comply with the order of the School Tribunal, directing payment to him. Section 13 of the M.E.P.S. Act is a penal provision and it states that if the management fails, without any reasonable cause, to comply with any direction issued by the Tribunal u/s 11, the management shall on conviction be punished. A Division Bench of this Court in the case of *Chandrakant Ganpat Shelar and others v. Sophy Keely, Hill Garange High School, Bombay and others* 1987 MH LJ 1012 held that the School Tribunal constituted under the M.E.P.S. Act is a Court within the meaning of the Contempt of Courts Act and hence, defiance of order passed by the School Tribunal can be punished under the Contempt of Courts

Act. It is on the basis of these two provisions namely section 11(3) and section 13 of the M.E.P.S. Act, the society has contended that the instant petition is not maintainable and the employee had an alternate and equally efficacious remedy. As has been stated in the opening paragraphs itself that the petitioner in the instant case has exhausted these remedies and his application filed u/s 13 of the M.E.P.S. Act during the pendency of this petition has been dismissed by the School Tribunal solely on the ground that his prayer for seeking directions to implement its order was pending for considerations by this Court in the instant petition. The petitioner has approached this Court as a last resort and he has failed in his continued efforts to mandate the respondent society to implement the order passed by the School Tribunal in his favour and specially when that order had become final in view of the fact that the management did not challenge it before this Court even by a cross appeal. In the case of Hanumansingh Thakur Vs. Municipal Council and Others, , this Court held that though, normally the High Court does not in its discretion entertain a writ petition under Article 226 of the Constitution of India, where there existed an adequate alternate remedy and the question regarding the maintainability of the writ petition has to be decided on the facts of each case, in regard to the exercise of its discretion on the question whether the party should be relegated to the statutory remedies or whether the High Court should entertain the writ petition and decide the same. Under these peculiar facts and circumstances of this case, the contentions that the petition is not maintainable do not hold ground and the said contentions are therefore, rejected.

12. The respondent society in its continued efforts to persuade us to reject the petition on the preliminary grounds of untenability, further submitted that a writ of mandamus cannot be issued by this Court against it as it is a private body and is not an authority as defined under Article 12 of the Constitution of India. These arguments fail to impress us. While dealing with the issue of jurisdiction of the High Court under Article 226 of the Constitution of India, Krishna Iyer, J., (as then he was) speaking for the Supreme Court in the case of Rohtas Industries Ltd. and Another Vs. Rohtas Industries Staff Union and Others, observed :

"The expansive and extraordinary power of the High Court under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person even a private individual - and be available for any (other) purpose - even one for which another remedy may exist. The amendment to Article 226 in 1963 inserting Article 226(1A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to the residence of such person. But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop. This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Court will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the

people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights."

13. In the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, the petitioner, a private college teacher, was denied the revised pay-scales as were approved by the University and a plea was raised that writ petition seeking a mandamus against the college to implement the revised pay-scale was not maintainable. The Supreme Court held that the service conditions of a college teacher are not purely of a private character and they are protected by University decisions creating a legal right - duty relationship between the staff and the management and such decisions were binding on the management and therefore, the mandamus could not be refused to the teacher. Dealing with the scope of powers under Article 226 to issue a mandamus against a private body, the Supreme Court stated :

"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. The law relating to mandamus has made the most spectacular advance. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is striking departure from the English law. Under Article 226, writs can be issued to "any person or authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose." 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. It may be pointed out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226 of the Constitution."

14. In the case of *Francis John Vs. Director of Education and Others*, the

Supreme Court held that any private school which receives aid from the Government under the Grant-in-Aid Code, which is promulgated not merely for the benefit of the management but also for the benefit of the employees in the school for whose salary and allowances the Government was contributing from the public funds under the Grant-in-Aid Code cannot escape from the consequences flowing from the breach of the Code.

15. In Writ Petition Nos. 278/93 and 1344/94 (at Mumbai) a Division Bench of this Court considered the issue as to whether a School recognised by the Government is amenable to the writ jurisdiction under Article 226 of the Constitution and while relying upon the earlier judgment in Writ Petition No. 2363/87 dated 14-2-1995 and by examining the scheme of the M.E.P.S. Act as well as the rules thereunder, by judgment dated 9-9-1997 it has been held that writ of mandamus can be issued against a private school, whether aided or unaided, to perform a statutory duty. The respondent society is solely engaged in running educational institutions and these institutions are not only recognised by the Government but are also receiving grant-in-aid from the Government. The society is registered under the Bombay Public Trusts Act, 1950 and is thus a juristic person. By running educational institutions, the society is performing the functions of the State so as to fulfill the rights guaranteed under Article 21 of the Constitution. In an appeal filed by the employee the School Tribunal constituted under the special statute namely the M.E.P.S. Act had passed an order directing it to reinstate the appellant in its service with back wages and its plea that the appeal was not tenable was rejected not only once but twice. This order reached its finality undoubtedly. When a juristic corporate body like the respondent society fails to implement and that to deliberately, an order passed by a Tribunal constituted under a special statute and the beneficiary employee fails in his endeavour to get such an order implemented by resorting to all alternative remedies, his writ application filed before this Court as a last resort must be held to be tenable against such a society though it is a private society. A society which has a juristic character is required to follow the provisions of law including the orders passed by a Tribunal created by law and when it refuses to do so, a writ of mandamus against such a society must validly go.

16. The respondent society did not stop here alone and instead it persisted in its continued monstrosity by contending that it was not obliged to implement the order of the Tribunal directing reinstatement of the petitioner, on the ground that the said order was a nullity in the eyes of law and it was not obliged to implement such an order. In support of these contentions it placed reliance on the following judgments :

- 1) Kiran Singh and Others Vs. Chaman Paswan and Others, .
- 2) Sughanmal Nandlal Bhandari Vs. State of Madhya Pradesh and Others, .

In the case of Kiran Singh (supra) the Supreme Court held that it is a fundamental principle that a decree passed by a Court without jurisdiction is a

nullity and its invalidity could set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. The Supreme Court further observed that a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

In the case of Suganmal Nandlal (*supra*) the tax assessment order passed by the State was set aside but there was no specific directions for refund of tax. A writ petition came to be filed for issuance of a writ of mandamus for enforcing a statutory duty or obligation for refund of tax and it was in these circumstances that the Division Bench of Madhya Pradesh High Court held that the order setting aside the assessment did not necessarily involve an implied direction for the refund of tax amount paid and even if it be taken that the orders of the appellate authority necessarily imposed an obligation to refund the tax amount, a writ of mandamus could not be issued for that purpose and to do so would be to execute the decisions of the Appellate Authority setting aside the assessment and a writ of mandamus cannot be issued for the execution of a decree or an order.

17. We have already held that the appeal filed by the petitioner u/s 9 of the M.E.P.S. Act was maintainable before the School Tribunal and the order passed by the School Tribunal was not without jurisdiction. Having regard to these findings, the respondent-society's plea that the order passed by the School Tribunal in favour of the petitioner was a nullity or it did not exist in the eyes of law, is unsustainable.

18. The petitioner has been knocking the doors of justice for the last more than 15 years and in his quest for justice, he has moved from pillar to post. His approach to this Court has remained dormant for the last about one and half decade. The School Tribunal has examined his claim of illegal termination of service on merits as well and held that he was illegally removed by the respondent society. These findings were never challenged by the society and in our considered view they are well reasoned. The orchestrated acts of the society have been, all along, to defeat the petitioner's claim only on technicalities and hyper technicalities. Even before this Court, the society has not filed any return explaining its activities other than educational, if any or how the petition was not tenable and how the order passed by the Tribunal was a nullity in law or it suffered from manifest errors on the face of the record both on facts and/or law. The petitioner has by now reached the age of 50 years and he has spent all his youth in waiting for justice. There is nothing on record to show that he was gainfully employed during all these years of waiting. It is therefore, imperative that our order encompasses the spirit of full justice to the petitioner and would be a pointer to uphold the majesty and authority of law.

19. In the result, we allow the petition and direct the respondent society to reinstate the petitioner in its service forthwith and pay him the back wages from

17-3-84 till he is reinstated, with all consequential benefits within a period of two months from today. In case the petitioner is not reinstated and/or his arrears of back wages are not paid within the period stipulated, we direct the respondent State through the Deputy Director of Education to deduct the amount of monthly salary including the arrears from the grants payable to the respondent society and pay to the petitioner. The petitioner shall be entitled for simple interest on the amount of arrears in salary at the rate of 12% p.a. and this interest amount shall be borne by the society alone and shall not be claimed from the State. We further direct the society to pay an additional amount of Rs. 40,000/- to the petitioner by way of fine as contemplated u/s 13(1) of the M.E.P.S. Act, within a period of one month from today.

20. Rule made absolute accordingly. No order as to costs in view of the find imposed against the employer.

21. Petition allowed.