
(2010) 07 AHC CK 0370
In the Allahabad High Court

Union of India (UOI) and Others

APPELLANT

Vs

Dileep Kumar Pandey

RESPONDENT

Date of Decision : 12-07-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 17, 19, 21, 226

Citation : (2010) 07 AHC CK 0370

Hon'ble Judges : Ferdino Inacio Rebello, C.J;A.P. Sahi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal is essentially on behalf of the management of Air Force School, Bamrauli, district Allahabad, questioning the correctness of the judgment of the learned single Judge dated 13.1.2010, whereby the institution in which the respondent - petitioner is working as a teacher, has been held to be amenable to the writ jurisdiction of this Court and further the petition has been allowed quashing the orders dated 28.6.2007, 9.8.2007 and 22.8.2008. These orders were challenged by an amendment during the pendency of the writ petition. The appointment of the respondent - petitioner from regular to contractual and consequential payments of salary was the subject matter of the writ petition.

2. The appellants herein raised a preliminary objection to the maintainability of the writ petition on the ground that neither the institution nor the Society managing the institution was amenable to the writ jurisdiction of this Court as it was not an instrumentality of the State within the meaning of Article 12 of the Constitution of India. This preliminary objection was taken setting out the averments in paragraph Nos. 3, 4, 8 and 9 of the counter-affidavit filed before the learned single Judge. This reply was in response to the averments contained in paragraph Nos. 5 and 6 of the writ petition, where it was alleged that the Air Force School established under a Society registered under the Societies Registration Act and governed by the education code of the Air Force School falls within the meaning of word State under Article 12 of the Constitution of India.

The reply to the averments contained in the counter-affidavit including the preliminary objection were replied by the respondent - petitioner by filing a rejoinder-affidavit and no further facts were either pleaded or brought on record in the said Affidavit in rebuttal to the contentions raised on behalf of the appellants.

3. The learned single Judge over ruled the preliminary objection with regard to maintainability of the writ petition by relying on the decision in the case of Anoop Kumar Pandey v. Union of India and Ors. (2003) 1 UPLBEC 186 and the decision in the case of Sanjai Kumar Sharma v. Central Board of Secondary Education and Ors. 2006 (7) ADJ 322 (DB). The learned single Judge also referred to the decisions, which were relied upon by the appellants in the case of Army School Vs. Smt. Shilpi Paul, Girish Kumar Mishra v. District Inspector of Schools 1999 (1) ESC 47, and Dr. A.K. Gupta v. Rajghat Education Centre (2003) 2 UPLBEC 336. He however did not find these decisions applicable as they were distinguishable on facts.

4. The learned single Judge thereafter also entered into the merits of the matter and allowed the writ petition.

5. We have heard Sri Ajay Bhanot for the appellants and Sri M.K. Tiwari for the sole respondent - petitioner.

6. Sri Bhanot, advancing his submissions, urged that the institution where the respondent - petitioner is employed is run under a registered Society which operates under its own by-laws framed under the Societies Registration Act, 1860. The apex body of the Society is stationed at New Delhi and institutions have been established for the education and welfare of the wards of the Air Force personnel throughout the country. The institution presently in question is within the Central Air Command Bamrauli Allahabad and according to the bye-laws, the Officers by virtue of their rank and position in the Air Force are ex-officio members of the governing body. It is submitted that they are not functioning in any official capacity and are simply part of the managing body of the institution. He submits that there is no governmental control at all and no funds are received from the government by the Society for running and management of the institution. The Society has its own fund and finances that are received either through welfare funds voluntarily contributed by the Officers or through the fees realised from the students. He, therefore, submits that there is neither any control nor any finances are made available that may give a colour of State to the Society within the meaning of Article 12 of the Constitution of India. In essence, he submits that there is neither any deep or pervasive control and even though a public function of imparting education is being performed by the institution, the same would not automatically make the institution amenable to the writ jurisdiction of this Court in relation to the dispute of its employees. Sri Bhanot has placed reliance on a large number of decisions, the compilation whereof has been handed down to us but he has particularly invited our attention to the decision in the case of Army School, Gorakhpur (supra), the unreported

decision in the case of Mrs. Asha Khosa v. Chairman, Army Public School and Ors. Writ Petition (Service) No. 1415 of 1996, decided by a Division Bench of the High Court of Jammu and Kashmir on 17.2.1997 and the order of the Apex Court dated 31.3.1997 in a Special Leave to Appeal against the judgment of the case in Asha Khosa (supra). The Apex Court dismissed the SLP and upheld the judgment of Asha Khosa. He has further invited our attention to paragraph Nos. 22 and 25 in particular read with paragraph Nos. 28 and 29 of the decision in the case of Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, , which in turn refers to the constitution Bench decision in the case of Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, On the strength of these decisions, Sri Bhanot contends that the test laid down are not satisfied in the present case and, therefore, the writ was not maintainable. He further submits that the learned single Judge has placed reliance in the case of Anoop Kumar Pandey (supra) which stands impliedly over ruled inasmuch as that decision had placed reliance on the case of Smt. Rajni Sharma v. Union of India and Ors. (1995) 3 UPLBEC 1664, which came to be expressly over ruled by the Division Bench in the case of Army School, Gorakhpur (supra).

7. His second limb of submission is directed towards the judgment in the case of Sanjai Kumar Sharma (supra) on which reliance has been placed by the learned single Judge for allowing the writ petition. Sri Bhanot invited the attention of the Court to paragraph Nos. 15 to 17 of the said decision to contend that the same is not a ratio decidendi and is not binding inasmuch as it does not lay down the law specifically answering the amenability of such a Society to the writ jurisdiction of the Court on the basis of the definition of State as contained in Article 12 of the Constitution of India.

8. Replying to the aforesaid submissions, Sri M.K. Tiwari contended that the foundation alleging that the institution was a State within the meaning of Article 12 of the Constitution of India has already been laid in the writ petition particularly in paragraph Nos. 5 to 7 thereof and the reply by the appellants - respondents does not in any way dilute that status, as such, the learned single Judge relying on the decision of Anoop Kumar Pandey (supra) and Sanjai Kumar (supra) rightly came to the conclusion that the preliminary objection of the appellant was unfounded. He submitted that once the officials of the Air Force are in control over the institution, they being public functionaries, it has to be presumed that there is an exclusive governmental control. He further submits that there is no doubt in view of the constitutional mandate that imparting of education is a public function is being discharged by the appellants and, therefore, they cannot escape from the scrutiny of this Court under Article 226 of the Constitution of India. He further submits that the institutions are housed within the control of the appellants and the funds that are made available maintain the institutions so as to bring the school within the definition of the word "State" as contained in Article 12 of the Constitution of India.

9. We have given our thoughtful consideration to the submissions raised on this

preliminary point relating to the maintainability of the writ petition. From the facts as pleaded, it is undisputed that the respondent - petitioner is an employee of the school which is not governed by any statutory regulation. The Society, which manages the institution, has its own education code so framed, which does not have any statutory sanction. At least, learned Counsel for the respondent - petitioner has been unable to point out any such existence of a rule or regulations having statutory flavour. The institution is admittedly established by a Society registered under the Societies Registration Act and is governed by its own by-laws. The only factual averments made by the petitioner in the writ petition are to the following effect:

5. That for the effective management and administration of the Air Force School at various units, the Society has framed an "Education Code Air Force Schools 2005. The Code aforesaid is identical to Education Code framed for the managing to Kendriya Vidyalay.

6. That the Air Force Schools are financed by the Central Government, through Indian Air Force School, controlled by the officers of the Indian Air Force and the purposes is to impart education to the children of officers and employees of the Indian Air Force. The Air Force Schools come within the meaning of the word "State" under Article 12 of the Constitution of India.

7. That the Air Force School, Bamrauli, Allahabad, is a school established by the aforesaid Society and the said school comes under the definition of "State" under Article 12 of the Constitution of India.

10. Apart from this, there is nothing in the writ petition to indicate that the School is funded through any government allocated fund or any control over the management under the authority of the government. The management is entrusted to the Officers under the by-laws of the Society. This nature of control is an administrative control and cannot be termed as a control by the government. In the absence of anything further, it will not be possible to construe either factually or legally that there is a governmental control much less a deep and pervasive control over the institution. So far as the finances are concerned, the appellant - respondent have categorically stated in their counter-affidavit that neither the welfare fund which is a voluntary contribution by the Officers is a fund allocated by the Government nor the Central Government or the State Government in any way extend any such financial aid to the institution. It has been further averred that the finances are arranged out of the fees collected from the students under various heads and the same is supplemented by the contribution of the Air Force personnel which is voluntary in nature. It has also been categorically stated that the by-laws namely the Education Code Air Force School 2005 which govern the terms and conditions of service of the respondent - petitioner are neither statutory nor do they indicate any state control.

11. A rejoinder-affidavit to the said Affidavit on behalf of the appellants has been

filed by the petitioner and there is no denial or any material to the aforesaid specific and categorical averments made in the counter-affidavit. The respondent - petitioner, therefore, apart from the bald averments in the writ petition did not bring on record any material to establish as a matter of fact that the School was either functionally, administratively or financially under the control of the government. This being the factual position on record, we may now turn towards the decisions which have been relied upon by the learned Counsel for the parties.

12. The learned single Judge relied on 2 decisions in order to meet this preliminary objection. The decision in the case of Anoop Kumar Pandey (supra) relied on the decision in the case of Smt. Rajni Sharma (supra). The decision in the case of Rajni Sharma came to be scrutinised in Army School, Kuraghat, Gorakhpur (supra) and the Division Bench vide judgment dated 16.8.2004 overruled the decision in the same holding that the Army Welfare Society and the institution managed by it were not amenable to the writ jurisdiction of the court as the Society and the institution were not State within the meaning of Article 12 of the Constitution. In this view of the matter, in our opinion, the law laid down in the case of Anoop Kumar Pandey does not hold water. The learned single Judge in the impugned judgement even though took notice of the aforesaid Division Bench judgment yet without considering the ratio of the same and without even discussing the contents thereof, held that it was distinguishable on facts. In our opinion, it is well known that though two cases are ordinarily not identical on facts yet the ratio of the decision has to be looked into in the light of the facts pleaded, and we therefore, find that the learned single Judge has committed an error by distinguishing the said Division Bench judgment even without taking notice of the ratio of the same.

13. The second decision relied upon by the learned single Judge in the case of Sanjai Kumar Sharma (supra) arose in relation to the dispute of the post of Principal of Air Force Station, Bamrauli, who is the appellant before us and, therefore, the said decision is directly in issue. We may quote paragraph Nos. 11 to 17 for reference:

11. One of the points strongly pressed on behalf of the respondents is that the writ was not maintainable, as the School is not Article 12 authority. It was said that the School is run by a Society registered on 25.9.1980, and that the funding is basically by the fees paid and the contributions of Air Force personnel, and allegedly not one rupee comes by way of State aid.

12. The Education Code handed up to us, which has been framed by the Chairman of the Board of Governors of the Indian Air Force Education and Cultural Society, bears the emblem of the Indian Air Force on its top cover. Chapter 8 Rule 9 of the said book deals with how the finances are received; grant-in-aid as well as interconnection with other service institution funds, is mentioned.

13. Mr. Vijay Bahadur Singh, learned Senior Advocate relied on several Supreme

Court cases in this regard. It is well known that the three important factors for considering whether the authority is an Article 12 authority or not, are (i) finance, (ii) control and (iii) purpose of the Institution. State financing tends to make the Institution come within Article 12; so does State control; so does public purpose, say, education as opposed to golfing activity.

14. One of the other possible ways of looking at it would be to imagine a hypothetical removal in one's mind of all State activity, and see whether the Institution would survive such removal. As an example, I.T.C. would certainly survive and it is certainly not an Article 12 authority. But cases which come to Court are not so simple, and all facts and circumstances have to be examined in each case. This is also well settled law. Would this School survive if all "State and Government" were removed from India? That is the question to look the answer for.

15. Yet another aid in deciding whether the authority is an Article 12 or not, is to ask oneself the question whether it is reasonable to treat the authority as at par with the State. Not identical, but a similar question is whether it would be unreasonable to exclude the authority from being treated as a State.

16. If the School is not an Article 12 authority subject to a writ scrutiny, then and in that event, a prospective employee, like the appellant would have no recourse against the School, or the Board, if he were simply kept out of the run without assigning any reason or justification at all; if even no advertisement is issued; if out of reasons of personal choice, say, the twentieth in the list were preferred to the first. He would not be able to file a suit as he has no contractual or other relationship and he is not a member of the Society either. He would have no recourse, just as he would have no recourse, if somebody were selected as a Manager in one of the small departments of I.T.C. It is for the Court to examine whether this is the reasonable view to take in the facts and circumstances of this case.

17. On a balance of convenience, it is manifestly clear to us that the appellant has an arguable case in both the appeals. Although the show cause was made a subject of the writ two months after it was issued, yet one cannot exclude from consideration the fact that it takes time for a layman to get prepared with a law case and to file it in Court before anything could be done, the removal order also came. It was at first thought that the writ against the removal had become infructuous, but later on it appeared, may be on queries made by the Court itself that if the show cause is inextricably connected with the appointment order of Ms. Kaul, and further, if the ground of mala fides is good, then everything resting upon the show cause has to be quashed along with it.

14. The said decision, in our opinion, proceeds on a hypothetical examination of the situation without laying down the law as to whether the Society which maintains the institution is amenable to the writ jurisdiction of the Court. The question that was posed by the Division Bench was, would this School survive if

all "State and Government" were removed from India and whether it would be unreasonable to exclude the authority from being treated as State. The conclusion drawn and the reason given for the same by the Division Bench is that the employees would have no recourse against the School by the Board if he was kept out of the run without assigning any reason or justification. Accordingly, the Bench presumed that this would be too harsh on the employee and, therefore, on a balance of convenience, the matter was entertained without, in our opinion, rendering any ratio decidendi to the question of amenability of the institution to the writ jurisdiction. In our opinion, the said decision does not in any way lay down the law as an absolute proposition that such a Society and the institution managed by it is a State within the meaning of Article 12 of the Constitution of India. This decision was rendered on 11.9.2006 and we find that it has proceeded on its own facts without noticing the decision in the case of Army

15. School, Gorakhpur (supra) which has been decided and reported earlier in 2004. The legal position in this matter stands concluded on the facts of this case keeping in view the ratio of the decision in the case of Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, This has been quoted with approval in paragraph No. 22 of the decision in the case of Zee Telefilms Ltd. (supra). We have found as a matter of fact that there was no material on record to demonstrate that the institution was either functionally, financially or administratively dominated or controlled by the Government. At the best, there may be a limited contribution in the shape of providing the premises for setting up the School but there is no material to indicate that the Schools have been set up through government funds.

16. Learned Counsel for the respondents placed reliance on the decision in the case of Indian Sainik School Employees Association v. Defence Ministry cum Chairman AIR 1989 SC 88, to contend that such a welfare school set up by the Defence Ministry and which is also managed by a body registered under the Societies Registration Act, has been held to be the State within the meaning of Article 12 of the Constitution of India. We have read the said decision carefully and we find that there were specific pleadings in that case about the governmental control and substantial funding by the Defence Ministry to establish Sainik Schools. It was, therefore, found as a matter of fact that the State had deep and pervasive control through its financial involvement and administrative control and hence the Apex Court ruled that its activities being a public function with help of governmental control, any dispute in relation thereof would be amenable to the writ jurisdiction. On facts found the said decision proceeded to hold that the Society was a State within the meaning of Article 12 of the Constitution of India. The aforesaid case is, therefore, clearly distinguishable on facts as in the present case nothing has been established to conclude that the appellants fall within the meaning of State as described under Article 12 of the Constitution of India.

17. Coming to the question of the nature of the function performed suffice would

be to quote paragraph No. 25 to 29 of the judgment in the case of Zee Telefilms Ltd. (supra) reproduced herein below:

25. Assuming for argument sake that some of the functions do partake the nature of public duties or State actions they being in a very limited area of the activities of the Board would not fall within the parameters laid down by this Court in Pradeep Kumar Biswas's case. Even otherwise assuming that there is some element of public duty involved in the discharge of the Board's functions even then as per the judgment of this Court in Pradeep Kumar Biswas (supra) that by itself would not suffice for bringing the Board within the net of "other authorities" for the purpose of Article 12.

26. The learned Counsel appearing for the petitioners, however, contended that there are certain facets of the activities of the Board which really did not come up for consideration in any one of the earlier cases including in Pradeep Kumar Biswas case (supra) and those facts if considered would clearly go on to show that the Board is an instrumentality of the State. In support of this argument, he contended that in the present day context cricket has become a profession and that the cricketers have a fundamental right under Article 19(1)(g) to pursue their professional career as cricketers. It was also submitted that the Board controls the said rights of a citizen by its rules and regulations and since such a regulation can be done only by the State the Board of necessity must be regarded as an instrumentality of the State. It was also pointed out that under its Memorandum of Association and the rules and regulations and due to its monopolistic control over the game of Cricket the Board has all pervasive powers to control a person's cricketing career as it has the sole authority to decide on his membership and affiliation to any particular Cricketing Association, which in turn would affect his right to play cricket at any level in India as well as abroad.

27. Assuming that these facts are correct the question then is, would it be sufficient to hold the Board to be a State for the purpose of Article 12?

28. There is no doubt that Article 19(1)(g) guarantees to all citizens the fundamental right to practise any profession or to carry on any trade occupation or business and that such a right can only be regulated by the State by virtue of Article 19(6). Hence, it follows as a logical corollary that any violation of this right will have to be claimed only against the State and unlike the rights under Articles 17 or 21 which can be claimed against non state actors including individuals the right under Article 19(1)(g) cannot be claimed against an individual or a non State entity. Thus, to argue that every entity, which validly or invalidly arrogates to itself the right to regulate or for that matter even starts regulating the fundamental right of the citizen under Article 19(1)(g), is a State within the meaning of Article 12 is to put the cart before the horse. If such logic were to be applied every employer who regulates the manner in which his employee works would also have to be treated as State. The prerequisite for invoking the enforcement of a fundamental right under Article 32 is that the violator of that right should be a State first. Therefore, if the argument of the

learned Counsel for the petitioner is to be accepted then the petitioner will have to first establish that the Board is a State under Article 12 and it is violating the fundamental rights of the petitioner. Unless this is done the petitioner cannot allege that the Board violates fundamental rights and is therefore State within Article 12. In this petition under Article 32 we have already held that the petitioner has failed to establish that the Board is State within the meaning of Article 12. Therefore assuming there is violation of any fundamental right by the Board that will not make the Board a "State" for the purpose of Article 12.

29. It was then argued that the Board discharges public duties which are in the nature of State functions. Elaborating on this argument it was pointed out that the Board selects a team to represent India in international matches. The Board makes rules that govern the activities of the cricket players, umpires and other persons involved in the activities of cricket. These, according to the petitioner, are all in the nature of State functions and an entity which discharges such functions can only be an instrumentality of State, therefore, the Board falls within the definition of State for the purpose of Article 12. Assuming that the abovementioned functions of the Board do amount to public duties or State functions, the question for our consideration is: would this be sufficient to hold the Board to be a State for the purpose of Article 12. While considering this aspect of the argument of the petitioner, it should be borne in mind that the State/Union has not chosen the Board to perform these duties nor has it legally authorised the Board to carry out these functions under any law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (self-arrogated). In such circumstances when the actions of the Board are not actions as an authorised representative of the State, can it be said that the Board is discharging State functions? The answer should be No. In the absence of any authorisation, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State. The Union of India has tried to make out a case that the Board discharges these functions because of the de facto recognition granted by it to the Board under the guidelines framed by it but the Board has denied the same. In this regard we must hold that the Union of India has failed to prove that there is any recognition by the Union of India under the guidelines framed by it and that the Board is discharging these functions on its own as an autonomous body.

18. There is yet another aspect of the matter which deserves to be noted that there has to be an existence of a right guaranteed in a citizen in order to invoke the jurisdiction of this Court. That right has to be an enforceable right under some law or under any guarantee of the Constitution. In absence of any such argument available to the respondent - petitioner, we are unable to persuade ourselves to allow the respondent - petitioner to maintain this petition. We are fortified in our view by the ratio of the Supreme Court decision in the case of Zee Telefilms Ltd. (supra) (paragraph No. 28) to that effect.

19. Thus, in view of our conclusions drawn herein above, it is clear that the respondent - petitioner is an employee of the institution and accordingly in the absence of any statutory rules, or in the absence of any governmental or state control, the respondent - petitioner could not have maintained the instant petition.

20. We may hasten to add that in the matter of private institutions also established under the Societies Registration Act, the issue was raised and answered by a Full Bench decision of our Court in the case of M.K. Gandhi and Others Vs. Director of Education (Secondary) and Others, The Full Bench held that no writ will lie against a private School but it further went on to observe that since the institution was recognized by the Central Board of Secondary Education, the said Board was directed to take action in respect of a dispute relating to the termination of teachers of the Institution. The matter went up to the Apex Court and the Apex Court vide judgment dated 14.8.2007 in Civil Appeal No. 339 of 2007 ruled as follows:

That all the respondents were teachers in DPS School, Ghaziabad. Their services were terminated. Therefore, they approach the High Court of Allahabad for setting aside the termination order. The learned Single Judge referred the matter to a larger Bench on the question as to whether the writ petition is maintainable against the private school or not, as there was conflict of opinion of that High Court. Subsequently, the matter was referred to the larger Bench and the larger Bench after hearing the parties, held that no writ will lie against the private school as it is not a "State" within the meaning of Article 12 of the Constitution of India. Having held that the writ petition is not maintainable against the private body, still, they directed the CBSE to take action, as mentioned above. With great respect to the Full Bench of the High Court, we fail to understand the direction given by the Allahabad High Court. In our opinion, the direction given by the Allahabad High Court to the CBSE is totally misconceived and uncalled for. When the Allahabad High Court has already held that the DPS School is within the meaning of Article 12 of the Constitution of India and the writ petition is not maintainable, there was no necessity for giving a direction to the CBSE which virtually amounts to granting a declaration in favour of those teachers whose services have been terminated. We fail to appreciate the view taken by the Allahabad High Court by unnecessarily complicating the issue by involving the CBSE for a private dispute between the teachers and the DPS. The Allahabad High Court should have stop short of holding that the said DPS is a private body and the writ is not maintainable. Hence, we are of the view that no writ is maintainable against a private school as it is not a "State" within the meaning of Article 12 of the Constitution of India and no direction could have been given by the High Court to the CBSE for interfering with the functioning of the teachers. The proper remedy for the teachers was to file a civil suit for damages, if there was any. Subsequently, we allow this appeal and set aside the order passed by the Allahabad High Court to the extent of giving a direction to the Board. There will be no order as to costs.

21. Accordingly, for the reasons herein above, we find that the learned single Judge fell in error in over ruling the preliminary objection and holding that the writ was maintainable.

22. In such a situation, there was no occasion for the learned single Judge to have entered into the merits of the impugned action of the appellants and the writ petition ought to have been dismissed on this count.

23. The Appeal is, therefore, allowed and the judgment and order of the learned single Judge dated 13.1.2010 is set aside.