
(2004) 05 DEL CK 0026
In the Delhi High Court
Case No : WP (C) No. 5160 of 2001

Vinay Kumar Tyagi

APPELLANT

Vs

Harijan Sevak Sangh and Others

RESPONDENT

Date of Decision : 06-05-2004

Acts Referred:

Citation : (2004) 112 DLT 134 : (2004) 74 DRJ 542 : (2005) 1 SLJ 326

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : M.R. Malhotra, for the Appellant; R.K. Saini and Gautam Kumar for R-3, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Present petition filed on 12th July, 2001 challenges the order dated 17.12.1998 passed by respondent No.3, who is the Secretary of respondent No.1, Harijan Sewak Sangh, terminating the services of the petitioner. Respondent No.1 is a society registered under the Societies Registration Act. It was incorporated following a Resolution passed by Members belonging to the Hindu Community on 25.9.1932. The Resolution records that it would be the duty of Hindu leaders to secure by legitimate and peaceful means an early removal of all social disabilities within the Hindu Community imposed by custom on the so-called untouchable classes.- A laudable object indeed.

2. As per the constitution of the Society, the stated object of the Society is eradication, by truthful and non-violence means, untouchability in Hindu Society with all evils and disabilities suffered by the so-called untouchables, commonly referred to in societies as Harijans.

3. An executive authority called the Central Board stands constituted under the Memorandum of Incorporation of the Society. This Board consists of a President, Vice-President(S), Secretary(S) and Treasurer. Since Regional or State Boards were contemplated to be set up in course of time, Presidents of the Regional

Boards are also the ex-officio members of the Board. In addition, 15 members, to be appointed by the President of the Society would also be on the Central board.

4. The Society is competent to acquire and hold movable and immovable property. Any person who subscribes to the object of the Society is entitled to become its member.

5. The memorandum of incorporation and the bye-laws of the society do not reveal any governmental control in the affairs or the management of the society. There is no government nominee on the board. The government has nothing to do with the incorporation of the society or in running the affairs of the society. It is purely a private body incorporated by Hindus. Of course, object of the society, being removal of untouchability is a laudable social purpose. No monitory consideration towards the corpus of the society came from the Government.

6. Petitioner was employed by the society on 21.7.1981. His appointment was as a B.K.M. Worker. (Terms of appointment have not been filed by the petitioner).

7. On 13.3.1982, petitioner was promoted to the post of Programme Organizer with effect from 8.1.1982. Appointment was for a period of one year. It was indicated that if the scheme, viz. "B.K.M. Programme" was continued for the year 1982-83, candidature of the petitioner for selection to the said post would be considered. Programme was continued. Petitioner continued to function as Programme Organizer.

8. On 11.5.1990, the respondent decided to have an Internal Auditor. On 27.7.1991, petitioner was appointed as an Internal Auditor. On 1.4.1991, services of the petitioner were confirmed as an internal auditor.

9. Petitioner continued to work as an Internal Auditor.

10. Petitioner alleges that he noticed serious financial irregularities which was not to the liking of the management and he sensed that his services would be terminated. Petitioner claims to have addressed a letter to the Members of the Board on 4.9.1997. Petitioner claims that he sent the said letter under Certificate of Posting. Petitioner alleges that his fears came to be well founded, evidenced by the fact that by the impugned order dated 17.12.1998, his services were terminated.

11. Order dated 17.12.1998 reads as under:-

"Shri Vinay Kumar Tyagi was asked vide this Office Memo No.118.07/98-99 1058 dated 1.12.98 to show cause within 7 days, why he should not be removed from service. The charges against him were that (1) he had been refused leave and asked to join his duties vide this office memo No.107.00/98-99/755, dated 2.9.98 but he did not join his duties and applied for further extension of leave which was also refused vide this Office Memo No.118.07/98-99/938, dated 17.10.98. He did not join his duties and is still absenting from duty. (2) During his leave, he had

also taken a job elsewhere without explicit permission of this office. This also constituted gross violation of rules of service in Harijan Sevak Sangh.

Shri Vinay Kumar Tyagi has not given any reply to this show-cause notice so far.

He is, Therefore, removed from the service of the Harijan Sevak Sangh from the date he is absenting from duty, on each of these two charges."

12. The respondent joins issues with the petitioner, inter alia, stating that it is a private charitable organization. It is neither a State nor an instrumentality of the State and hence is not amenable to the writ jurisdiction of this court. It is also contended that the respondent does not perform any duties imposed by a Statute, nor is it regulated by any statutory law in its working. Respondent contends that since it does not perform any statutory obligation much less of a public character, no writ can be issued against it. On facts, respondent states that highly disputed questions of fact arise for adjudication, and Therefore, this court, exercising writ jurisdiction would not adjudicate on the disputed questions of fact. It is further contended that it is purely a private service dispute which is raised by the petitioner. Contract of personal service cannot be specifically enforced. Effect of issuing the writ would be to enforce a contract of personal service which this court would not enforce under Article 226 of the Constitution of India.

13. The factual position which has led to the passing of the impugned order as may be gleaned from the writ petition itself is that the petitioner joined a computer course in the month of August, 1998. Petitioner alleges, in para 7 of the writ petition, that he was assured 3 months leave for completion of the course. Petitioner alleges that he was advised by the Secretary of the Society to seek leave by stating the reason that leave was sought "due to unavoidable work or due to unavoidable circumstances." Petitioner states that he applied for the said leave.

14. Be that as it may, on 28/29.9.1998, respondent issued the following office order to the petitioner :

"OFFICE ORDER

Shri Vinay Tyagi is absent from duty without leave or permission. He will not be paid any salary and advance, or given any loan from his provident fund till his case of unauthorised absence is decided."

15. It was followed by another communication dated 28.9.1998 addressed by the respondent to the petitioner. Following was communicated to the petitioner:-

"You are employed as an Internal-Auditor in the Harijan Sevak Sangh. You were also instructed to assist the Office-Secretary in his work, and deal with audit objections and other related work. You were thus entrusted with very responsible work in the Sangh.

On 25.4.99, you applied for 92 days leave on the ground that you wanted to do a

3 months" course of financial management, which was duly sanctioned w.e.f. 1.5.98.

It was expected that you would resume your duties on the expiry of this leave, with due sense of responsibility. You joined duties on 1.8.98, Saturday which was a half working day, absented from duty on 4-5 August, and applied for granting casual leave, as you could not attend office due to unavoidable work. You attended office on 6th and 7th August. 8th and 9th August were holidays. You again applied for casual leave from 10th to 13th, August due to some unavoidable work. 14, 15 and 16 August were holidays. On 17.8.98, you applied for 15 days leave due to some unavoidable circumstances and remained absent from office without awaiting sanction. On 11.8.98, you again sent an application for extending your leave from 1.9.98 to 30.9.98.

You were informed vide this office memo 107.00/98-99/755, dated 2.9.98, that the leave applied for by you is refused and your presence was and is required in the office for attending to important work connected with sending reports to the Government (like preparing statements of accounts, replies to audit objections and assisting the Office-Secretary).

Though the Order was duly received and noted by you, you did not care to resume your duties and continue to remain absent.

You have also not cared to hand over complete charge of your desk and office as is clear from the enclosed report of Shri Rajeshwar Prasad Tyagi.

The above account of the manner in which you have availed casual leave and applied for leave on the expiry of your leave on 1.8.98, shows that you had no intention to join your duties and discharge your responsibilities, while your presence was needed in the office for dealing with important official work. Your not handing over proper charge before proceeding on leave also amounts to gross dereliction of duty. The keys on one of the office Almirah is still with you, which your duty bound to hand over before proceeding on leave. You have thus rendered yourself unworthy and unfit for holding any responsible charge.

You are Therefore, charged as under:-

- a. Highly irresponsible conduct and rendering yourself unworthy and unfit thereby, for holding any responsible charge by remaining absent from duty without awaiting sanction of leave and not joining duty even after leave was refused and
- b. Not handing over proper charge before proceeding on leave.

A copy of the order dated 2.9.98 refusing leave and a report of Shri Rajeshwar Prasad Tyagi about not receiving complete charge are also enclosed herewith.

Please submit your written statement of defense within 10 days and also intimate if you wish to be heard in person."

16. On 2.9.1998, another communication was addressed to the petitioner. Following was communicated to the petitioner:-

"You have proceeded on leave from 1st September,98 to 30th September,98 without approval. Earlier also, you proceeded on leave in August without approval. Your leaves are refused. Report on duty immediately after receipt of this letter. Your presence was and is necessary in the Office in August and now for the purpose of submission of various important reports to the Government."

17. Petitioner states that on 7.10.1998, by hand, he gave the following response to the communications received by him.

"Sir,

It is to state that the reasons for cancellation of my earned leave mentioned in your letter no.107.00/98-99/863, dated 28/29.9.98 which is received by me on 2nd October, 98, are totally false and baseless.

1. It is surprising charge against me that it is my responsibility to prepare the statement of accounts and their submission to Government. It is foremost duty of Accountant to prepare account statements and not of Internal Auditor. Therefore, if the Accountant failed to do so, then it is not my fault.

2. Before proceeding on leave from 1st May, 1998 onwards, replies of all audit objections were prepared by me and submitted to you for necessary amendments, thereafter, these final replies were handed over to Shri Rajeshwar Prasad Tyagi, English Typist for typing. And if these replies were not submitted to the Government then it is not my fault.

3. I have already submitted my leave applications before in time but after a time of one month now I have been directed to report on duty immediately cancelling my leaves giving baseless charges/reasons. You better know the reasons behind such type of act at your end."

18. I may note that the respondent has denied receipt of the said letter. The same does not bear any endorsement showing receipt by the respondent.

19. On 3.12.1998, the respondent wrote another letter to the petitioner, pointing out that he was absent for the last 3/ 1/2 months. It was communicated to the petitioner that he should let it be known to the respondent whether the petitioner was interested in retaining his job. Following was communicated to the petitioner :

"Shri Vinay Kumar Tyagi,

You have taken a job elsewhere and are absenting from your duty in this office for the last 3-1/2 months and have not joined your duties in spite of our orders. Please let us know why it should not be deemed that you are no longer interested in retaining your job and have resigned it."

20. On 1.12.1998, a notice to show cause was issued to the petitioner requiring

him to show cause within 7 days as to why his services be not terminated on ground of unauthorised absence. Following was communicated to the petitioner :

"Shri Vinay Kumar Tyagi,

You were refused leave and asked to join your duties vide this office memo No.107.00/98-99/755, dated 2.9.98. You did not join your duties and applied for further extension of leave, which was also refused vide this office letter No.118.07/98-99/938, dated 17.10.98. You did not join your duties and are still absenting from duty.

During your leave you have also taken a job elsewhere without the explicit permission of this office. This also constitutes gross violation of rules of service in Harijan Sevak Sangh. Therefore, please show cause within 7 days why your services should not be terminated on each of these counts."

21. Petitioner claims that on 14.12.1998, he submitted his reply to the respondent as under :

"Sir,

You have charged me that I am serving somewhere else and directed me to join the office by cancelling my leaves in your letters No.118.07/98-99/1058, dated 3.12.98.

As I have already informed the office and submitted my clarification in respect of my leaves and to join the office vide my letters dated 7.8.90 (copy enclosed as Annexure `A") and 10.9.98 (copy enclosed as Annexure `B"). Therefore, there is no need to repeat the same.

As far as the question of serving somewhere else arises, it is to request you that it is totally baseless charge. Do you have any proof or information in this respect?

You have also instructed me to submit Rs.366.85. As my salary from August, 98 onwards was stopped by you and I have no other source of income. In this situation, I am unable to pay the said amount."

22. It be noted that the letter dated 14.12.1998 which the petitioner claims as his response to the show cause notice has been claimed to be sent under Certificate of Posting. Respondents deny receiving the same.

23. On 17.12.1998, the impugned order was passed.

24. The factual dispute which obviously arises on the pleadings of the parties is :

1. Whether the petitioner was given any verbal assurance that his leave would be sanctioned beyond 92 days provided he applies for the same;

2. Whether any assurance was given to the petitioner that on his justifying the leave by stating that it was occasioned by unavoidable circumstances, it would be granted/sanctioned;

3. Whether the petitioner, by hand served the letter dated 7.10.1998;
4. Whether the petitioner at all sent, under Certificate of Posting, letter dated 14.12.1998.
25. Petitioner states that the respondent receives grant in aid from the government and this by itself would make it an instrument of the State and hence it would be amenable to the writ jurisdiction of this court.
26. The issue need not hold me for long because in my decision dated 14.1.2004 delivered in WP(C) 5067/2001, Smt. Poonam Sharma & Ors. Vs. UOI & Ors. (reported as 2004 LLR 210) analyzing the Memorandum of Association and the bye-laws of the respondent society and taking note of the fact that it receives grant-in-aid from the Government of India, I had held that the respondent is not a "State" within the meaning of Article 12 of the Constitution of India. In coming to the conclusion aforesaid, decisions of the Supreme Court reported as Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, , Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, , Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, , and the latest decision of the Supreme Court reported as 2003 AIR SCW 4995, Federal Bank Limited Vs. Sagar Thomas and Ors. have been considered by me.
27. Following are the conclusions drawn by me in the judgment in Poonam Sharma's case:-
- "Applying the tests as summarised in Ajay Hasia's case (supra) and approved by the majority in Pradeep Kumar Biswas's case (supra), it is to be noted that as far as the Sangh is concerned, neither is it a case where its share capital is held by the Government nor is it a case where it enjoys any monopoly status. There is no Governmental control much less a deep and pervasive governmental control. Though the functions of the Sangh are of importance, but are of social importance to the society and cannot be said to be related, much less closely related, to the governmental function. It is also not a case where any department of Government stands transferred to the Sangh. We only have one of the relevant test which gets attracted i.e. test of financial assistance. This financial assistance, as noted above, is rendered by the Government not under any statutory provisions but under the policy of the Government to extend aid to the NGOs. Merely because, while granting aid, the Government requires the Sangh to account for the same does not mean that the Sangh acts under the Control and authority of the Government. As held in Federal Bank's case (refer para 32) mere regulatory provisions to ensure that activities are carried on by private bodies within a discipline, does not confer upon it obligations which could be enforced through issue of a writ under Article 226 of the Constitution of India."
28. De hors the status of the respondent can a writ be issued to it? Counsel for

the petitioner contended that under Article 226 of the Constitution of India, writ can be issued to any person. Counsel contended that as against a writ which can be issued under Article 32 of the Constitution of India only against the State, under Article 226 of the Constitution of India, writ can be issued to any person.

29. Counsel, however, conceded that a private dispute cannot be resolved under Article 226 of the Constitution of India, in that, stated that no writ could be issued against a person for enforcement of a contractual/private dispute. Counsel, however, contended that where a private person was performing a public duty, in the performance of the said public duty, a writ could be issued.

30. Let me instruct myself on the law on the subject. Various decisions rendered by the courts and in particular the Supreme Court are required to be distilled.

31. Since the dispute raised before me pertains to a condition of service, I restrict the analysis of the law on the subject pertaining to a service dispute.

32. Every service starts with a letter of offer, offering appointment on certain terms and its acceptance. In a strict sense, every employment has an element of offer and acceptance i.e. a contract. Under the common law, a contract of personal service, normally would not be specifically enforced. No declaration to enforce a contract of personal service, normally is granted. Common law remedy of the employee is to seek damages for breach of contract. To this well recognized principle of common law, there are 3 well recognized exceptions to the rule. The same was stated by the Supreme Court in the decision reported as Bank of Baroda Ltd. Vs. Jeewan Lal Mehrotra, . In para 3 of the judgment, following was observed.

".....The law as settled by this Court is that no declaration to enforce a contract of personal service will be normally granted. The well recognised exceptions to this rule are (1) where a public servant has been dismissed from service in contravention of Art.311 (2) where reinstatement is sought of a dismissed worker under the industrial law by Labour or Industrial Tribunals, (3) where a statutory body, has acted in breach of a mandatory obligation imposed by statute...."

33. A decision commonly cited in support of the proposition that a writ would lie against a private individual in matters impinging upon a right of an employee being The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, be noted. The appellant, a company incorporated under the Indian Companies Act had its share holding distributed amongst the Union Government, Government of Andhra Pradesh and private individuals. The company entered into a settlement with a union which had the effect of relieving the company of its obligations under two earlier statements with another union of workmen. Respondents who were workmen had filed a writ petition challenging the agreement entered into which relieved the company of its obligation under the earlier settlements. Provisions of the Industrial Disputes Act namely Section 18(1) and Section 19(2)(3) were brought into aid by the workmen. It was contended that the settlement was in

violation of the provisions of the Industrial Disputes Act. The management questioned the very maintainability of the writ petition alleging that it was a private body and no writ would lie against him. A learned Single Judge who heard the writ petition upheld the preliminary objection and dismissed the writ petition. In appeal, the Division bench agreed that the writ petition was not maintainable. Notwithstanding the fact that it was affirmed by the Division Bench that the writ petition was not maintainable, the Division bench proceeded to grant a declaration in favor of the workmen. Matter was taken up before the Supreme Court by way of a Petition for Special Leave to Appeal which was granted. Civil Appeal No.612/1966 which was the number assigned to the appeal on ground of the permission for Special Leave to Appeal came to be decided by the Supreme Court, which decision stands reported as noted above.

34. Affirming the view of the Division Bench that no writ could be issued against a private body, in the context of Article 226 of the Constitution of India, the Supreme Court observed, in para 6, as under:-

"No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs but it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essential of a private character nor can such an application be maintained to secure performance of obligations owned by a company towards its workmen or to resolve any private dispute."

35. It was further observed:-

"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 only them by the Statutes authorising their undertakings."

36. It was held that appellant company being a non-statutory body and neither a statutory nor a public duty was imposed on it by a Statute in respect of which enforcement was sought, Therefore, neither was the writ petition maintainable, nor could the declaration granted by the Division Bench be granted. Appeal was allowed.

37. Issue came up before the Supreme Court in the context of a service dispute where the claim of an employee was based on Statutory Law to be observed by the employer in the matter pertaining to his service. Decision reported is Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, , Vaish Degree College was a society registered under the Registration of Co-operative Societies Act. Its object was to impart education. In the year 1967, the college obtained affiliation to Agra University. One of the term

of affiliation was that the college would be bound by the provisions of the Agra University Act, the Statutes and Ordinances made there under. Respondent was appointed as a Principal of the College. His services were terminated. The statute of the University required approval of the Vice-Chancellor before termination could be effected. Respondent filed a civil suit seeking injunction to restrain the appellant from interfering with his duties as member of the college. Respondent claimed that since termination was invalid, he continued as Principal of the College and the appellant had no legal right to interfere with his acting as a Principal. The suit was dismissed. In appeal, the first appellate court reversed the degree of the trial and decreed the suit. Second appeal was filed. Matter was placed before the full bench of Allahabad High Court. The full bench of the High Court held in favor of the respondent inter alia, holding that the appellant was bound by the provisions of the Agra University Act and the Statutes made there under. There being a violation of the same, the termination was invalid.

38. Setting aside the decision of the High Court, the Supreme Court (para 9) drew a distinction between an institution which is not created by or under a Statute but is governed by certain statutory provisions for the proper maintenance and administration of the institution. It was held that the High Court fell in error in holding that merely because the Executive Committee followed certain statutory provisions of the University Act or the Statutes made there under, it must be deemed to be a statutory body.

39. Dealing with the submission that such relief could be granted notwithstanding that the duty was not imposed by the statute under which the body was created, in the context of the submission that the Executive Committee would be bound by the statutory provisions of law of the Agra University as it had agreed, as a term of its affiliation to abide by the same, in para 19 the Supreme Court dealing with the issue on the assumption that the appellant was bound by the provisions of the Agra University Act, Statutes and Ordinances framed there under held that the Executive Committee of the College was guilty of default. However, on the facts of the case, relief was denied and instead monitory compensation was awarded.

40. *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, is another incisive decision on the issue. Case related to a dispute pertaining to the pay scales which were claimed by the respondents. The High Court had granted the monitory benefits. Appellant was a public trust. It was running a college at Ahmedabad. The college was affiliated to Gujarat University. The University teachers were paid salary in the pay scales recommended by the University Grants Commission. The University required the appellant to pay to its employees, salary as per the pay scales recommended by the UGC, which scales were applicable to the University employees. Taking note of the decision of the Supreme Court reported as *Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others*, (noted by me in para 37

above), the Supreme Court (para 12, 13) held that it was not dealing with a dispute of dismissal and, Therefore, the common law principle that a service contract cannot be specifically enforced was irrelevant. The court noted that it was dealing with a dispute pertaining to payment of wages.

41. Dealing with the question whether the trust could be compelled to pay by writ of mandamus, the court held:-

"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 a 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 Art.32. Article 226 confers power on the High Court to issue writs for enforcement of the 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 adjudged 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 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 wherever it is found". Technicalities should not come in the way of granting that relief under Article 226."

42. Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , inter alia, raised the issue of termination of services of District Government Counsel and whether the said decision could be impugned by way of a writ petition. Repelling the plea of the government that government counsel did not hold a post and their services rendered were contractual in nature, the Supreme Court held that the post of a District Government Counsel as a public element attached to it and this was sufficient to attract the power of judicial review.

43. Another decision, dealing with a service dispute is the decision of the Supreme Court reported as AIR 1977 SC 645, Air India Statutory Corporation Vs.

United Labour Union. In the context of the issue of enforcement of a service dispute under writ jurisdiction against a private person, the Supreme Court held that if the person has an element of authority or ability to effect the relations with its employees by virtue of power vested in it by law, Memorandum of Association or bye-laws or Articles of Association, a right predicated on law, Memorandum of Association or bye-law or Articles of Association of the body could be enforced under writ jurisdiction. In addition, it was held that if the person or body renders an element of public service and is accountable to the workman, it would be amenable to a writ jurisdiction.

44. In U.P. State Co-operative land Development Bank Vs. Chandra Bhan Dubey & Ors., duty imposed upon the appellant by the Statute under which it was incorporated i.e. U.P. Co-operative Societies Act, 1965 was held to be enforceable by issuance of a writ. The Supreme Court found that service conditions of employees of co-operative banks incorporated under the U.P. Co-operative Societies Act, 1965 were regulated by statutory regulations framed in exercise of a statutory power vested by the Act and hence, violation of the statutory service regulations was held entitling an employee to maintain an action for judicial review under Article 226 of the Constitution of India.

45. The last of the decisions on the issue is the decision of the Supreme Court reported as 2003 AIR SCW 4995 Federal Bank Limited Vs. Sagar Thomas Limited. A private company carrying on banking business was regulated in its functioning by the Banking Regulation Act and the guidelines issued by the Reserve Bank of India from time to time. However, there were no statutory provisions regulating the service conditions of the employees. Taking note of the various decisions of the Supreme Court on the issue and in particular whether a service dispute between a private body and its employee could be a subject matter of adjudication under Article 226 of the Constitution of India, the Supreme Court, in para 17 of the decision crystallized the legal position as under:-

"From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Govt.); (ii) Authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a private body run substantially on State funding; (vi) a private body discharging public duty or positive obligation of public nature (vii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function. "

46. The legal position which flows from the decision aforesaid is that a private body, in the matter relating to a service dispute would be amenable to writ jurisdiction if the service conditions are regulated by the Statute under which the body is constituted or is regulated by statutory regulations framed in exercise of statutory power created by the Act under which the private body is constituted. For this would be a case where a statutory right is sought to be enforced. The principle that a contract of service being a private contract between the parties

cannot be specifically enforced would not apply. Similarly, where Memorandum of Association or the bye-law of a private body mandates a particular service condition to be followed and the body concerned has a public law element in the discharge of its duties or performance of its obligations, it would be amenable to writ jurisdiction and an action impinging upon the service of its employee would be amenable to judicial review under Article 226 of the Constitution of India.

47. The respondent in the present case is a private body registered as a society under the Societies Registration Act. It is not the case of the petitioner that any statutory service rule is bound to be followed by the respondent. It is also not the case of the petitioner that the bye-laws of the society or its Memorandum of Association enjoins upon it a duty to observe a course of conduct to be followed in the matter relating to employment.

48. The concept of a public duty imposed upon a private body would mean that there is some law, may be a Statute, a Government Directive or any other instrument having the force of law which obliges it to follow a particular course of action. A public duty, inherently has to be imposed upon a private person by an instrument having the force of law. Merely because the respondent by virtue of its activities, carries out or performs a function where society at large is benefited would not mean that it is performing a public duty enjoined upon it by law. We have large number of non-governmental organizations engaged in charitable work of upliftment of the disadvantaged persons in society. They perform a yeoman servant to the society, by removing inequalities in society. Merely because the society is benefited by their work would not mean that all these bodies would be amenable to writ jurisdiction in respect of their action. It cannot be forgotten that these bodies are private bodies and are carrying on work relating to a field of activity which benefits the society, but purely out of volition. No statute imposes any obligation on them to carry out their affairs in a particular manner. Employment effected by these bodies is purely of a personal and a private character. By no means, these employees can be said to have no remedy, but that remedy would be a remedy at common law.

49. I accordingly hold that pertaining to a dispute raised by the petitioner which relates to his service condition under the respondent present petition is not maintainable.

50. Respondents state that assuming that the petition is maintainable, since disputed questions of facts are raised, remedy of the petitioner is to challenge his termination by way of a suit.

51. The disputed questions of fact which arise for consideration are as noted by me in para 24 above.

52. It cannot be lost sight of that the petitioner has filed the petition after more than 2 years and 7 months of his termination. The petitioner does not dispute that he did not report for work for over 4 months after initial sanctioned leave period of 92 days lapsed. Petitioner claims that he was verbally assured that his

further leave would be sanctioned and that he should apply for further leave by stating the reason: "due to unavoidable circumstances." The respondents deny the said fact. Petitioner does not dispute having received various communications requiring him to report for duty. Petitioner does not dispute that preceding the termination, he was served with a show cause notice requiring him to explain as to why he was unauthorisedly absenting from duty. Petitioner relies upon a letter stated to have been delivered by hand at the office of respondent. Petitioner relies upon letters purportedly sent under Certificate of Posting. Respondent denies receiving any such letters. Denial is on oath. Respondents allege that receipts evidencing posting of a letter under Certificate of Posting can be easily obtained.

53. An employee who remains absent without leave being sanctioned is on unauthorised absence. Unauthorised absence justifies the termination of an employee. In the instant case, preceding the termination, admittedly a show cause notice was served. Absence from duty is an admitted fact. Whether it was authorised or unauthorised, on the pleadings of the parties, would require evidence. Respondents assertion that the petitioner had been gainfully employed elsewhere and that is the reason why he did not report for work as against the assertion of the petitioner that he was verbally assured of leave requires evidence to be led on both sides. Petitioner would also have to explain as to why he challenged the termination after 2 years and 7 months. Is it a case where he lost his employment elsewhere and created documents to show that he was responding to the communications sent by the respondent would again require evidence. Even on facts, since highly disputed questions of fact arise, writ proceedings would not be the appropriate form with the dispute can be adjudicated.

54. The writ petition is dismissed. However, keeping in view the nature of dispute and the issues raised, I award no costs.

May 06, 2004

Pradeep Nandrajog , J.