

**AFR**  
**RESERVED**

**Case :-** WRIT - A No. - 63708 of 2014

**Petitioner :-** Roychan Abraham

**Respondent :-** State Of U.P. And 3 Ors

**Counsel for Petitioner :-** Ashish Kaushik, Ravi Chandra Srivastava

**Counsel for Respondent :-** C.S.C., Pratik J. Nagar

**Hon'ble Govind Mathur, C.J.**

**Hon'ble Suneet Kumar, J.**

**Hon'ble Dr. Y.K. Srivastava, J.**

**( Per Suneet Kumar, J.)**

1. The matter came to be referred to the Larger Bench by the learned Single Judge on being confronted with the judgment rendered by the Supreme Court in **Ramesh Ahluwalia vs. State of Punjab and others**<sup>1</sup> (**Ramesh Ahluwalia case**), wherein, the Court held that a private educational body performing public duty or discharging public function would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution of India, consequently, in the opinion of the referring Court, the Full Bench judgment of this Court in **M.K. Gandhi and others v. Director of Education (Secondary) U.P. and others**<sup>2</sup> (**M.K. Gandhi case**) and Division Bench decision rendered in **Anjani Kumar Srivastava Vs State of U.P. and others**<sup>3</sup> (**Anjani Kumar Srivastava case**) needs to be revisited. Relevant portion of the referring order reads thus:

*“In my opinion, since the judgment of **Ramesh Ahluwalia (supra)** clearly stipulates that even a purely private body where the State has no control over its internal affairs would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution if it discharges a public function or public duty, the judgment of the Full Bench of this Court in **M.K. Gandhi** as well as the Division Bench judgment in **Anjani Kumar Srivastava** needs to be revisited.*

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1. 2012 (12) SCC 331

2. 2006(62) ALR 27

3. 2017 (7) ADJ 112 (DB)

*It is, therefore, directed that the records of this case be placed before the Hon'ble Chief Justice for referring the matter to the Larger Bench in the light of the judgment of the Supreme Court in the case of Ramesh Ahluwalia.”*

2. We have carefully gone through the pleadings of the writ petition with the assistance of learned counsel for the parties and the referring order. In our opinion the following questions require to be answered:

- (i) whether private institutions imparting education perform public duty, a State function, making them amenable to judicial review under Article 226 of the Constitution of India;
- (ii) whether the Full Bench decision rendered in **M.K. Gandhi** and Division Bench judgment in **Anjani Kumar Srivastava** requires to be revisited in view of the Supreme Court decision rendered in **Ramesh Ahluwalia**.

**Facts:**

(I) Saint Francis School, a Christian Minority Institution founded and run by Shamli Franciscan Education Society, a religious and charitable organization, registered under the Societies Registration Act, 1860, is affiliated to the Council for the Indian School Certificate Examinations, New Delhi.

(II) Petitioner, an assistant teacher of junior section of the school, was placed under suspension, thereafter, his services came to be terminated on 07 March 2014 with immediate effect. The writ petition was filed assailing the order of termination being arbitrary and in violation of the service conditions of the institution.

(III) A preliminary objection was raised that the writ petition is not maintainable before the High Court under Article 226 of the Constitution against private educational institution in view of the Full Bench decision rendered in **M.K. Gandhi**. The Full Bench, in that case, held that Delhi Public School was not the 'State' within the meaning of Article 12 of the Constitution, but the affiliating body i.e. the Central Board of Secondary

Education (CBSE) is the 'State' within the meaning of the Article. The Full Bench also held that the bylaws framed by the CBSE Board for affiliation shall be deemed to have been adopted by a school in case service conditions have not been framed by the institution and the CBSE Board would be liable to take action under its bylaws to disaffiliate the school in the event of breach.

(IV) The judgment of the Full Bench of this Court was carried in appeal<sup>4</sup>, the Supreme Court while disposing of the appeal vide judgment dated 14 August 2007 observed 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 to 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***

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4. Civil Appeal No. 339 of 2007

***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....”***

(V) The issue of maintainability of such a writ petition has also been considered in **Ramesh Ahluwalia**. In that case, an order removing an administrative officer of a school affiliated with CBSE was challenged before the High Court which dismissed the writ petition on the ground that it was not maintainable under Article 226 of the Constitution. The Supreme Court adverted to the earlier decision in **Shri Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Sampark Trust v. V.R. Rudani**<sup>5</sup> (**Anadi Mukta case**), holding that the expression “any person or authority” used in Article 226 of the Constitution is not only to be confined to statutory authorities and instrumentalities of the State and would cover any other person or body performing public duty. The Supreme Court also relied upon the decisions in **Unni Krishnan, J.P. and others v. State of Andhra Pradesh and others**<sup>6</sup> (**Unni Krishnan case**) and **Zee Telefilms Ltd. and another v. Union of India and others**<sup>7</sup> (**Zee Telefilms case**).

3. In the aforesaid backdrop, the learned Single Judge was of the opinion that **M.K. Gandhi** and **Anjani Kumar Srivastava** requires reconsideration.

#### **Article 12 of the Constitution.**

4. The party before it seeks to invoke Part-III rights against an authority, it will have to satisfy that the authority is 'State' within the meaning of Article 12 of the Constitution, failing which, Part-III rights cannot be invoked against the said authority. Thus, the importance of the

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5. (1989) 2 SCC 691

6. 1993 SCC (1) 645

7. (2005) 4 SCC 649

concept and understanding of what is 'State' within the meaning of Article 12 of the Constitution.

5. Article 12 of the Constitution reads thus:

*“12. Definition-In this part, unless the context otherwise requires, the State includes: Government and Parliament of India. Government and the Legislature of each of the States. All local or other authorities within the territory of India or under the control of the Government of India”.*

6. A perusal of the above Article shows that the definition of 'State' in the said Article includes the Government of India, Parliament of India, Government of the State, Legislatures of the States, local authorities as also 'other authorities'.

7. The importance of 'State' as contemplated under Article 12, is confined to the restrictions placed in Part-III of the Constitution upon the 'State' as against rights conferred by the said Part. Part III deals with the fundamental rights. The Article 13 prohibits the 'State' in taking away or abridging by law any fundamental right and any such law would be void.

8. Part-IV 'Directive Principle of State Policy' as envisaged under the Constitution, 'State' has been ascribed the same meaning as for the purposes of Part III (Article 36 of the Constitution of India). Thus, seen 'State' as contemplated under Article 12 of the Constitution, has significant role so far as rights conferred by Part III are concerned. The remedy for enforcement of Part-III rights itself has been made a fundamental right under Article 32 conferring jurisdiction on the Supreme Court. The jurisdiction of the Supreme Court under Article 32 could be invoked only in respect of rights conferred by Part-III in relation to 'State' actions. To invoke the constitutional remedy, the infringement complained must essentially be against 'State'. Thus, the Supreme Court would decline relief and petition under Article 32 upon finding that the infringing authority is not a 'State', in that event writ petition under Article

32 would not be maintainable.

9. The scope and ambit of Article 12 came up for consideration before a seven Judge Bench in **Smt. Ujjam Bai vs State Of Uttar Pradesh**<sup>8</sup>. The objection was that the authority under the provisions of U.P. Sales Tax Act did not include judicial authorities under Article 12 of the Constitution. It is in this perspective the question of interpretation of Article 12 arose. The Court held that the expression “other authority” in Article 12 could not be read ejusdem generis with Government, Parliament of India, Legislature of State and local authorities as there was no common genus. In other words the definition is inclusive and there might be other instrumentalities of State action which might be comprehended within the expression 'State'. The Court held as follows:

*“152. In the first place, it has to be pointed out that the definition is only inclusive, which itself is apt to indicate that besides the Government and the Legislature there might be other instrumentalities of State action which might be comprehended within the expression “State”. That this expression 'includes' is used in this sense and not in that in which it is very occasionally used as meaning 'means' and 'includes' could be gathered not merely from other provisions of Part-III but also from Art. 12 itself..... There is no characterization of the nature of the “authority” in this residuary clause and consequently it must include every type of authority set up under a Statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws.”*

10. Thus, quasi judicial statutory authorities acting under statutes was held to be 'State'.

11. In **Rajasthan State Electricity Board vs Mohan Lal**<sup>9</sup> Constitution Bench held that the expression 'other authority' is wide enough to include within it every authority created by a statute, on which powers are conferred to carry out governmental or quasi-governmental functions

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8. 1962 AIR 1621

9. 1967 AIR 1857:1967 SCR (3) 377

and functioning within the territory of India or under the control of the Government of India, a departure from the restricted view taken earlier that statutory bodies like universities, were not 'other authorities' for the purpose of Article 12.

12. Within a decade, thereafter, the concept of 'State' had undergone drastic changes; with the State entering commercial space, acting through corporations, thus, making it an agency or instrumentality of the State. The public corporation, therefore, became a third arm of the Government which were often of a specialised and highly technical character. The employees of public corporation are not civil servants. In so far as public corporations fulfil public tasks on behalf of government they are public authorities and were subject to control by the Government. The public corporation being a creation of the State is subject to the constitutional limitation as the 'State' itself. In **Sukhdev Singh and others v. Bhagatram Sardar Singh Raghuvanshi and another**<sup>10</sup>, the expression 'other authorities' was consequently expanded holding bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance Corporation, created by statutes and having regard to the nature of their activities come within Article 12. Even though in reality they were constituted for commercial purposes. It was due to change in the socio-economic policies of the Government that Supreme Court considered it necessary by judicial interpretation to give a wider meaning to the term 'other authorities' which came about primarily with a view to prevent the Government from by-passing its constitutional obligations by creating companies, corporations etc. to perform its duties.

13. Thereafter, a seven Judge Bench of the Supreme Court in **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology**<sup>11</sup>, after adverting to various authorities<sup>12</sup> laid down guidelines for a body to be 'State' under Article 12.

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10. 1975 (3) SCR 619

11. (2002) 5 SCC 111

12. Ramana Dayaram Shetty v. International Airport Authority of India and others, (1979) 3 SCC 489, Ajay Hasia (supra), Sukhdev Singh (supra), Sabhajit Tewary vs Union Of India and others, 1975 AIR 1329

*“(1) Principles laid down in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.*

*(2) The Question in each case will have to be considered on the bases of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.*

*(3) Such control must be particular to the body in question and must be pervasive.”*

14. A body which is financially, functionally, administratively dominated, by or under the control of the Government on established facts alone would be 'State' under Article 12.

**Article 226 of the Constitution:**

15. The power of the High Court to issue writ begins with a non-obstante clause. The power and jurisdiction of the High Court is much wider. The jurisdiction extends to enforcement against infringement of Part III rights, against 'State' and also against 'any person or authority' and 'for any other purpose'. The limitation of action against the 'State' alone is not there under Article 226 of the Constitution. Thus, there is distinction between the powers to issue writs as between the Supreme Court and the High Court. The power to issue writ conferred upon the Supreme Court by Article 32 is for enforcement of Part III rights, but the power to issue writs as conferred under Article 226 upon the High Court is for enforcement of fundamental rights as against 'State' and non fundamental rights as against any 'other person or authority' or 'for any other purpose'. Thus, is the distinction between writ jurisdiction of the Supreme Court and the High Court, that even where the Supreme Court declines a Article 32 writ petition on the ground that the offending party/authority is not 'State' yet the High Court can interfere and issue writ

under Article 226 in appropriate cases.

16. The term 'authority' used in Article 226, must receive a liberal meaning unlike the term 'authority' in Article 12. 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.

17. The Supreme Court in **Anadi Mukta** upon examining the scope and ambit of the expression 'authority' used in Article 12 and in Article 226 of the Constitution was of the opinion that the expression "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 and determinative element is the nature of the duty imposed on the body. This is a striking departure from the English law.

*“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.” (Para No.*

**82 at page 2208)**

18. The words 'any other purpose' makes the jurisdiction of the High Court to issue writ more extensive than that of Supreme Court. 'Any other purpose' means a purpose for which any of the writs could, according to well established principles issue and not otherwise. In short the words means 'enforcement of legal right' and the performance of any legal duty. (Refer: State of Orissa vs. Madangopal Rungta,<sup>13</sup>; Fertilizer Corporation Kamgar Union vs. Union of India<sup>14</sup>; Calcutta Gas Corporation vs. State of West Bengal<sup>15</sup>)

19. Though the jurisdiction of the High Court is not confined to issuing prerogative writs, there is consensus of opinion, the Court will not permit this extraordinary jurisdiction to be converted into a suit. A declaration that a contract of service with the employer still subsisted will not be made in the sphere of an ordinary relationship of master and servant or contract of service, not protected by any statutory or constitutional provisions, because of the principle that Courts do not grant specific performance of contract of service. (Refer: Bool Chand vs. Kurukshetra University<sup>16</sup>; Praga Tools Corporation vs. C.A. Immanuel<sup>17</sup>; S.R. Tiwari vs. District Board, Agra<sup>18</sup>)

20. Judicial Review forms the basic structure of the Constitution. It is inalienable. Public law remedy by way of judicial review is available under Articles 32 and 226 of the Constitution. They do not operate in different fields. Article 226 operates only on a broader horizon to cover any other person or body performing public duty and not confined only to statutory authorities and instrumentalities of the State.

**Public duty/public function:**

21. The concept of public law function is yet to be crystallized. Concededly, however, the power of judicial review can be exercised by

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13. AIR 1952 SC 12

14. AIR 1981 SC 344

15. AIR 1962 SC 1044

16. AIR 1968 SC 292 (296)

17. AIR 1969 SC 1306

18. AIR 1964 SC 1680

the Supreme Court under Article 32 and by the High Courts under Article 226 of the Constitution of India only in a case where the dispute involves a public law element as contradistinguished from a private law dispute. (See: Dwarka Prasad Agarwal (D) by LRs. And Another Vs. B.D. Agarwal and Others<sup>19</sup>).

22. General view, however, is that whenever a State or an instrumentality of a State is involved, it will be regarded as an issue within the meaning of public law but where individuals are at loggerheads, the remedy therefor has to be resorted in private law field. Situation, however, changes with the advancement of the State function particularly when it enters in the fields of commerce, industry and business as a result thereof either private bodies take up public functions and duties or they are allowed to do so which primarily is a State function. The distinction has narrowed down but again concededly such a distinction still exists. Drawing inspiration from the decisions of the Supreme Court as also other courts, it may be safely inferred that when essential governmental functions are placed or allowed to be performed by a private body they must be held to have undertaken a public duty or public function.

23. When the 'State' merely authorizes a given 'private' action that action cannot automatically become one taken under 'state authority'. Private action would not be a public function. Which authorizations would have that Constitution triggering effect will necessarily turn on the character of the decision-making responsibility placed in private hands. However described, there must exist a category of responsibilities regarded at any given time as so 'public' or 'governmental' that their discharge by private persons, pursuant to state authorization even though not necessarily in accord with state direction, is subject to the constitutional norms that would apply to public officials discharging those same responsibilities.

24. Governmental functions are multifacial. There cannot be a single test for defining public functions. Such functions are performed by a

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19. (2003) 6 SCC 230 at page 242

variety of means. Furthermore, even when public duties are expressly conferred by statute, the powers and duties do not thereunder limit the ambit of a statute, as there are instances when the conferment of powers involves the imposition of duty to exercise it, or to perform some other incidental act, such as obedience to the principles of natural justice. Many public duties are implied by the courts rather than commanded by the legislature; some can even be said to be assumed voluntarily. There are, however, public duties which arise from sources other than a statute.

25. In **Assembrook Exports Ltd. & another. v. Export Credit Guarantee Corpn. of India Ltd. and others**<sup>20</sup>, it has been held that public law remedy would be available when determination of a dispute involving public law character is necessary. The said decision has been affirmed by the Supreme Court in **ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Limited and others**<sup>21</sup>. [See: *Tata Cellular vs. Union of India*<sup>22</sup> and *State of U.P. and Another vs. Johri Mal*<sup>23</sup>.

26. In the case of **General Manager, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad and others**<sup>24</sup>, in a writ application filed by terminated workman of Sugarmills Co-operative Society, Supreme Court again considered the maintainability of the writ petition under Article 226 and held as under:

*“9. Learned counsel appearing .....*

*.....*

*that it is only in the circumstances when the authority or the person performs a public function or discharges a public duty that Article 226 of the Constitution can be invoked.”*

27. In **Binny Ltd. and anr. v. V. Sadasivan and other**<sup>25</sup>, the Supreme Court observed that private companies and corporation could come within

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20. AIR 1998 Cal 1

21. [JT 2003 (10) SC 300]

22. AIR 1996 SC 11

23. [(2004) 4 SCC 714]

24. (2003) III LLJ 1108 SC

25. (2005) III LLJ 738 SC

the sweep of judicial review provided are discharging public functions, but it is difficult to draw a line between public functions and private functions. The Court observed as follows:

*“.....It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. **Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.**”*

28. The Court further cautioned that though a writ could be issued against a private body or person, specially in view of the words/expression used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. The Court in **Binny Ltd. (supra)** observed as follows:

*“29. ....If the private body is discharging a public duty imposed on such body, then public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law.”*

29. The Supreme Court finally in para 32 held that though the private body need not be a 'State' within the meaning of Article 12, such body would be amenable to writ jurisdiction of the High Court under Article 226 provided there must be public law element in such action.

*“32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not 'State' within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the*

*Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties.”*

30. Whether a private company engaged in banking business performs public function. In other words does banking business as a scheduled bank involve public law element was considered by the Supreme Court in **Federal Bank Ltd. v. Sagar Thomas and other**<sup>26</sup>, the Court held that a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public function. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. The statutory provisions governing a private bank is merely regulatory. To put it differently a company in banking business is not required to perform public function nor essential governmental function is placed upon it.

31. The susceptibility to judicial review an approach solely, based on source of the public authority's power came to be considered too restrictive. The claim for judicial review has gradually shifted to “a decision, action or failure to act in relation to the exercise of a public function”. Supreme Court in **Janet Jeyapaul Versus SRM University and others**<sup>27</sup> (SRM University case), quoted with approval following extract from the decision of the English court in **R. v. Panel on Takeovers and Mergers, ex parte Datafin Plc and another (Norton Opax Plc and another intervening)**<sup>28</sup>:

*“In determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body’s powers and duties but could also look to*

26. (2003) 10 SCC 733

27. (2015) 16 SCC 530

28. (1987) 1 All ER 564

*their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body's decisions.....”*

32. In **Andi Mukta**, the question before the Supreme Court was as to whether mandamus can be issued at the instance of an employee (teacher) against a Trust registered under Bombay Public Trust Act, 1950 which was running educational institutions. The main legal objection of the Trust while opposing the writ petition of their employee was that since the Trust is not statutory body and hence it cannot be subject of writ jurisdiction of the High Court.

33. The Supreme Court on the question of maintainability of the writ petition for mandamus as against the management of the college held as under:

***“15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of***

*this relationship, mandamus cannot be refused to the aggrieved party.*

34. The issue as to whether a private body, though not 'State' within the meaning of Article 12 of the Constitution, would be amenable to the writ jurisdiction of the High Court under Article 226 was examined by the Constitution Bench in **Zee Telefilm Ltd.** The question that fell for consideration was whether Board of Control for Cricket in India (in short "BCCI") falls within the definition of 'State'. The ratio laid down in **Andi Mukta** was approved, but on the facts of the case, Supreme Court, by majority held that BCCI does not fall within the purview of the term 'State' but clarified that when a private body exercises public function even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Para 31, 32 and 33 of **Zee Telefilm** reads thus:

*“31. **Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.***

*33. Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226.....”*

35. The ratio decidendi of **Zee Telefilms** is clear that: (i) BCCI a private body is not 'State' within the meaning of Article 12; (ii) BCCI

discharges public functions; (iii) an aggrieved party can seek public law remedy against the BCCI under Article 226 of the Constitution of India.

36. In **G. Bassi Reddy Versus International Crops Research Institute and other**<sup>29</sup>, the Supreme Court observed that though it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The Court accordingly held that the primary activity of research and training voluntarily undertaken by the respondent institution therein cannot be said to be a public duty as the institution does not owe the duty to the Indian public to provide research and training facilities.

37. In **State of U.P. and another vs. Johri Mal**<sup>30</sup>, the Supreme Court held that for a public law remedy enforceable under Article 226, the action of a person or the authority need to fall in the realm of public law. The question is required to be determined in each case.

*“The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law -be it a legislative act or the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having regard to the nature of and extent of authority vested in the State. However, it may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions.”*

38. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right upon the aggrieved to invoke extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or

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29. 2003 (4) SCC 225

30. 2004 (4) SCC 714

breach of mutual contracts without having any public element as its integral part cannot be rectified through petition under Article 226. Wherever Courts have intervened in exercise of jurisdiction under Article 226, either the service conditions were regulated by statutory provisions or the employer had the status of 'State' within the expansive definition under Article 12 or it was found that the action complained of has public law element.

39. We accordingly hold that a private body though not 'State', but performing public duty is amenable to the writ jurisdiction under Article 226 of the Constitution. Whether a writ would lie at the behest of an aggrieved party against the offending act of the private body performing public duty would depend upon the facts and the nature of the offending act complained against.

#### **Educational Institution**

40. Whether private educational institutions perform public duty?

41. To impart education is a State function, it is the obligation of the welfare State to ensure that children are imparted education, which is one of the directive principles of State Policy enshrined in Article 41 of the Constitution of India. The State can, however, delegate its functions to the private sector educational institutions and while doing so, the State has created its limbs as it was in the case of companies and corporation to discharge its constitutional obligation of imparting education at all levels from primary to higher education.

42. The State neither has the funds and resources to setup educational institutions and in particular institutions imparting higher education. Imparting education is not a State monopoly, though it is one of the most important functions of the Indian State. The right to establish and administer educational institution is guaranteed under the Constitution to all citizens under Article 19(1)(g) and 26, and to the minorities specifically under Article 30.

43. Private educational institutions are a necessity in the present day

context. Government is in no position to meet the demand of education at all levels—from primary education to higher education. Private educational institutions have a role to play.

*"194. The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Governments are in no position to meet the demand - particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions - including minority educational institutions - too have a role to play."*

**(Observed by Jeevan Reddy, J., in Unni Krishnan at page 749, para 194)**

The para has been quoted with approval in **T.M.A. Pai**.

44. In **Unni Krishnan**, the Constitution Bench held that private educational institutions discharge public duties irrespective of the fact they receive aid or not. The absence of aid does not detract from the public nature of the duty. These institutions supplement the effort of the State in educating the people which is the principal duty cast upon the State under the constitutional scheme.

*"83. The emphasis in this case is as to the nature of duty imposed on the body. It requires to be observed that the meaning of authority under Article 226 came to be laid down distinguishing the same term from Article 12. In spite of it, if the emphasis is on the nature of duty on the same principle it has to be held that these educational institutions discharge public duties. Irrespective of the educational institutions receiving aid it should be held that it is a public duty. The absence of aid does not detract from the nature of duty."*

45. A mere recognition from the State or affiliation by the Board/University does not make the educational institution an instrumentality of the State. But nevertheless educational institution discharge public duty in supplementing the effort of the State in imparting

education, it is not an independent activity viz. banking and other commercial activity. If, therefore, what is discharged by the educational institution, is a public duty then that requires it to act fairly.

46. **Unni Krishnan** came to be partly overruled by the subsequent eleven Judge Bench in **T.M.A. Pai Foundation and others vs. State of Karnataka and others**<sup>31</sup> (**T.M.A. Pai case**), however, the ratio decidendi, insofar educational institution discharging public function and it is the duty of the State to provide education to children from the age of six to fourteen years held to be fundamental right was affirmed.

47. The Supreme Court again got an opportunity to examine the issue as to whether private institution imparting education in higher studies to students is discharging 'public function' and whether, Deemed University notified by the Central Government under Section 3 of the University Grants Commission Act, 1956<sup>32</sup> which, inter alia, provides for effective discharge of public function, namely, education for the benefit of public is an authority within the meaning of Article 12 of the Constitution then as a necessary consequence, it becomes amenable to writ jurisdiction of High Court under Article 226 of the Constitution. The Court in **SRM University** held that the institution engaged in/and imparting higher studies to students is discharging 'public function' by imparting education.

*“This we say for the reasons that firstly, respondent No. 1 is engaged in imparting education in higher studies to students at large. Secondly, it is discharging "public function" by way of imparting education. Thirdly, it is notified as a "Deemed University" by the Central Government under Section 3 of the UGC Act. Fourthly, being a “Deemed University”, all the provisions of the UGC Act are made applicable to respondent No. 1, which inter alia provides for effective discharge of the public function - namely education for the benefit of public. Fifthly, once respondent No. 1 is declared as “Deemed University” whose all functions and activities are governed by the UGC Act, alike other universities then it is an "authority" within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an "authority" as provided in Article 12*

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31. (2002) 8 SCC 481

32. UGC Act

*then as a necessary consequence, it becomes amenable to writ jurisdiction of High Court under Article 226 of the Constitution.”*

48. In **Miss Raj Soni v. Air officer in charge Administration and another**<sup>33</sup>, a dispute arose regarding retirement age of the teachers. Though the school was run by a registered society, however, all recognized schools whether aided or otherwise were governed and regulated by Delhi Education Act, 1973 and the Delhi Education Rules, 1973. While considering the question of maintainability of writ petition, Supreme Court held that a private body cannot defy the mandate of a statute on the pretext that it is not a 'State' under Article 12.

*“The recognised private schools in Delhi whether aided or otherwise are governed by the provisions of the Act and the Rules. The respondent-management is under a statutory obligation to uniformly apply the provisions of the Act and the Rules to the teachers employe`e School. When any authority is required to act in a particular manner under a statute it has no option but to follow the statute. The authority cannot defy the statute on the pretext that it is neither a State nor an 'authority' under Article 12 of the Constitution of India.”*

49. In **K. Krishnamacharyulu and others v. Sri Venkatesvara Hindu College of Engineering and another**<sup>34</sup>, the teachers/non-teaching staff of private education institutions filed writ petition seeking parity of pay-scale on the strength of executive instructions issued by the Government, whereunder, employees of private college were entitled to pay-scale at par with the Government employees. The Supreme Court while examining the question of their locus to file petition under Article 226 of the Constitution of India observed:

*“We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education. The private institutions cater to the needs of the educational opportunities. The teacher duly appointed to a post in*

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33. 1990 (2) SCR 412

34. AIR 1998 SC 295

*the private institution also is entitled to seek enforcement of the orders issued by the Government. The question is as to which forum one should approach. The High Court has held that the remedy is available under the Industrial Disputes Act. **When an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedy provided under Article 226;** the jurisdiction part is very wide. It would be different position, if the remedy is a private law remedy. So, they cannot be denied the same benefit, which is available to others. Accordingly, we hold that the writ petition is maintainable. They are entitled to equal pay so as to be on par with Government employees under Article 39(d) of the Constitution.”*

50. The eleven Judge Bench in **T.M.A. Pai** while considering the relationship between the management and the employees/teachers of private technical and higher education though being contractual in nature but, in the case of educational institutions, the Court was of the opinion that requiring a teacher or a staff to go to civil court for the purposes of seeking redress is not in the interest of education. Therefore, it would be appropriate to setup Educational Tribunal by the State Government.

*“.....In the case of a private institution the relationship between the management and the employees is contractual in nature. A teacher, if the contract so provides, can be proceeded against, and appropriate disciplinary action can be taken if the misconduct of the teacher is proved. Considering the nature of the duties and keeping the principle of natural justice in mind for the purposes of establishing misconduct and taking action thereon, it is imperative that a fair domestic enquiry is conducted. It is only on the basis of the result of the disciplinary enquiry that the management will be entitled to take appropriate action. We see no reason why the “.....In the case of a private institution the relationship between the management and the employees is contractual in nature. A teacher, if the contract so provides, can be proceeded against, and appropriate disciplinary action can be taken if the misconduct of the teacher is proved. Considering the nature of the duties and keeping the principle of natural justice in mind for the purposes of establishing misconduct and taking action*

*thereon, it is imperative that a fair domestic enquiry is condumanagement of a private unaided educational institution should seek the consent or approval of any governmental authority before taking any such action. In the ordinary relationship of master and servant, governed by the terms of a contract of employment, anyone who is guilty of breach of the terms can be proceeded against and appropriate relief can be sought. Normally, the aggrieved party would approach a court of law and seek redress. **In the case of educational institutions, however, we are of the opinion that requiring a teacher or a member of the staff to go to a civil court for the purpose of seeking redress is not in the interest of general education. Disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs.** It would, therefore, be appropriate that an Educational Tribunal be set up in each district in a State, to enable the aggrieved teacher to file an appeal, unless there already exists such an Educational Tribunal in a State—the object being that the teacher should not suffer through the substantial costs that arise because of the location of the Tribunal; .....The State Government shall determine, in consultation with the High Court, the judicial forum in which an aggrieved teacher can file an appeal against the decision of the management concerning disciplinary action or termination of service.”*

51. In compliance a number of States have set up Education Tribunal, the Government of Uttar Pradesh, however, is yet to comply. We hope and trust that Education Tribunal is setup in the State at the earliest being in the interest of general education, teachers and staff.

52. The contention of the learned Senior Counsel appearing for the respondent institution that minority institution imparting secular education is not amenable to judicial review under Article 226 of Constitution is untenable, accordingly rejected. The submission is on misreading of **Pramati Educational & Cultural Trust and others versus Union of India and others**<sup>35</sup>. The minority institutions were before the Supreme Court assailing the validity of the parliamentary enactment.—The Right

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35. (2014) 8 SCC 1

of Children to Free and Compulsory Education Act 2009<sup>36</sup>, providing free and compulsory education to children from the age of six years to fourteen years to enforce the fundamental right guaranteed under Article 21A. The Court upheld the vires of Act, 2009 but declared Act, 2009 ultra vires of the Constitution, insofar, it was made applicable to institutions established and administered by minorities. **Paramati** (supra) is not an authority on the question whether educational institution established and administered by the minorities perform public duty and whether are amenable to judicial review under Article 226 of the Constitution.

53. Private educational institutions, both aided and unaided, or established and administered by religious and linguistic minorities, as well as by non-minorities provide education at three levels, viz., school, college and professional level. The ultimate goal of a minority institution imparting general secular education like any other private educational institution is advancement of learning primarily a State function, therefore are amenable to judicial review under Article 226 of the Constitution of India.

54. One of the question in **TMA Pai** was with regard to the meaning of 'education' and 'educational institutions'. The question and answer to the question reads thus:

*“Q.11 What is the meaning of the expressions "Education" and "Educational Institutions" in various provisions of the Constitution? Is the right to establish and administer educational institutions guaranteed under the Constitution?”*

*A. The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level upto the post-graduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.”*

55. Education should not be misunderstood to include coaching/tuition/play-way establishment. These are private activity and,

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36. Act, 2009

are not covered by the expression 'education' nor they perform public duty.

56. Education at every level is fundamental and is a matter of public importance; the country's future depends upon the same. Education is one of the most important functions of the Indian State and it has no monopoly therein. The private educational institutions aided/unaided, run and managed by the minority or majority communities rendering education to children/students from the age of six onwards cater to the obligation of the State to provide opportunity in education to the people to avail education. We accordingly hold that all these educational institutions are subject to judicial review of the High Court under Article 226 of the Constitution of India.

**M.K. Gandhi/Anjani Kumar Srivastava case**

57. The petitioners before the Full Bench were teachers in Delhi Public School (D.P.S. School) duly affiliated with Central Board of Secondary Education (CBSE). The services of the teachers came to be terminated without conducting any enquiry or affording any opportunity to the teachers. On notice to DPS School by the CBSE to show cause, stand was taken that the services of the petitioners have been dispensed with in accordance with the terms of their appointment. The Full Bench was examining the scope and extent of protection available to the teachers teaching in school affiliated to the CBSE.

58. In this backdrop, the Court formulated the following points for determination:

- “(i) *Whether the D.P.S. School is a State within the meaning of Article 12 of the Constitution.*
- (ii) *Whether the Board is a State within the meaning of Article 12 of the Constitution of India.*
- (iii) *Whether the 'Affiliation bye-laws' have statutory force.*
- (iv) *In case the answer to the second question is in negative then, whether the affiliation bye-laws are still binding on the schools affiliated to the Board.*
- (v) *Whether the Committee of Management of the School, while*

*dealing with the service matters of its employees or the teachers, is performing public duty.*

- (vi) *Whether a writ petition is maintainable against a privately managed school for violation of the service rules.*
- (vii) *Whether a writ petition is maintainable against the Board for non-observance of its bye-laws.”*

59. Answer to points (iii), (iv), (v), (vi) and (vii) turn on merits arising from the facts of the case. Insofar, points (i) and (ii), the Court held that D.P.S. School is not a 'State'; CBSE the affiliating body was held to be a 'State' within the meaning of Article 12 of the Constitution of India.

60. The question as to whether a private institution imparting education is amenable to judicial review under Article 226 of the Constitution, though not a 'State' within the meaning of Article 12 of the Constitution, was not an issue in **M.K. Gandhi**. The Full Bench decision is confined to the facts arising in the case and is not an authority on the question that we are called upon to answer. The Full Bench for the reasons stated in para 36 and 37 declined to entertain writ petition against the private educational institution.

*“36. Is a writ petition maintainable for,*

- *violation of the bye-laws that do not have statutory force?*
- *enforcement of a private contract between the school and the teacher?*

*We are afraid; our answer has to be in the negative. The Full Bench of our Court in **Aley Ahmad Abidi v. District Inspector of Schools**<sup>37</sup>, (The Aley Abidi Case) has held that:*

*“The Committee of Management of an Intermediate College is not a statutory body. Nevertheless, a writ petition filed against it is maintainable if such petition is for enforcement of performance of any legal obligations or duties imposed on such committee by a statute.”*

*37. The committee of management of the D.P.S. School is recognised by the Board but it is neither a statutory body nor a State within the meaning of Article 12. The legal obligation or duty on the D.P.S. School is neither imposed by any statute nor by any*

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37. AIR 1977 All 539

*statutory provision : it has been imposed by the affiliation bye-laws and agreement which is a contract between the parties and non-statutory. In view of this the writ petition is not maintainable against the D.P.S. School for violation of the affiliation bye-laws.”*

61. In **Anjani Kumar Srivastava**, the Division Bench though noticing **Ramesh Ahluwalia** declined to interfere for the reason that private contract of service between the master and servant was not enforceable in writ jurisdiction. The case is confined to the facts obtaining therein.

62. In **Ms. Geeta Pushp v. Union of India and others**<sup>38</sup>, the petitioner therein was a teacher in Army Public School managed by the Army Welfare Education Society, registered under the Societies Registration Act, 1860. The question for determination in the facts of the case was whether a writ petition by an employee or teacher for enforcement of service contract against the private institution was maintainable. It was held that while retiring a teacher there was no public law element in the action of the private body. The Court, therefore, declined to enforce the service contract in writ jurisdiction. The cases herein above are not reflective of the position of law that private educational institution render public duty and are amenable to judicial review under Article 226 of the Constitution of India. The Court in the given facts obtaining therein declined the relief to the petitioner as in the opinion of the Court there was no public law element in the offending act complained against the educational institution.

**Conclusion:**

63. We accordingly proceed to answer the reference in the following terms:

64. **Question (i):** Private Institutions imparting education to students from the age of six years onwards, including higher education, perform public duty primarily a State function, therefore are amenable to judicial review of the High Court under Article 226 of the Constitution of India.

65. **Question (ii):** The broad principle of law which has been

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38. 2018(2) ALJ 292

formulated in the judgement of the Full Bench in **M.K. Gandhi** and Division Bench in **Anjani Kr. Srivastava** is confined to the facts obtaining therein and is not an authority on the proposition of law that private educational institutions do not render public function and, therefore, are not amenable to judicial review of the High Court. The judgements do not require to be revisited.

66. The reference to the Full Bench, shall accordingly stand answered. The writ petition shall now be placed before the regular Bench according to roster for disposal in light of the questions so answered.

**Order Date:-** 26.02.2019

K.K. Maurya/S.Prakash

(Govind Mathur,CJ.)

(Suneet Kumar,J.)

(Dr. Y.K. Srivastava,J.)