AFR
Reserved

Court No. - 29

Case :- WRIT - A No. - 9814 of 2020

Petitioner :- Uttam Chand Rawat
Respondent :- State Of U.P. And 7 Others
Counsel for Petitioner :- Shyam Shanker Pandey
Counsel for Respondent :- C.S.C.

Hon'ble Munishwar Nath Bhandari,Acting Chief Justice
Hon'ble Prakash Padia,J.
Hon'ble Sanjay Kumar Singh,J.

(As per : Hon'ble Munishwar Nath Bhandari, ACJ)

Learned Single Judge has referred following questions to the Larger Bench finding conflicting judgments on the issue :

> *"(i) Whether the element of public function and public duty inherent in the enterprise that an educational institution undertakes, conditions of service of teachers, whose functions are a sine qua non to the discharge of that public function or duty, can be regarded as governed by the private law of contract and with no remedy available under Article 226 of the Constitution?*
>
> *(ii) Whether the decision in Rajesh Kumar Srivastava and others versus State of U.P. and others, 2020 (2) AWC 1693 is in teeth of the holding of the Full Bench in Roychan Abraham versus State of U.P. and others, (2019) SCC OnLine All 3935?"*

The questions have been referred after detailed consideration of the earlier judgments on the issue. The judgment in the case of ***M.K. Gandhi and others versus Director of Education (Secondary) U.P. and others, 2005 (3) ESC 2265 (Alld) (FB)*** affirmed by the Apex Court in the case of ***Committee of Management, Delhi Public School and another versus M.K. Gandhi and others, (2015) 17 SCC 353*** has also been considered.

Learned Single Judge has given reference of the judgments of the Apex Court in the cases of ***Ramesh Ahluwalia versus State of Punjab and others, (2012) 12 SCC 331*** and ***Lal Bahadur Gautam versus State of U.P. and others, (2019) 6 SCC 441***. It also noticed that the issue of

maintainability of the writ petition was considered by the Larger Bench in the case of ***Roychan Abraham versus State of U.P. and others, (2019) SCC OnLine All 3935***. It was to revisit the view expressed by the Full Bench in the case of ***M.K. Gandhi (supra)*** and Division Bench in the case of ***Anjani Kumar Srivastava versus State of U.P. and others, 2017 (7) ADJ 112 (DB)***. The Full Bench in the case of ***Roychan Abraham (supra)*** answered the questions as under:-

> *"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 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."*

Learned Single Judge found judgment in the case of ***Rajesh Kumar Srivastava (supra)*** to be in conflict with other judgments. In the case of ***Rajesh Kumar Srivastava (supra)***, learned Single Judge held writ petition under Article 226 of the Constitution of India to be maintainable against the authority or the person discharging public duty only when issue of public law is involved. The writ petition would not be maintainable if claim is arising out of a private contract between the two parties. The aforesaid view was taken to be in conflict with the earlier judgment of this Court and, accordingly, matter has been referred to the Larger Bench.

The questions referred to the Larger Bench is about maintainability of the writ petition against the authority or the person discharging public duty/public function which may not fall within the definition of "State or its authority" under Article 12 of the Constitution of India.

The issue aforesaid has been considered by the Apex Court at

length recently in the case of ***Ramakrishnan Mission and another versus Kago Kunya and others, (2019) 16 SCC 303***. In the said case, the Apex Court has considered all the earlier judgment on the issue. The judgment in the case supra was given after considering the scope of Article 12 so as Article 226 of the Constitution of India. It is not only after analyzing the fact of the case but the proposition of law evolved by the Apex Court in the earlier judgments on maintainability of the writ petition. For maintainability of the writ petition, twin test is to be satisfied. The first test is about the public function/public duty by an authority or a person and the second test is about the challenge to the action falls in the domain of public law. Accordingly, the writ petition would not be maintainable against the authority or the person referred under Article 226 of the Constitution of India merely for the reason of discharge of public function/public duty unless an issue of public law is involved.

The word "public law" has been elaborately discussed by the Apex Court in the case of ***K.K. Saksena versus International Commission on Irrigation and Drainage and others, (2015) 4 SCC 670***. It was held that private law remedies would not be enforceable through the extraordinary jurisdiction of the High Court. Private law is a part of legal system under the common law that involves relationship between individuals such as law of contract or torts. It was held that even if writ petition is maintainable against an authority or person, before issuing it, Court needs to satisfy itself that the action of the authority or the person is in the domain of public law distinguished from private law. The contractual and commercial obligations are enforceable only by ordinary civil action.

In view of the judgments in the cases of ***K.K. Saksena (supra)*** and ***Ramakrishnan Mission (supra)***, the issue canvassed by learned Single Judge can be answered but before that, we would like to give reference of other judgments for clarity because issue of maintainability of the writ petition is coming time and again before this Court and presently, two judgments of the Larger Bench exist.

The issue of maintainability was initially discussed by the Apex Court in the case of ***Ajay Hasia and others versus Khalid Mujib Sehravardi and others, (1981) 1 SCC 722***. It was mainly in reference to Article 12 of the Constitution of India. The issue of maintainability of the writ petition against a private body not falling under the definition of "State or its authority" under Article 12 of the Constitution of India needs to be considered under Article 226 of the Constitution of India. For ready reference, Article 12 and 226 of the Constitution of India are quoted hereunder :-

> *"**12. Definition** - In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*
>
> ***226. Power of High Courts to issue certain writs. -***
>
> *(1) Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*
>
> *(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*
>
> *(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without -*
>
> > *(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and*
> >
> > *(b) giving such party an opportunity of being heard, makes an application to the High Court*

> *for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.*
>
> *(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."*

The issue in reference of Article 12 and 226 of the Constitution of India was considered by the Apex Court in the case of ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691***. It was a case where order of termination of a teacher of a private aided and affiliated college was challenged. The Apex Court held writ petition to be maintainable even against the private body finding it to be discharging public duty. It was after referring to the activity of education by Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust. The judgment aforesaid was given in reference to Article 226 of the Constitution of India which provides jurisdiction of the High Court to issue order or writ against any person or authority. According to the judgment in the case supra, the writ petition is maintainable against the private educational institution discharging public duty/public function.

The issue of maintainability of the writ petition was again considered by the Apex Court in the case of ***Binny Ltd. and another versus V. Sadasivan and others, (2005) 6 SCC 657***. It was held that writ of mandamus or remedy under Article 226 of the Constitution of India is a public law remedy and can be exercised against a body or person

discharging public function/public duty. The word "public function" was elaborately discussed to define it. It was held that a body or person would be performing public function when it seeks to achieve collective benefit for the public or section thereof. Relevant paras of the said judgment are quoted hereunder:-

> *"**9.** The superior court's supervisory jurisdiction of judicial review is invoked by an aggrieved party in myriad cases. High Courts in India are empowered under Article 226 of the Constitution to exercise judicial review to correct administrative decisions and under this jurisdiction the High Court can issue to any person or authority, any direction or order or writs for enforcement of any of the rights conferred by Part III or for any other purpose. The jurisdiction conferred on the High Court under Article 226 is very wide. However, it is an accepted principle that this is a public law remedy and it is available against a body or person performing a public law function. Before considering the scope and ambit of public law remedy in the light of certain English decisions, it is worthwhile to remember the words of Subba Rao, J. expressed in relation to the powers conferred on the High Court under Article 226 of the Constitution in Dwarkanath v. ITO [(1965) 3 SCR 536 : AIR 1966 SC 81] (SCR, pp. 540 G-541 A):*
>
> > *"This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary from of*

> *Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."*

10. *The writ of mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the Sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporations which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the Administrative Law (9th Edn.) by Sir William Wade and Christopher Forsyth (Oxford University Press) at p. 621, the following opinion is expressed:*

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

> *their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."*

11. *Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between 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. In a book on Judicial Review of Administrative Action (5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24, it is stated thus:*

> > *"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all*

these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

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

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

"1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit."

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

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

31. *The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void and illegal under Section 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in State of U.P. v. Bridge & Roof Co. (India) Ltd. [(1996) 6 SCC 22] and also in Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293] . In the latter case, this Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226.*

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.*

33. *We are unable to perceive any public element in the termination of the employees by the appellant in Civil Appeal No. 1976 of 1998 and the remedy available to the respondents is to seek redressal of their grievance in civil law or under the labour law enactments especially in view of the disputed*

questions involved as regards the status of employees and other matters. So also, in the civil appeal arising out of SLP (Civil) No. 6016 of 2002, the writ petition has been rightly dismissed by the High Court. We see no merit in the contention advanced by the appellant herein. The High Court rightly held that there is no public law element and the remedy open to the appellant is to seek appropriate relief other than judicial review of the action taken by the respondent Company."

Prior to the judgment aforesaid, the Apex Court had considered the same issue in the case of ***Federal Bank Ltd. versus Sagar Thomas and others, (2003) 10 SCC 333***. The judgment aforesaid was given after considering the nature of work performed by the Federal Bank. The argument was raised that not only Bank was incorporated under the Companies Act but is governed by regulatory provisions of banking. The Apex Court did not accept the argument on maintainability of the writ petition merely for the reason that the authority or the person was incorporated under the Companies Act and is governed by the regulatory provisions. It was held that a writ petition under Article 226 of the Constitution of India would be maintainable against following; (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute with compulsion to perform statutory function. The writ petition therein was not held maintainable merely for the reason that Bank was incorporated under the Companies Act and otherwise governed by the regulatory provisions which may be Industries (Development and Regulation) Act, 1951. The Apex Court did not find State dominance or control over the affairs of the company. The relevant paras of the said judgment are quoted hereunder for ready reference :-

"27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private

bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

28. *The six factors which have been enumerated in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] and approved in the later decisions in the case of Ramana [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] and the seven-Judge Bench in the case of Pradeep Kumar Biswas [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] may be applied to the facts of the present case and see whether those tests apply to the appellant Bank or not. As indicated earlier, share capital of the appellant Bank is not held at all by the Government nor is any financial assistance provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant Bank does not enjoy any monopoly status nor can it be said to be an institution having State protection. So far as control over the affairs of the appellant Bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant Bank nor is any one of them a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the*

purpose of maintaining a healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by Reserve Bank of India under a statute or the Central Government. Even if it was with the Central Government in place of Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Assn. [AIR 1962 SC 171 : (1962) 3 SCR 269] does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

29. *There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, maybe banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have impact on the economy of the country in general. But such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] . Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company. For the sake of argument, even if it may be assumed that one or the other test as provided in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] quoted earlier would also be relevant.*

30. *We may now consider the two decisions i.e. Andi Mukta [(1989) 2 SCC 691] and U.P. State Coop. Land Development*

Bank Ltd. [(1999) 1 SCC 741 : 1999 SCC (L&S) 389 : AIR 1999 SC 753] upon which much reliance has been placed on behalf of the respondents to show that a writ would lie against the appellant company. So far as the decision in the case of U.P. State Coop. Land Development Bank Ltd. [(1999) 1 SCC 741 : 1999 SCC (L&S) 389 : AIR 1999 SC 753] is concerned, it stands entirely on a different footing and we have elaborately discussed it earlier.

31. *The other case which has been heavily relied upon is Andi Mukta [(1989) 2 SCC 691]. It is no doubt held that a mandamus can be issued to any person or authority performing public duty, owing positive obligation to the affected party. The writ petition was held to be maintainable since the teacher whose services were terminated by the institution was affiliated to the university and was governed by the ordinances, casting certain obligations which it owed to that petitioner. But it is not the case here. Our attention has been drawn by the learned counsel for the appellant to paras 12, 13 and 21 of the decision (Andi Mukta [(1989) 2 SCC 691]) to indicate that even according to this case no writ would lie against the private body except where it has some obligation to discharge which is statutory or of public character."*

The issue was again considered by the Apex Court in the case of ***K.K. Saksena (supra)*** where after elaborate discussion of the issue, a difference between the private law and public law was made. A controversy under private law is held to be a part of legal system under common law depending on individual's relationship which may be under contract law or law of torts, etc. The writ petition involving a question under private/common law would not be maintainable even if an authority or a person is discharging public duty or public function. It was held that if a writ petition is brought against an authority or a person discharging public duty or public function, it would be maintainable if an element of public law is involved. A writ petition involving a question under common law, i.e., arising out of the contract between the parties or a relationship involving a dispute under private law would not be maintainable. The word "public law" has been elaborately discussed and defined in the said judgment and is the governing factor to answer the question referred by learned Single Judge in this case.

According to the judgment of the Apex Court in the case of ***K.K. Saksena (supra)***, twin test is to be satisfied for maintainability of the writ petition under Article 226 of the Constitution of India. The writ petition would be maintainable against an authority or person only when it is discharging public duty/public function and the matter pertains to public law. Merely for the reason that an authority or a person is discharging public function/public duty would not be amenable to writ jurisdiction unless the action challenged therein falls under the domain of public law. A dispute arising out of Contract or under the common law would not make a writ to be maintainable. The relevant paras of the judgment in the ***K.K. Saksena (supra)*** are quoted hereunder:-

> *"**44.** Within a couple of years of the framing of the Constitution, this Court remarked in Election Commission of India v. Saka Venkata Rao [Election Commission of India v. Saka Venkata Rao, AIR 1953 SC 210] that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for "any other purpose" has been held to be included in Article 226 of the Constitution with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary "private law remedies" are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities (see Administrative Law, 8th Edn., H.W.R. Wade and C.F. Forsyth, p. 656). In a number of decisions, this Court has held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.*
>
> ***45.** On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in Federal Bank Ltd. [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733], such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function.*
>
> ***46.** In the present case, since ICID is not funded by the Government nor is it discharging any function under any statute, the only question is as to whether it is discharging public duty or positive obligation of public nature.*
>
> ***47.** It is clear from the reading of the impugned judgment that*

the High Court was fully conscious of the principles laid down in the aforesaid judgments, cognizance whereof is duly taken by the High Court. Applying the test in the case at hand, namely, that of ICID, the High Court opined that it was not discharging any public function or public duty, which would make it amenable to the writ jurisdiction of the High Court under Article 226. The discussion of the High Court is contained in paras 34 to 36 and we reproduce the same for the purpose of our appreciation : (K.K. Saksena case [K.K. Saksena v. International Commission on Irrigation and Drainage, 2011 SCC OnLine Del 1894 : (2011) 180 DLT 204], SCC OnLine Del)

> *"34. On a perusal of the preamble and the objects, it is clear as crystal that the respondent has been established as a scientific, technical, professional and voluntary non-governmental international organisation, dedicated to enhance the worldwide supply of food and fibre for all people by improving water and land management and the productivity of irrigated and drained lands so that there is appropriate management of water, environment and the application of irrigation, drainage and flood control techniques. It is required to consider certain kind of objects which are basically a facilitation process. It cannot be said that the functions that are carried out by ICID are anyway similar to or closely related to those performable by the State in its sovereign capacity. It is fundamentally in the realm of collection of data, research, holding of seminars and organising studies, promotion of the development and systematic management of sustained irrigation and drainage systems, publication of newsletter, pamphlets and bulletins and its role extends beyond the territorial boundaries of India. The memberships extend to participating countries and sometimes, as bye-law would reveal, ICID encourages the participation of interested national and non-member countries on certain conditions.*
>
> *35. As has been held in Federal Bank Ltd. [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733] solely because a private company carries on banking business, it cannot be said that it would be amenable to the writ jurisdiction. The Apex Court has opined that the provisions of the Banking Regulation Act and other statutes have the regulatory measure to play. The activities undertaken by the respondent Society, a non-governmental organisation, do not*

> *actually partake the nature of public duty or State actions. There is absence of public element as has been stated in V.R. Rudani [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] and Sri Venkateswara Hindu College of Engg. [K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg., (1997) 3 SCC 571 : 1997 SCC (L&S) 841] It also does not discharge duties having a positive application of public nature. It carries on voluntary activities which many a non-governmental organisations perform. The said activities cannot be stated to be remotely connected with the activities of the State. On a scrutiny of the Constitution and bye-laws, it is difficult to hold that the respondent Society has obligation to discharge certain activities which are statutory or of public character. The concept of public duty cannot be construed in a vacuum. A private society, in certain cases, may be amenable to the writ jurisdiction if the writ court is satisfied that it is necessary to compel such society or association to enforce any statutory obligation or such obligations of public nature casting positive public obligation upon it.*
>
> *36. As we perceive, the only object of ICID is for promoting the development and application of certain aspects, which have been voluntarily undertaken but the said activities cannot be said that ICID carries on public duties to make itself amenable to the writ jurisdiction under Article 226 of the Constitution."*

The issue was recently considered by the Apex Court in the case of ***Ramakrishnan Mission (supra)***. In the said judgment, the Apex Court has elaborately discussed the earlier judgments. The writ petition was not found maintainable against the mission merely for the reason that it is running a hospital, thus discharging public function/public duty. It is also when the land was allotted by the State on concessional price and the Mission was even receiving aid. It was found that aid received from the Government is not sufficient to meet with the expenditure incurred by the Mission. The Apex Court has considered the issue in reference to the element of public function which should be akin to the work performed by the State in its sovereign capacity. In the light of the judgment

aforesaid, every public function/public duty would not make a writ petition to be maintainable against an authority or a person referred under Article 226 of the Constitution of India unless functions are such which are akin to the functions of the State or are sovereign in nature. Relevant paras of the said judgment are quoted hereunder for ready reference :-

> *"17. The basic issue before this Court is whether the functions performed by the hospital are public functions, on the basis of which a writ of mandamus can lie under Article 226 of the Constitution.*
>
> *18. The hospital is a branch of the Ramakrishna Mission and is subject to its control. The Mission was established by Swami Vivekanand, the foremost disciple of Shri Ramakrishna Paramhansa. Service to humanity is for the organisation co-equal with service to God as is reflected in the motto "Atmano Mokshartham Jagad Hitaya Cha". The main object of the Ramakrishna Mission is to impart knowledge in and promote the study of Vedanta and its principles propounded by Shri Ramakrishna Paramahansa and practically illustrated by his own life and of comparative theology in its widest form. Its objects include, inter alia to establish, maintain, carry on and assist schools, colleges, universities, research institutions, libraries, hospitals and take up development and general welfare activities for the benefit of the underprivileged/backward/tribal people of society without any discrimination. These activities are voluntary, charitable and non-profit making in nature. The activities undertaken by the Mission, a non-profit entity are not closely related to those performed by the State in its sovereign capacity nor do they partake of the nature of a public duty.*
>
> *19. The Governing Body of the Mission is constituted by members of the Board of Trustees of Ramakrishna Math and is vested with the power and authority to manage the organisation. The properties and funds of the Mission and its management vest in the Governing Body. Any person can become a member of the Mission if elected by the Governing Body. Members on roll form the quorum of the annual general meetings. The Managing Committee comprises of members appointed by the Governing Body for managing the affairs of the Mission. Under the Memorandum of Association and Rules and Regulations of the Mission, there is no governmental control in the functioning, administration and day to day management of the Mission. The conditions of service of the employees of the hospital are governed by*

service rules which are framed by the Mission without the intervention of any governmental body.

20. *In coming to the conclusion that the appellants fell within the description of an authority under Article 226, the High Court placed a considerable degree of reliance on the judgment of a two-Judge Bench of this Court in Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691]. Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] was a case where a public trust was running a college which was affiliated to Gujarat University, a body governed by the State legislation. The teachers of the University and all its affiliated colleges were governed, insofar as their pay scales were concerned, by the recommendations of the University Grants Commission. A dispute over pay scales raised by the association representing the teachers of the University had been the subject-matter of an award of the Chancellor, which was accepted by the government as well as by the University. The management of the college, in question, decided to close it down without prior approval. A writ petition was instituted before the High Court for the enforcement of the right of the teachers to receive their salaries and terminal benefits in accordance with the governing provisions. In that context, this Court dealt with the issue as to whether the management of the college was amenable to the writ jurisdiction. A number of circumstances weighed in the ultimate decision of this Court, including the following:*

20.1. *The trust was managing an affiliated college.*

20.2. *The college was in receipt of government aid.*

20.3. *The aid of the government played a major role in the control, management and work of the educational institution.*

20.4. *Aided institutions, in a similar manner as government institutions, discharge a public function of imparting education to students.*

20.5. *All aided institutions are governed by the rules and regulations of the affiliating University.*

20.6. *Their activities are closely supervised by the University.*

20.7. *Employment in such institutions is hence, not devoid of a public character and is governed by the decisions taken by the University which are binding on the management.*

21. *It was in the above circumstances that this Court came to the conclusion that the service conditions of the academic staff do not partake of a private character, but are governed by*

a right-duty relationship between the staff and the management. A breach of the duty, it was held, would be amenable to the remedy of a writ of mandamus. While the Court recognised that "the fast expanding maze of bodies affecting rights of people cannot be put into watertight compartments", it laid down two exceptions where the remedy of mandamus would not be available: (SCC p. 698, para 15)

> *"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."*

22. *Following the decision in Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] , this Court has had the occasion to re-visit the underlying principles in successive decisions. This has led to the evolution of principles to determine what constitutes a "public duty" and "public function" and whether the writ of mandamus would be available to an individual who seeks to enforce her right.*

25. *A similar view was taken in Ramesh Ahluwalia v. State of Punjab [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715], where a two-Judge Bench of this Court held that a private body can be held to be amenable to the jurisdiction of the High Court under Article 226 when it performs public functions which are normally expected to be performed by the State or its authorities.*

26. *In Federal Bank Ltd. v. Sagar Thomas [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733], this Court analysed the earlier judgements of this Court and provided a classification of entities against whom a writ petition may be maintainable: (SCC p. 748, para 18)*

> *"18. 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 (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform*

such a statutory function." (emphasis supplied)

27. *In Binny Ltd. v. V. Sadasivan [Binny Ltd. v. V. Sadasivan, (2005) 6 SCC 657 : 2005 SCC (L&S) 881], a two-Judge Bench of this Court noted the distinction between public and private functions. It held thus: (SCC pp. 665-66, para 11)*

> *"11. … 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 Bench elucidated on the scope of mandamus: (SCC p. 673, para 29)*

> *"29. … However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action … There cannot be any general definition of public authority or public action. The facts of each case decide the point." (emphasis supplied)*

29. *More recently in K.K. Saksena v. International Commission on Irrigation & Drainage [K.K. Saksena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] , another two-Judge Bench of this Court held that a writ would not lie to enforce purely private law rights. Consequently, even if a body is performing a public duty and is amenable to the exercise of writ jurisdiction, all its decisions would not be subject to judicial review. The Court held thus: (SCC p. 692, para 43)*

> *"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ*

> *petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law."*

30. *Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.*

31. *Having analysed the circumstances which were relied upon by the State of Arunachal Pradesh, we are of the view that in running the hospital, Ramakrishna Mission does not discharge a public function. Undoubtedly, the hospital is in receipt of some element of grant. The grants which are received by the hospital cover only a part of the expenditure. The terms of the grant do not indicate any form of governmental control in the management or day to day functioning of the hospital. The nature of the work which is rendered by Ramakrishna Mission, in general, including in relation to its activities concerning the hospital in question is purely voluntary.*

32. *Before an organisation can be held to discharge a public function, the function must be of a character that is closely related to functions which are performed by the State in its sovereign capacity. There is nothing on record to indicate that the hospital performs functions which are akin to those solely performed by State authorities. Medical services are provided by private as well as State entities. The character of the organisation as a public authority is dependent on the circumstances of the case. In setting up the hospital, the Mission cannot be construed as having assumed a public function. The hospital has no monopoly status conferred or mandated by law. That it was the first in the State to provide service of a particular dispensation does not make it an "authority" within the meaning of Article 226. State Governments provide concessional terms to a variety of*

organisations in order to attract them to set up establishments within the territorial jurisdiction of the State. The State may encourage them as an adjunct of its social policy or the imperatives of economic development. The mere fact that land had been provided on a concessional basis to the hospital would not by itself result in the conclusion that the hospital performs a public function. In the present case, the absence of State control in the management of the hospital has a significant bearing on our coming to the conclusion that the hospital does not come within the ambit of a public authority.

33. *It has been submitted before us that the hospital is subject to regulation by the Clinical Establishments (Registration and Regulation) Act, 2010. Does the regulation of hospitals and nursing homes by law render the hospital a statutory body? Private individuals and organizations are subject to diverse obligations under the law. The law is a ubiquitous phenomenon. From the registration of birth to the reporting of death, law imposes obligations on diverse aspects of individual lives. From incorporation to dissolution, business has to act in compliance with law. But that does not make every entity or activity an authority under Article 226. Regulation by a statute does not constitute the hospital as a body which is constituted under the statute. Individuals and organisations are subject to statutory requirements in a whole host of activities today. That by itself cannot be conclusive of whether such an individual or organisation discharges a public function. In Federal Bank [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733], while deciding whether a private bank that is regulated by the Banking Regulation Act, 1949 discharges any public function, the Court held thus: (SCC pp. 758-59, para 33)*

> *"33. … in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. 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. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a*

> *case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank." (emphasis supplied)*
>
> ***34.*** *Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in K.K. Saksena [K.K. Saksena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed.*
>
> ***35.*** *It is of relevance to note that the Act was enacted to provide for the regulation and registration of clinical establishments with a view to prescribe minimum standards of facilities and services. The Act, inter alia, stipulates conditions to be satisfied by clinical establishments for registration. However, the Act does not govern contracts of service entered into by the hospital with respect to its employees. These fall within the ambit of purely private contracts, against which writ jurisdiction cannot lie. The sanctity of this distinction must be preserved."*

In the light of the judgments referred to above, it is not difficult to answer questions framed by learned Single Judge. We are not elaborately discussing the judgments of the Larger Bench of this Court for the reason that the recent judgment of the Apex Court covers the issue. Thus, the questions can be answered with clarity though the earlier decision of the Larger Bench of this Court in the case of ***Roychan Abraham (supra)*** is also based on the judgment of the Apex Court referred in this order.

The substance of the discussion made above is that a writ petition would be maintainable against the authority or the person which may be a private body, if it discharges public function/public duty, which is

otherwise primary function of the State referred in the judgment of the Apex Court in the case of **Ramakrishnan Mission (supra)** and the issue under public law is involved. The aforesaid twin test has to be satisfied for entertaining writ petition under Article 226 of the Constitution of India.

From the discussion aforesaid and in the light of the judgments referred above, a writ petition under Article 226 of the Constitution would be maintainable against (i) the Government; (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

There is thin line between "public functions" and "private functions" discharged by a person or a private body/authority. The writ petition would be maintainable only after determining the nature of the duty to be enforced by the body or authority rather than identifying the authority against whom it is sought.

It is also that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if Court is satisfied that action under challenge falls in the domain of public law, as distinguished from private law. The twin tests for maintainability of writ are as follows :

1. *The person or authority is discharging public duty/public functions.*

2. *There action under challenge falls in domain of public law and not under common law.*

The writ petition would not be maintainable against an authority or a person merely for the reason that it has been created under the statute or is to governed by regulatory provisions. It would not even in a case

where aid is received unless it is substantial in nature. The control of the State is another issue to hold a writ petition to be maintainable against an authority or a person.

If the writ petition refers to contractual obligation *inter se* between the parties, it would not be maintainable. Thus, the twin test, as suggested by us in this judgment is to be satisfied for maintainability of the writ petition and that too, after taking notice of the finding and observation made by us in reference to the nature of authority or person. Accordingly, we answer the questions referred by learned Single Judge in following terms :

(1) The remedy under Article 226 of the Constitution of India would be available against an authority or a person only when twin tests are satisfied. The authority or the person should not only discharge public function or public duty but the action challenged therein should fall in the domain of public law. The writ petition would not be maintainable against an authority or person even if it is discharging public function/public duty, if the controversy pertains to the private law such as a dispute arising out of contract or under the common law.

(2) The judgment of this Court in the case of ***Rajesh Kumar Srivastava (supra)*** is not against the ration pronounced by the Larger Bench in the case of ***Roychan Abraham (supra)*** rather it has followed the judgment of the Apex Court in the case of ***K. K. Saksena (supra)***.

Since the questions have been answered by the Larger Bench, the Registry is directed to place this order before the learned Single Judge where the writ petition is pending for hearing.

Order Date :- 4.10.2021
Shubham

(Munishwar Nath Bhandari, A.C.J.)

(Prakash Padia, J.)

(Sanjay Kumar Singh, J.)