



REPORTABLE

GAHC010118552023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

WP(C)/3111/2022

SMT. MRIDULA KONWAR HAZARIKA
W/O- HAMILTON HAZARIKA
R/O- PANITOLA
NAHAT PATHAR
P.O- PANITOLA
DIST- TINSUKIA
ASSAM
PIN-786183

VERSUS

THE DIRECTOR OF SECONDARY EDUCATION ASSAM AND 3 ORS.
ASSAM
KAHILIPARA
GUWAHATI
ASSAM
PIN-781019

2:THE MONTFORT SCHOOL
CHABUA
DIBRUGARH
ASSAM
PIN-786184

3:THE CHAIRMAN
SCHOOL MANAGING COMMITTEE
MONTFORT SCHOOL
CHABUA
DIBRUGARH



ASSAM
PIN-786184
4:THE SECRETARY AND PRINCIPAL
MONTFORT SCHOOL
CHABUA
DIBRUGARH
ASSAM
PIN-786184

Advocate for : MR S BORTHAKUR
Advocate for : SC
SEC. EDU. appearing for THE DIRECTOR OF SECONDARY EDUCATION
ASSAM AND 3 ORS.

Linked Case : WP(C)/3576/2022

MRIDULA KONWAR HAZARIKA
W/O- HAMILTON HAZARIKA
RESIDENT OF PANITOLA
NA-HAT PATHAR
POST OFFICE- PANITOLA
DISTRICT- TINSUKIA
ASSAM
PIN- 786183.

VERSUS

THE DIRECTOR OF SECONDARY EDUCATION AND 3 ORS
KAHILIPARA
GUWAHATI-19
ASSAM.

2:THE MONTFORT SCHOOL
CHABUA
DIBRUGHAR
ASSAM- 784184.
3:THE CHAIRMAN
SCHOOL MANAGING COMMITTEE
MONTFORT SCHOOL
CHABUA
DIBRUGHAR
ASSAM- 786184.
4:THE SECRETARY AND PRINCIPAL
MONTFORT SCHOOL
CHABUA



DIBRUGHAR
ASSAM- 786184.

Advocate for : MR S BORTHAKUR
Advocate for : SC
SEC. EDU. appearing for THE DIRECTOR OF SECONDARY EDUCATION AND 3
ORS

**BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

Date : 20-11-2023

JUDGMENT & ORDER (ORAL)

Heard Mr. S Borthakur, learned counsel for the petitioner. Also heard Mr. B Kaushik, learned counsel for the respondents in the Secondary Education Department, Government of Assam as well as Mr. A Dhar, learned counsel for the authorities under the Montfort School, Chabua.

2. The petitioner is a teacher in the Montfort High School at Chabua in the Dibrugarh district and is aggrieved by a communication dated 04.04.2022 from the authorities in the Montfort High School by which the petitioner was discontinued as a teacher of the school concerned. In the communication dated 04.04.2022 certain reasons thereof have been stated as to why the petitioner has been discontinued. When the writ petition was moved on 13.05.2022, the petitioner took a stand that although the Montfort High School is a privately managed high school, but they are governed by the provisions of Assam Non-Government Educational Institution (Regulation and Management) Act, 2006 (for short, the Act of 2006). Accordingly, in the order dated 13.05.2022 in



WP(C)No.3111/2022 it was taken note that although three reasons have been stated in the communication dated 04.04.2022 and the communication also refers to certain show cause notices, but the show cause notices did not pertain to the allegations referred in the order of discontinuing the services of the petitioner and on the other hand, they were related to some other incidents. It was further taken note that under Section 15(2) of the Act of 2006, which according to the petitioner was applicable in the facts and circumstances of the present case, there is also a requirement of providing a reasonable opportunity of being heard before an employee of a non-governmental educational institution can be dismissed, removed or reduced in rank and accordingly a *prima facie* view was formed that there was an aberration of the requirement of Section 15(2) of the Act of 2006.

3. Objections were raised by Mr. SMT Chistie, learned counsel for the respondents in the Secondary Education Department of the Government of Assam that the respondent institution being a private institute, a writ under Article 226 of the Constitution of India would not be maintainable. But, however, Mr. S Borthakur, learned counsel for the petitioner relied upon two pronouncements of the Hon'ble Supreme Court rendered in *Marwari Balika Vidyalaya Vs. Asha Srivastava and Others*, reported in (2020) 14 SCC 449 and *Ramesh Ahluwalia Vs. State of Punjab and Ors.* reported in (2012) 12 SCC 331, wherein it has been held that a writ petition under Article 226 of the Constitution of India would also be maintainable against a private un-aided educational institution. Accordingly, considering the nature of the *prima facie* case made regarding not following the provisions of Section 15(2) of the Act of 2006 and also in view of the reliance of the petitioner upon the pronouncements



of the Supreme Court in Marwari Balika Vidyalaya (supra) and Ramesh Ahluwalia (supra) which rebutted the objections raised by Mr. SMT Chistie, learned counsel for the Secondary Education Department, an interim order was passed providing that the communication dated 04.04.2022 shall remain stayed until further order(s).

4. In response thereof, the respondents in the Montfort High School have instituted IA(C)No.1580/2023 seeking for a recall of the interim order dated 13.05.2022 by raising the contention that under Section 2(xv) of the Act of 2006, an institute governed by Article 30(1) of the Constitution of India would not be included in the definition of a 'non-government educational institution' and, therefore, the provisions of the Act of 2006 would be inapplicable in respect of the respondent Montfort High School. It being inapplicable, it is the further contention that as the interim order was based upon non-compliance of Section 15(2) of the Act of 2006, therefore, the interim order requires a recall. Mr. S Borthakur, learned counsel for the petitioner in response thereof relies upon the judgment of the Hon'ble Supreme Court in Ramesh Ahluwalia (supra) wherein in paragraph 12 a proposition had been laid down that a private body, if performing public functions, which are normally expected to be performed by the State authorities, such public body would be amenable to a writ jurisdiction. Accordingly, it is the contention of Mr. S Borthakur, learned counsel for the petitioner that even if the provisions of the Act of 2006 would be inapplicable, in respect of the respondent Montfort High School, the procedure adopted for discontinuing the services of the petitioner, would clearly lead to a violation of the principles of natural justice, and, therefore, placing reliance upon the proposition laid down in Ramesh Ahluwalia (supra) contends that a writ petition against the respondent Montfort High School would be maintainable and the

impugned action of discontinuing the services of the petitioner by following the procedure which is in violation of the principles of natural justice would render a writ petition under Article 226 of the Constitution of India to be maintainable.

5. As the core contention of the petitioner is based on the maintainability of a writ petition, against a private educational institution, even without referring the institution to be governed by Article 30(1) of the Constitution of India and also without relying upon the contention that the impugned action is in violation of the provisions of the Act of 2006, the petitioners intend to raise an issue that the procedure adopted by the respondent Montfort High School in discontinuing her services is in violation of the principles of natural justice and, therefore, a writ petition would be maintainable *inasmuch as*, the school is discharging a public function. In the circumstance, the parties were required to look into a later decision of the Hon'ble Supreme Court rendered in *St. Mary's Education Society and Another Vs. Rajendra Prasad Bhargava and Others* reported in (2023) 4 SCC 498.

6. In the aforesaid background, the matter is being heard.

7. As a decision rendered on the issues raised in the application for recalling the interim order would also render a final decision on the issues raised in the writ petition, we accordingly proceed in the hearing construing it to be a hearing of WP(C) No.3111/2022 itself. It is also taken note that there is another writ petition by the same petitioner against the respondent Montfort High School which is WP(C)No.3576/2022 in respect of an order dated 18.05.2022 whereby the petitioner was placed under suspension.

8. As common issues are involved in both the writ petitions, we propose to hear both the writ petitions together and intend to adjudicate it by this common order. In the background of the claims, contentions and statements made as indicated above, the questions for determination would be (i) whether a writ petition would be maintainable against the respondent Montfort High School (ii) and if the writ petition would be maintainable against the respondent Montfort High School, whether it would also imply that a writ petition would be maintainable to adjudicate the issues raised in the writ petition.

9. On the issue as to whether the respondent Montfort High School being a minority institution under Article 30(1) of the Constitution of India would be excluded from the definition of 'non-government educational institution', in order to bring it within the purview of the Act of 2006, we have taken note of the certificate issued by the National Commission for Minority Educational Institution, Government of India, wherein it is certified that Montfort High School at Chabua in the Dibrugarh district of Assam is an institution covered under section 2(g) of the National Commission for Minority Educational Institutions Act, 2004, meaning thereby that it is a minority educational institution and as such, would be covered by the provision of Article 30(1) of the Constitution of India.

10. As the respondent Montfort High School is a minority institution, under Article 30(1) of the Constitution of India, we take note of the definition of 'non-government educational institutions' under the Act of 2006 under Section 2(xv), which is extracted as below:-

“2(xv) "non-government educational institutions" means schools established and run by an individual or association of individuals or any Non- Government Organization or Society or Trust, except the schools established or maintained by minorities under



clause(1) of Article 30 of the Constitution of India and imparting education at Primary, Middle, Secondary and Higher Secondary Level without receiving any grants-in-aid from the State Government excluding the educational institutions run or aided by the Central Government or the State Government. The word "institution" wherever it occurs in the Act shall be constructed accordingly."

11. A reading of the definition of 'non-government educational institution' under section 2(xv) of the Act of 2006 makes it discernible that there is an exception as regards schools established and maintained by the minorities under Article 30(1) of the Constitution of India and imparting education at primary, middle, secondary and higher secondary level without receiving any grants-in-aid from the State Government, to be excluded from the definition of 'non-government educational institution'. Apart from the respondent Montfort High School being a minority institution under Article 30(1) of the Constitution of India, we also take note of the submission of the learned counsel for the respondent Montfort High School that the school does not receive any grants-in-aid from the Government of Assam for its functioning.

12. As the institution is a minority institution under Article 30(1) of the Constitution of India and it does not receive any grants-in-aid from the State Government for its functioning, we are agreeing that the respondent Montfort High School is not a non-government educational institution under the Act of 2006.

13. As the respondent Montfort School is not a non-government educational institution, as defined in section 2(xv) of the Act of 2006, we are also of the view that the said school would not be subjected to the provisions of the Act of



2006. As the respondent Montfort School would not be subjected to the provisions of the Act of 2006, it would also be acceptable that the procedure under Section 15 of the Act of 2006 with regard to any appointment or any other conditions of service in respect of persons appointed in Montfort High School would also not be governed by Section 15 of the Act of 2006. It being so, the contention of the petitioner that the provision of section 15 of the Act of 2006 had been violated while the impugned communication dated 04.04.2022 was issued discontinuing the service of the petitioner would also be untenable in law.

14. Accordingly, we examined the other contentions of the petitioner that irrespective of the applicability of the provisions of the Act of 2006, there is also a requirement to follow the procedure of natural justice before discontinuing the service of a teacher. But in doing so, we also take note of the submission of Mr. A Dhar, learned counsel for the respondent Montfort High School as well as that of Mr. B Kaushik, learned counsel for the Secondary Education Department that a writ petition under Article 226 of the Constitution of India would not be maintainable in respect of the impugned communication discontinuing the services of the petitioner.

15. We have heard the rival contentions on the maintainability of the writ petition under Article 226 against the respondent Montfort High School. We take note of the submission of Mr. S Borthakur, learned counsel for the petitioner, who relies upon the proposition laid down by the Hon'ble Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others Vs. V.R Rudani and others*, reported in (1989) 2 SCC

691. Mr. S Borthakur, learned counsel for the petitioner relies upon the provisions in paragraphs 20 and 22 of the said pronouncement to substantiate that as the Montfort High School is discharging the function of providing education, it is discharging a public function and therefore, whether or not it is an instrumentality of the State under Article 12 of the Constitution of India, but by virtue of the nature of functions of providing education, which is a public duty, the respondent Montfort High School would be within the meaning of "any person or authority" under Article 226 of the Constitution of India. It is the submission of Mr. S Borthakur, learned counsel for the petitioner that as held by the Hon'ble Supreme Court in paragraph 20 of the judgment rendered in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others*(supra), the restricted meaning of an instrumentality of State under Article 12 would be in respect of petitions under Article 32 of the Constitution of India and such restricted interpretations would not be applicable in respect of a petition under Article 226 of Constitution of India wherein the expression "any person or authority" is given a much wider meaning and therefore, as the respondent Montfort High School is also discharging a public duty, therefore, a writ petition under Article 226 of the Constitution of India would be maintainable against such respondent.

16. The provision of the Hon'ble Supreme Court in paragraphs 20 and 22 in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others* (supra) is extracted as below:-

"20. 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.

22. *Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." [Judicial Review of Administrative Action, 4th Edn., p. 540] We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."*

17. In appreciating the contention raised by Mr. S Borthakur, learned counsel for the petitioner, we also take note of the proposition laid down by the Hon'ble Supreme Court in its judgment in St. Mary's Education Society (supra). We specifically take note that the judgment rendered by the Hon'ble Supreme Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others(supra) had been considered in paragraphs 23, 38 and 68 of St. Mary's Education Society (supra). In paragraph 23 the reference to the pronouncement in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others(supra) is in respect of a written submission made by the respondents before the Hon'ble Supreme Court to take note of the proposition laid down therein and in paragraph 38, the Hon'ble Supreme Court takes note that the proposition in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others(supra) was also taken into consideration in K.K Saksena Vs. International

Commission on Irrigation and Drainage, reported in (2015) 4 SCC 670. In paragraph 68 of its pronouncement in St. Mary's Education Society (supra), the Hon'ble Supreme Court also refers to the judgment rendered in *Ramakrishna Mission Vs. Kago Kunya*, reported in (2019) 16 SCC 303, wherein in paragraph 25 thereof one of the judgment's relied upon by the petitioner being Ramesh Ahluwalia (supra) was also taken note of. In paragraph 70, the Hon'ble Supreme Court takes note of a Full Bench judgment of the High Court of Allahabad wherein in paragraph 18 thereof, it is provided that there is a thin line between the public functions and private functions discharged by a person or a private body/authority and a 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. Paragraph 18 of the pronouncement of the Full Bench of High Court of Allahabad is extracted below:-

“18. There is a 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.”

18. In paragraph 74, the Hon'ble Supreme Court takes note of the proposition laid down in R.K Mission (supra), wherein in paragraph 34 it is provided that 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 and only exception arises in a situation where the contract of service is governed or regulated by a statutory provision. Having taken note of the provisions, some of which are extracted as above, the Hon'ble Supreme Court in paragraph 75 of its pronouncement in St. Mary's Education Society (supra) had summed up the final

conclusion which are as extracted:-

“75. *We may sum up our final conclusions as under:*

75.1. *An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.*

75.2. *Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the 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.*

75.3. *It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a constitutional court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a “public function” or “public duty” be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.*

75.4. *Even if it be perceived that imparting education by private unaided school is a public duty within the expanded expression of the term, an employee of a non-teaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether “A” or “B” is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of*



law may be interfered with by the Court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.

75.5. *From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character."*

19. In paragraph 75.1 of its pronouncement, the Hon'ble Supreme Court provided that an application under Article 226 of the Constitution of India is maintainable against a person or a body discharging public duty or functions. But at the same time, it is circumscribed to an extent that for ascertaining the discharge of public functions, it must be established that the body or the person was seeking to achieve the same for collective benefit of the public or a section of it and the authority to do so must be accepted by the public.

20. From the proposition of the Hon'ble Supreme Court as provided in paragraph 75.1, we answer the first question framed for adjudication as to whether a writ petition would be maintainable against the respondent Montfort High School and accordingly answer that the respondent Montfort High School having discharging a public duty or function, a writ petition otherwise would be maintainable.

21. But having said so, such maintainability would also be circumscribed to the extent that it also must be established that for the discharge of the public functioning the body or the person was seeking to achieve a collective benefit for the public or a section of it and the authority to do so must be accepted by the public. To ascertain the same, we take note as to what issue is raised in this writ petition and what action of the respondent Montfort High School is being



assailed.

22. As noted above, a communication dated 04.04.2022 is assailed in this writ petition by which the service of the petitioner had been discontinued. Further, we also take note of the proposition laid down by the Hon'ble Supreme Court in paragraph 75.2 and 75.3 of its pronouncement in *St. Mary's Education Society* (supra). In paragraph 75.2, it is provided that even if it is assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty and in paragraph 75.3 it is provided that it must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a constitutional court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. In the said paragraph, it had further been held that an educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a public function or public duty be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, but the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognized as being amenable to challenge under Article 226 of the Constitution and in the absence of such conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.

23. In the instant case, it is noticed that the petitioner was appointed in the respondent Montfort High School pursuant to a contract between the parties



and the Montfort High School being not a non-government educational institution within the meaning of section 2(xv) of the Act of 2006, the service conditions of the petitioner pursuant to such contract arrangement would have to be accepted to be not covered by any statutory provision.

24. A reading of the communication dated 04.04.2022 by which the service of the petitioner had been discontinued makes it further discernible that it is an arrangement between the respondent Montfort High School and the discontinuance of service of the petitioner because of the reasons stated therein, which appears to be more an internal matter between the respondent school and the petitioner would definitely be within the confines of an ordinary contract of a service having no statutory force or backing.

25. Accordingly, the other proposition laid down in paragraph 75.1 of the pronouncement of the Hon'ble Supreme Court in St. Mary's Education Society (supra) circumscribing the maintainability of a petition under Article 226 of the Constitution of India read with the provision in paragraph 75.2 and 75.3 of the said judgment leaves the Court to arrive at a conclusion that although the respondent Montfort High School may be subjected to a writ jurisdiction under Article 226 of the Constitution by virtue of being discharging public duties or public functions, but in respect of the impugned communication dated 04.04.2022 by which the service of the petitioner was discontinued being within the realm of a ordinary contract of service, a writ petition against the said communication of 04.04.2022 would not be maintainable under Article 226 of the Constitution of India.



26. In view of such conclusion, the writ petition stands dismissed. The interim order passed earlier stands vacated.

27. However, we are clarifying that we have not expressed any view on the legality or acceptability of the communication dated 04.04.2022 by which the service of the petitioner had been discontinued nor in respect of any of the reasons stated therein.

28. The writ petition is held to be not maintainable on a technical aspect of the maintainability of an application under Article 226 of the Constitution of India in respect of an ordinary contract of service between the respondent Montfort High School and the petitioner. As the writ petition had been dismissed on a technical aspect as indicated above, liberty remains with the petitioner to approach any other appropriate forum, if so advised and the dismissal of this writ petition shall not be construed to be also a dismissal on the merit of the claim of the petitioner against the communication dated 04.04.2022.

29. Accordingly, the other writ petition being WP(C) No. 3576/2022 being also against the order of a suspension of a similar nature pursuant to an ordinary contract of service, stands dismissed.

30. We are conscious of the aspect that because of our interim order, the petitioner was required to be allowed to remain in service and for the intervening period, the petitioner was paid. As the interference is made on a technical ground on the maintainability of the writ petition under Article 226 of



the Constitution and not on the merit of the issue, we provide that respondent Montfort High School shall not initiate any proceeding for recovery of the amount paid to the petitioner during this intervening period when the interim order was in force.

JUDGE

Comparing Assistant