*** THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA**

**+ W.P.No.26298 of 2024**

%Dated 31.12.2024

# Between:

Gowripaga Albert Lael and two others

PETITIONERS

*VERSUS*

Joseph D'Souza and 11 others

RESPONDENTS

! Counsel for Petitioners : Mr. Mr. J.Sudheer

^ Counsel for Respondents : Mr. A.Venkatesh, learned Senior Counsel representing Mr. Ch.Siddharth Sharma, learned counsel for the respondent Nos.1 to 5, 7 and 9.

Mr.Prathamesh Kamat, learned counsel appearing for respondent Nos.6 and 8.

< GIST :

> HEAD NOTE :

? Cases referred :

1. (2003) 10 SCC 733
2. (2024) 6 S.C.R. 934
3. (2002) 5 SCC 111
4. (2023) 4 SCC 498
5. (2015) 4 SCC 670
6. (1981) 1 SCC 722
7. (2019) 16 SCC 303
8. 2020 (6) MHL 662
9. (2005) 6 SCC 657
10. (2020) 1 MHLJ 922
11. 2020 SCC OnLine Bom 934
12. 2023 SCC OnLine SC 435
13. (1998) 8 SCC 1
14. (2003) 2 SCC 107
15. (1977) 2 Supreme Court Cases 806
16. 2023 SCC OnLine SC 1182
17. AIR 1964 SC 1013
18. (1991) 4 Supreme Court Cases 578
19. (2022) SCC Online Del 2213
20. (2008) 12 SCC 675
21. W.P.No.304272 of 2022
22. 2019 SCC Online All 3935
23. (1989) 2 SCC 691
24. (2023) 109 GSTR 402 : 2023 SCC OnLine SS 95

**THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA**

**WRIT PETITION No.26298 OF 2024**

Mr. J.Sudheer, learned counsel for the petitioners.

Mr. A.Venkatesh, learned Senior Counsel representing Mr. Ch.Siddharth Sharma, learned counsel for the respondent Nos.1 to 5, 7 and 9.

Mr.Prathamesh Kamat, learned counsel appearing for respondent Nos.6 and 8.

**ORDER**:

The writ petition has been filed for appointment of an Advocate Commissioner to administer and manage the affairs of the respondent Nos.6-9 and to reinstate the former Trustees/founding Directors of the said respondents to take appropriate action against the respondent No.11 in failing to conduct inspection and Audit of the Directors of the respondent Nos.7 and 9 under the Companies Act, 1956.

2. The petitioners claim to be erstwhile employees of the respondent Nos.6 – 9 which are public trust/charities. All the three petitioners claim to have been terminated from service without enquiry. The respondent No.6 is a Public Trust registered under The Bombay Trusts Act, 1950. The respondent No.7 is a Public Charity (Non-profit) registered under section 25 of The

Companies Act, 1956 operating in the name and style of "Operation Mobilisation India" which was later changed to "Operation Mercy India Foundation". The respondent No.8 is also a Public Charity registered under the Andhra Pradesh Societies Registration Act, 2001 in the name and style of "Good Shepherd Community Society". The respondent No.9 is a Public Charity registered under section 25 of The Companies Act, 1956 in the name and style of "O.M. Books Foundation" and the respondent No.10 is an International Charity registered under The Companies Act, 1956, of England and Wales with operations in over 110 countries including in India.

3. The petitioners allege that the petitioners were unceremoniously terminated from service due to the whistle-blowing activities of the petitioner No.1. The petitioners allege that the respondent No.1, a Director of the respondent charities, is mismanaging the affairs of the Trust and misappropriating funds brought in by the donors. The petitioners hence pray for appointment of an Advocate Commissioner to act as an Administrator for managing the affairs of the respondent Nos.6-9.

4. Learned counsel for the petitioners submits that there are admitted and established violations of the respondent Trusts and Public Charities carried out at the behest of its Trustees and Directors/private respondents in the writ petition. Counsel submits that the private respondents have abused their position and caused financial misappropriation and irregularities in the management of the Public Trusts. Counsel submits that the respondent Nos.1 to 5 are not qualified to hold positions as Trustees or Directors of the respondent Nos.6-9. Counsel argues in favour of the maintainability of the writ petition despite an alternative remedy being available under The Bombay Public Trusts Act, 1950.

5. Learned Senior Counsel appearing for the respondent Nos.1-5, 7 and 9 argues against the maintainability of the writ petition as being filed against the respondent Nos.1-5 who are private individuals and are not discharging any public functions. Counsel submits that the writ petition reeks of personal animosity and is also barred by the principles of *res judicata* and constructive *res judicata.* Counsel submits that the writ petition is filed beyond the maximum period of limitation provided under The Companies Act,

2013 and the writ petition is also not maintainable against foreign non-juristic entities.

6. Learned counsel appearing for the respondent Nos.6 and 8 reiterates the argument on the non-maintainability of the writ petition also in light of the alternative remedy under The Bombay Trusts Act, 1950. Counsel submits that the respondent No.8, which is registered under The Andhra Pradesh Co-operative Societies Act, 1964, is not amenable to Writ jurisdiction and that the writ petition involves disputed questions of facts which a Writ Court cannot adjudicate upon.

7. I have heard the arguments of learned counsel appearing for the petitioners. I have also heard the submissions made on behalf of the respondent Nos.1-5, 7 and 9 and the respondent Nos.6 and 8 represented by learned Senior Counsel and learned counsel appearing for the two sets of the respondents, respectively. The Court has also considered the material which has been placed for the Court's perusal.

8. The decision of the Court is captioned under different headings. The reasons and conclusions are given on the captioned issue.

Is the Writ Petition maintainable in its present form ?

9. It would be evident from the prayers in the writ petition that the petitioners seek removal of the respondent Nos.1-5 who are presently Directors/Office Bearers/Trustees of the respondent Nos.6-9 (prayer-a); appointment of an Advocate Commissioner to act as an Administrator for managing the affairs of the respondent Nos.6-9 and for reinstating the founding Directors to oversee the administration of the Trust (prayer-b); direction on the Advocate Commissioner to formulate a scheme for addressing the individual grievances of the staff members and employees who were allegedly illegally terminated (prayer-c); direction on the respondent No.11 (the Regional Director, South Eastern Region, Ministry of Corporate Affairs) to take appropriate action against the Directors of the respondent Nos.7 and 9 (prayer-d) and direction on the respondent No.10 to take necessary steps to revive the respondent Nos.6-9 institutions to their original mandate of serving public duties (prayer – e). Prayer-f is directed against the position and

powers given to the respondent No.1 and for a declaration in respect of the actions taken by the respondent No.1.

10. The cause of action pleaded in the writ petition and the consequential reliefs prayed for makes it clear that the petitioners have brought a dispute directed against individuals which is purely private and personal in nature.

11. Even a bare perusal of the writ petition would show that the cause of action is one of personal animosity primarily arising out of the petitioners' service being terminated by the Directors/persons in control of the respondent Nos.6-9. The cause of action clearly lacks the accepted markers of an action within the parameters of Article 226 of the Constitution of India which must necessarily include a public element or an infraction of fundamental rights guaranteed under Part III of the Constitution or the complained act being in violation of the principles of natural justice: *Federal Bank Ltd. Vs. Sagar Thomas*[1] and Mr.*R.S. Madireddy Vs. Union of India*[2].

12. In order to successfully pass the test of maintainability, the petitioners must also show that the impugned act is by or at the

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[1] (2003) 10 SCC 733
[2] (2024) 6 S.C.R. 934

behest of a "State" as defined under Article 12 of The Constitution or a "Person" or "Authority" having the trappings of a State either in form or in discharge of functions or owing a positive obligation to the affected party. The writ petition lacks these ingredients by way of pleadings as well as the material disclosed.

13. It is undisputed that the respondent Nos.6-9 are not financially, functionally or administratively dominated by the Government or under the control of the Government. In any event, mere regulatory control, under a statute or otherwise, will not adorn the body with the trappings of a "State" or an instrumentality of a State: *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[3]. *St. Mary's Education Society Vs. Rajendra Prasad Bhargava*[4] reinforced the dictum that judicial review of an action can only be brought within Article 226 of the Constitution if there is a public law element and not for enforcing a contract of personal service with a further qualification that a contract of personal service includes all matters relating to the service of the employee including suspension, termination, confirmation and transfer. *St. Mary's* (supra) relied on *K.K.*

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[3] (2002) 5 SCC 111
[4] (2023) 4 SCC 498

*Saksena v. International Commission on Irrigation and Drainage* [5] which demarcated the exceptions to a contract of personal service where the employee is a public servant or is employed by an authority within the meaning of Article 12 of the Constitution or is a "workman" within the meaning of section 2(s) of The Industrial Disputes Act, 1947. Admittedly, the petitioners do not fall within the exceptions carved out in *K.K. Saksena* (supra).

14. The mere fact that the respondent No.7 is imparting education will not make the said respondent amenable to writ jurisdiction in the absence of a public law element which is quintessential to the maintainability of the writ petition: *St. Mary Education Society* (supra).

15. Admittedly, the schools functioning under respondent No.2 are unaided private institutions and come within the ambit of section 2(n)(iv) of The Right of Children to Free and Compulsory Education Act, 2009. Section 12(2) of the said Act clarifies that the "school" specified under section 2(n)(iv) providing free and compulsory elementary education shall be reimbursed expenditure incurred by it by the State. It is not the petitioners' case that the

[5] (2015) 4 SCC 670

respondent Nos.5-7 receive State aid or finances. Even if it is assumed that the respondent Nos.5-7 receive State aid, the case is unsubstantiated and in any event disputed by the respondents.

16. Imparting education, *per se*, will not pull the respondents within the stranglehold (in a punitive sense) of Article 226 of the Constitution unless the respondents can be shown to discharge a public duty with an attending public law element or that there is a pervasive State control in their day-to-day affairs. Although the Supreme Court in *Pradeep Kumar* (supra) opined that the tests formulated in *Ajay Hasia v. Khalid Mujib Sehravardi*[6] are not a rigid set of principles, the question in each case would be whether the body is financially, functionally and administratively dominated by or under the control of the Government in the light of the cumulative facts as established.

17. The Court, therefore, concludes that the writ petition is for settling of a personal score with a stark absence of a case being made out that the respondents are amenable to the writ jurisdiction of the Court.

[6] (1981) 1 SCC 722

18. The essential requirement of the alleged wrongdoer falling within a "State" or a "Public Authority" is discussed in the next point.

<u>The Writ Petition is against a Public Trust:</u>

19. The Objects of the respondent No.6 "Operation Mobilisation India" indicate that the activities of the respondent No.6 are voluntary in nature with a focus on spreading the teachings of Jesus Christ. Admittedly, the respondent No.6/Trust does not receive any financial assistance from the State and would, therefore, not fall within the definition of "State" under Article 12 of the Constitution.

20. As stated above, the cause of action pleaded revolves around personal rights and agenda and does not involve any public law element: *Ramakrishna Mission Vs. Kago Kunya*[7] and *Lakhichand Marotrao Dhoble Vs. Joint Charity Commissioner, Civil Lines, Nagpur*[8]. In the latter case, the Division Bench of the Bombay High Court considered the objects of a Public Trust which engaged

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[7] (2019) 16 SCC 303
[8] 2020 (6) MHL 662

in religious activities to be purely of a voluntary nature without any financial assistance from the State. The Court opined that inculcating religious feelings amongst members of a particular community cannot be equated to a public function or discharge of a public duty. A public function is generally for achieving a collective benefit for the public or a section of the public with a flavour of social or economic affairs in public interest: *Binny Ltd. Vs. S. Sadasivan*[9].

21. It is hence clear that the respondent No.6 does not qualify under the accepted parameters of a State or an instrumentality of the State. The reason for this view finds place in the next captioned heading.

The Bombay Public Trusts Act, 1950, specifically provides for the power to remove a Trustee.

22. The fact that the respondent No.6 is a Public Trust registered under The Bombay Public Trusts Act, 1950 is not disputed. Section 41B of the said Act confers the power to institute an enquiry with regard to a particular charity or a class of charities on

[9] (2005) 6 SCC 657

the Charity Commissioner. Section 41D delineates the procedure for suspending, removing or dismissing Trustees. Section 47 reiterates the power of the Charity Commissioner to appoint, suspend, remove or discharge Trustees and invest property to new Trustees. Section 80 declares that Civil Courts shall not have jurisdiction to decide or deal with any question covered by the Act of 1950.

23. The above provisions of The Bombay Public Trusts Act,1950 makes it clear that the respondent No.6/Public Trust is amenable to the said Act which also provides for the mechanism for the precise relief which the petitioners have prayed for in the present writ petition. Besides, the procedure for suspension and removal of Trustees, as provided under section 41D (2) of the Act, entails leading of evidence and proving of the charges framed against a Trustee along with the explanation given by the Trustee. The aforesaid matters are beyond the periphery of a writ petition: *Totaram Dasuji Rathod Vs. Atmaram Kisansing Rathod*[10] and *Eknath Tukaramji Pise Vs. Rama Kawaduji Bhende*[11]. The importance of leading evidence and proving of the charges levelled

[10] (2020) 1 MHLJ 922
[11] 2020 SCC OnLine Bom 934

against the Trustee was noted in *Totaram Dasuji Rathod* (supra) in view of the harsh consequences of removal from the Trust.

24. The above discussion would lead to the inescapable conclusion that the petitioners have invoked the writ jurisdiction of the Court despite a precise statutory remedy being available to the petitioners under The Bombay Trusts Act, 1950.

This also means that the petitioners have an efficacious alternative statutory remedy available to them.

25. The Bombay Public Trusts Act, 1950 demonstrates that the petitioners' cause can very well be espoused before the Charity Commissioner and other officers under the Act. The writ petition does not disclose any challenge to the vires of any statute or any allegation of violation of fundamental rights or the principles of natural justice. Therefore, the Court does not find any ground to entertain the writ petition despite the existence of an efficacious alternative remedy: *South Indian Bank Ltd. Vs. Naveen Mathew Philip*[12]. This decision relied on *Whirlpool Corporation Vs. Registrar*

[12] 2023 SCC OnLine SC 435

*of Trade Marks*[13] and *Harbanslal Sahnia Vs. Indian Oil Corporation Ltd.*[14] where the Supreme Court laid down the proposition that availability of alternative remedy may not be an absolute bar in certain contingencies.

The Writ Petition is in any event hit by the Principles of *Res Judicata*/Constructive *Res Judicata*

26. The following facts are undisputed in respect of the captioned heading.

27. The first petitioner had filed a Company Petition seeking identical relief against the respondents for oppression and mismanagement under sections 241 and 245 of The Companies Act, 2013 which included the relief for termination or modification of Agreements under section 243 of The Companies Act, 2013.

28. The Company Petition (C.P.No.60/241/HDB/2019) was dismissed on merits by the NCLT, Hyderabad Bench on 22.06.2020. The findings in the order of dismissal include that the petitioner failed to prove any oppression and management into the affairs of the Company/Operation Mercy India Foundation (the

[13] (1998) 8 SCC 1
[14] (2003) 2 SCC 107

respondent No.7 herein) and also failed to file documentary proof for considering the prayer in the Company Petition. Incidentally, the petitioner also prayed for an order of investigation into the affairs of the Company and to suspend the Board and to appoint a Commissioner. The first petitioner herein was the first petitioner in the Company Petition.

29. The petitioner Nos.2 and 3 herein approached the Industrial Tribunal along with 18 other employees against the termination of their employment. The request for re-instatement was rejected by the Industrial Tribunal by an order dated 10.07.2023. The petitioner No.1 also filed a writ petition (W.P.No.36200 of 2022) challenging his termination before this Court, said writ petition is pending as on date.

30. This Court therefore finds substance in the contentions of the answering respondents that the multiple actions instituted by the petitioner No.1 for similar relief and the findings of the NCLT and Industrial Tribunal attract the principles of *res judicata* and constructive *res judicata*: *State of Uttar Pradesh Vs. Nawab*

*Hussain*[15], *Samir Majumdar Vs. Union of India*[16]. A three Judge Bench of the Supreme Court in the former decision explained 'constructive *res judicata'* as a rule which postulates that if a plea could have been taken by a party in an earlier proceeding, he/she would not be permitted to take that plea against the same party in a subsequent proceeding founded on the same cause of action. The rule is anchored on public policy as no party can be encouraged to institute one proceeding after another and urge new grounds every time. *Amalgamated Coalfields Ltd. Vs. Janapada Sabha, Chhindwara*[17], categorically held that the principle of *res judicata* is also applicable to writ petitions.

31. The above facts would indicate that the present writ petition has been filed beyond the statutory time period provided under The Companies Act, 2013 for filing an Appeal from an order of the NCLT to NCLAT. The order of the NCLT, Hyderabad dismissing the Company Petition on 22.06.2020 means that the challenge to the said order could only have been filed within 45 + 45 days from the date on which a copy of the order of NCLT was made available to

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[15](1977) 2 Supreme Court Cases 806
[16]2023 SCC OnLine SC 1182
[17]AIR 1964 SC 1013

the petitioner under section 421(3) read with the proviso to The Companies Act, 2013.

32. It is evident that the petitioners seek to re-agitate the very same points in the writ petition which were raised before the NCLT without complying with the timelines of the challenge provided under The Companies Act, 2013. Article 226 of the Constitution of India cannot be used to entertain belated claims unless the petitioners offer a credible explanation.

The writ petition is not maintainable against a Society

33. The respondent No.8/Good Shepherd Community Society is registered under The Andhra Pradesh Co-operative Societies Act, 1964 whose objects include imparting spiritual teachings, setting up primary health and literary centers. Such a society cannot fall within the definition of "State" within the meaning of Article 12 of the Constitution of India. A writ petition is also not maintainable against a Co-operative Society: *Chander Mohan Khanna Vs. National Council of Educational*[18]. The Supreme Court in this case agreed with the contention that NCERT is a Society registered

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[18] (1991) 4 Supreme Court Cases 578

under the Societies Registration Act and was not a "State" under Article 12 of the Constitution.

34. The respondent No.10/O.M International situated in United Kingdom is admittedly a foreign entity which has no control over or connection with the respondents. The respondent No.12/Bishops Council and Synod is also not a legal or statutory entity incorporated under any law. Its constitution is approved by the Council of Bishops on 31.07.2014 with four Bishops including a Presiding Bishop. It is the headquarters of the Good Shepherd Community Church.

35. In *Prakash Singh Vs. Union of India*[19], a Division Bench of the Delhi High Court held that the respondent No.2 therein i.e., Agence France Press is an entity of France and cannot be termed as "State" under Article 12 of the Constitution of India and therefore is not amenable to Writ jurisdiction.

36. The Court also agrees with the contentions raised on behalf of the respondents that the writ petition concerns disputed questions of fact since the petitioners have only proceeded on the

[19] (2022) SCC Online Del 2213

allegations of mismanagement and corrupt practices which have been disputed by the respondents. The nature of allegations require evidence and conclusive proof which the Writ Court is not equipped to deal with: *State of Uttar Pradesh Vs. Uttar Pradesh Rajya Kanij Vikas Nigam SS*[20].

37. The decisions cited on behalf of the petitioner are distinguishable on facts as well as in law. *D.Bright Joseph Vs. Church of South India*[21] involved a challenge to the election of a member of the Synod at the instance of an elected member. The Supreme Court held that the writ petition was maintainable as the institution in that case was discharging a public duty. In the present case, the reliefs claimed are entirely in the realm of private law and the petitioners, as ex-employees, are seeking re-instatement. *Roychan Abraham Vs. State of U.P.*[22] was considered in *St.Mary's Education Society (supra)* where the Supreme Court held that a writ petition against an educational institution cannot be maintained if there is no direct nexus between the act complained of and discharge of public duty. *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak*

[20] (2008) 12 SCC 675
[21] W.P.No.304272 of 2022
[22] 2019 SCC Online All 3935

*Trust Vs. V.R. Rudani*[23] was a case involving a public trust running a college affiliated to the Gujarat University with a dispute of pay scales in relation to the governing provisions of the University Grants Commission. *Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer-cum-Assessing Authority* [24] considered the issue of an alternative remedy of appeal under section 33 of the Haryana Value Added Tax Act, 2003. The Supreme Court held that a writ petition can be maintained to deal with a pure question of law despite existence of the alternative remedy.

38. The above discussion under the separate heads leads to the firm conclusion that the writ petition is not maintainable. The fundamental consideration for this view remains the personal cause of action brought to the Court without any public law element or violation of fundamental rights of the petitioners at the hands of the State or instrumentalities of the State.

39. This Court therefore does not have any hesitation to dismiss the writ petition on the ground of maintainability.

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[23] (1989) 2 SCC 691
[24] (2023) 109 GSTR 402 : 2023 SCC OnLine SS 95

40. W.P.No.26298 of 2022, along with all connected applications, is accordingly dismissed as not being maintainable. Interim orders, if any, shall stand vacated. There shall be no order as to costs.

**MOUSHUMI BHATTACHARYA, J**

Date: 31.12.2024
**Note: L.R. copy to be marked**
*VA/BMS*