

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 22.12.2022
Pronounced on:30.12.2022

OWP No.1521/2018

M/S AISHA CONSTRUCTIONS

... PETITIONER(S)

*Through: - Mr. R. A. Jan, Sr. Advocate, with
Mr. Aswad Attar, Advocate.*

Vs.

J AND K CRICKET ASSOCIATION & ANR

...RESPONDENT(S)

*Through: - Mr. Rahul Pant, Sr. Adv. With
Mr. Achyut Dubey, Advocate &
Mr. Arif Sikander, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has sought a direction upon the respondents seeking release of withheld admitted liability to the tune of Rs.6.00 crores in its favour.

2) As per the case of petitioner, tender notice No.JKCA/Try/618-21 dated 12.12.2009 was floated by the respondents and in response thereto, the petitioner submitted its bid. It is further submitted that the petitioner was allotted three work orders bearing Nos.JKCA/Try/659-

63 dated 17.01.2010, JKCA/Try/52-B/664-68 dated 10.02.2010 and JKCA/Try/740-44 dated 20.03.2010 as it was the lowest among the tenderers. The petitioner was awarded work contract for construction of Pavilion Building No.1 at JKCA, Head Quarters, Srinagar, and the estimate of the said work was at Rs.1.75 crores. It is also submitted that vide work order No.JKCA/Try/52-B/664-68 dated 10.02.2010, the petitioner was awarded work order for construction of building N.2 at JKCA Headquarter, Srinagar, for an estimate of Rs.1,67,42,000/. Vide work order No.JKCA/7440-44 dated 20.03.2010, the petitioner was asked to undertake construction works at an estimated costs of Rs.11.85 lacs. Again, vide work order No.JKCA/Try/52-B/454-58 dated 03.01.2011, the petitioner was awarded work for construction of building No.3 at JKCA Headquarter, Srinagar, at an estimated cost of Rs.5,34,12,670/.

3) Vide communication dated 11.06.2012, the Civil Engineer of respondent Association submitted the report pertaining to the petitioner to the Treasurer, JKCA, Srinagar. It is averred that the petitioner had executed most of the works on verbal orders of the respondent Association and the same was acknowledged and accepted

by the Engineer, Incharge, JKCA, vide his communication dated 02.04.2013. It has been further submitted that despite a number of representations right from the year 2013 till 2018, payments were not released in favour of the petitioner. It has been submitted that out of the works executed by the petitioner, an amount of Rs.4.00 crores has been released in its favour but the balance amount of Rs.6.00 crores has not been released.

4) In the backdrop of aforesaid facts, the petitioner has sought release of an amount of Rs.6.00 crores from the respondents.

5) The respondents have filed a short reply to the writ petition raising objections to its maintainability. While denying its liability to pay any amount to the petitioner, the respondents have submitted that respondent No.1 is not a "State" within the meaning of Article 12 of the Constitution and, as such, the writ petition is not maintainable. It has been further submitted that even if a writ petition would lie against respondent No.1, but no mandamus can be issued against it for enforcement of private law rights. It has also been contended that the claim of the petitioner is stale and, as such, the writ petition is not maintainable. Another ground raised by the respondents objecting to the

maintainability of the writ petition is that disputed questions of fact arise in the instant case which cannot be determined in these proceedings.

6) I have heard learned counsel for the parties and perused the record of the case.

7) It has been contended by learned senior counsel appearing for the respondents that the Jammu and Kashmir Cricket Association is a society and is not a State within the meaning of Article 12 of the Constitution of India, as such, the writ petition against it is not maintainable.

8) *Per contra*, learned counsel appearing for the petitioner has submitted that the Supreme Court has, in the case of **Board of Control for Cricket in India vs. Cricket Association of Bihar and others**, (2015) 3 SCC 251, settled the controversy and has held that the Board of Control for Cricket in India, of which respondent No.1 is a constituent, is amenable to writ jurisdiction under Article 226 of the Constitution.

9) In the **Board of Control for Cricket in India's** case (supra), the Supreme Court has, while answering the question whether BCCI is a state within the meaning of

Article 12 of the Constitution and if it is not, whether it is amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India, held that BCCI though not a state under Article 12 of the Constitution but it is certainly amenable to writ jurisdiction under Article 226 of the Constitution. The Supreme Court, while holding as above, has observed as under:

“33. The majority view thus favours the view that BCCI is amenable to the writ jurisdiction of the High Court under Article 226 even when it is not “State” within the meaning of Article 12. The rationale underlying that view if we may say with utmost respect lies in the “nature of duties and functions” which BCCI performs. It is common ground that the respondent Board has a complete sway over the game of cricket in this country. It regulates and controls the game to the exclusion of all others. It formulates rules, regulations, norms and standards covering all aspects of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person. It spends crores of rupees on building and maintaining infrastructure like stadia, running of cricket academies and supporting State associations. It frames pension schemes and incurs expenditure on coaches, trainers, etc. It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India has allowed the Board to select the national team which is then recognised by all concerned and applauded by the entire nation including at times by the highest of the dignitaries when they win tournaments and bring laurels home. Those distinguishing themselves in the international arena are conferred highest civilian awards like the Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri apart

from sporting awards instituted by the Government. Such is the passion for this game in this country that cricketers are seen as icons by youngsters, middle aged and the old alike. Any organisation or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity.

34. The functions of the Board are clearly public functions, which, till such time the State intervenes to takeover the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/private body to discharge functions which it could in law take over or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action."

10) From the foregoing enunciation of law of the subject, it is clear that BCCI may not be an authority under Article 12 of the Constitution but the same is amenable to the writ jurisdiction of the High Court because of wide scope of Article 226 of the Constitution. The words "any person or authority" used in Article 226 of the Constitution not only includes the statutory authorities and instrumentalities of the State but it also includes "any person or authority" performing public duties. Since the JKCA, by the logic adopted by the Supreme Court in **Board of Control for Cricket in India's** case (supra), also performs the public functions like selection of team for UT of J&K, maintenance of infrastructure, running of cricket academies and similar

other activities and, as such, is amenable to writ jurisdiction of the High Court.

11) Having held that respondent No.1 is amenable to writ jurisdiction of the High Court, the question arises as to whether a mandamus can be issued against respondent No.1 for upholding its contractual obligations, as is being sought by the petitioner in this case.

12) In the above context, learned Senior counsel for the petitioner has relied upon the judgment of the Supreme Court in the case of **ABL International Ltd and another vs. Export Credit Guarantee Corporation of India Ltd. and others**, (2004) 3 SCC 553, wherein the Supreme Court has, after discussion of law on the subject, observed that in an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable. The Court has further held that merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

13) From the above enunciation of law laid down by the Supreme Court, it is clear that even contractual obligations

of a State or an instrumentality of a State can be enforced by having resort to the writ proceedings. However, in the instant case, we are not dealing with a State or an instrumentality of the State. As has been held by the Supreme Court in **Board of Control for Cricket in India's** case (supra), Board of Control for Cricket in India is not a State or an instrumentality of a State within the meaning of Article 12 of the Constitution but it is amenable to writ jurisdiction because it qualifies to be "any person or authority" within the meaning of Article 226 of the Constitution, which vests power with the High Court to issue writs. While State or an instrumentality of a State, in terms of law laid down by the Supreme Court in **ABL International Ltd.'s** case (supra), is amenable to writ jurisdiction even in cases arising of a contractual obligation but the same may not be the position in a case where the contractual obligation is sought to be enforced against a person or authority which is not a state or an instrumentality of a state.

14) The Supreme Court in the case of **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust vs. V. R. Rudani**, (1989) 2 SCC 691, has discussed the question as to in which cases a writ

of mandamus would lie against a person or an authority which is neither a state nor an instrumentality of the state in the following manner:

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

17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statute--and whose powers and duties are defined by statute. So, Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from

the English law. Under Article 226, writs can be issued to "any person or authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose.

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 Art. 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as nonfundamental 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."

15) From the foregoing enunciation of the law, it is clear that the Supreme Court carved out two exceptions to the issuance of writ of mandamus against a person or body which is not a state or its instrumentalities, (i) if the rights are purely of a private character, no mandamus can be issued, and (ii) if the management of the college is purely a private body with no public duty, mandamus will not lie. The guiding factor, therefore, is the nature of duty imposed upon the person or body against whom mandamus is being sought. Thus, if the nature of duty imposed on a body is public in nature, it is amenable to writ jurisdiction under Article 226 but if the rights sought to be enforced are

purely of a private character, mandamus cannot be issued against such body.

16) In **Binny Ltd. vs. V. Sadasivan**, (2005) 6 SCC 657, the Supreme Court clarified that though writ can be issued against any private body or person, the scope of mandamus is limited to enforcement of public duty. It was discussed that it is the nature of duty performed by such person or body which is the determinative factor as the Court is to enforce the said duty and the identity of the authority against whom the right is sought is not relevant. The Court further clarified that that such duty can either be statutory or even otherwise but there has to be public law element in the action of that body. Para 32 of the aforesaid judgment is relevant to the context and the same is reproduced as under:

“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 a 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.”

17) The Supreme Court has, after noticing its aforesaid judgments in the case of **K. K. Saksena vs. International**

Commission of Irrigation and Drainage and others,

(2015) 4 SCC 67, observed as under:

“43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a '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 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. Reason is obvious. 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.”

18) In **St. Mary's Education Society & anr. vs. Rajendra Prasad Bhargava & Ors.** 2022 SCC Online SC 109, the Supreme Court, while considering the question whether a writ petition would be maintainable against a private body, made certain observations in para 27 and 61 of the judgment, which are relevant to the context, and the same are reproduced as under:

“27. The respondent No. 1 herein has laid much emphasis on the fact that at the time of his appointment in the school, the same was affiliated to the Madhya Pradesh State Board. It is his case that at the relevant point of time the school used to receive the grant-in-aid from the State Government of Madhya Pradesh. Later in point of time, the school came to be affiliated to the CBSE. The argument of the respondent No. 1 seems to be that as the school is affiliated to the Central Board i.e. the CBSE, it

falls within the ambit of “State” under Article 12 of the Constitution. The school is affiliated to the CBSE for the purpose of imparting elementary education under the Right of Children to Free and Compulsory Education Act, 2009 (for short, “Act 2009”). As the appellant No. 1 is engaged in imparting of education, it could be said to be performing public functions. To put it in other words, the appellant No. 1 could be said to be performing public duty. Even if a body performing public duty is amenable to the writ jurisdiction, all its decisions are not subject to judicial review. Only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction. If the action challenged does not have the public element, a writ of mandamus cannot be issued as the action could be said to be essentially of a private character.

61. Merely because a writ petition can be maintained against the private individuals discharging the public duties and/or public functions, the same should not be entertained if the enforcement is sought to be secured under the realm of a private law. It would not be safe to say that the moment the private institution is amenable to writ jurisdiction then every dispute concerning the said private institution is amenable to writ jurisdiction. It largely depends upon the nature of the dispute and the enforcement of the right by an individual against such institution. The right which purely originates from a private law cannot be enforced taking aid of the writ jurisdiction irrespective of the fact that such institution is discharging the public duties and/or public functions. The scope of the mandamus is basically limited to an enforcement of the public duty and, therefore, it is an ardent duty of the court to find out whether the nature of the duty comes within the peripheral of the public duty. There must be a public law element in any action.”

19) In the aforesaid case, the Supreme Court while summing up its conclusions, held as under:

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

(a) 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.

(b) 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.

(c) 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.

(d) Even if it be perceived that imparting education by private unaided the school is a public duty within the expanded expression of the term, an employee of a nonteaching 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 nonteaching 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 nonteaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered 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.

(e) 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.”

20) From the foregoing enunciation of the law on the subject, it is clear that while a private body like respondent No.1, would be amenable to writ jurisdiction of the High Court under Article 226 of the Constitution but the judicial review of its actions by the High Court would be confined to only those actions which have the element of public duty and its actions which have the character of private law rights are not amenable to the writ jurisdiction of the High Court.

21) Learned counsel for the petitioner has, on the basis of the ratio laid down by the Supreme Court in the case of **ABL International Ltd** (supra), contended that once it is shown that the action of a private body is arbitrary and violative of Article 14 of the Constitution, a writ petition would certainly lie even to enforce contractual obligations

of such body. It is contended that in the instant case, respondents have withheld the amount of the petitioner without any rhyme and reason and such action of the respondents is arbitrary and, therefore, the instant petition to quash such an action of respondents is certainly maintainable.

22) The argument of Senior learned counsel for the petitioner, as urged above, is without any merit for the reason that the right to equality under Article 14 of the Constitution is available against a State. It cannot be claimed against a private body like respondent No.1. In my aforesaid view I am supported by the judgment of the Supreme Court in the case of **Satimbla Sharma vs. St. Paul's Senior Secondary School**, (2011) 13 SCC 760, wherein it has been held that right guaranteed under Article 14 of the Constitution is not available against unaided private schools.

23) Through the medium of instant petition, the petitioner is seeking enforcement of a contractual obligation of respondent No.1, which falls within the realm of private law. It is not a case where the petitioner is seeking enforcement of any obligation against respondent No.1 which constitutes a public duty or public function of the

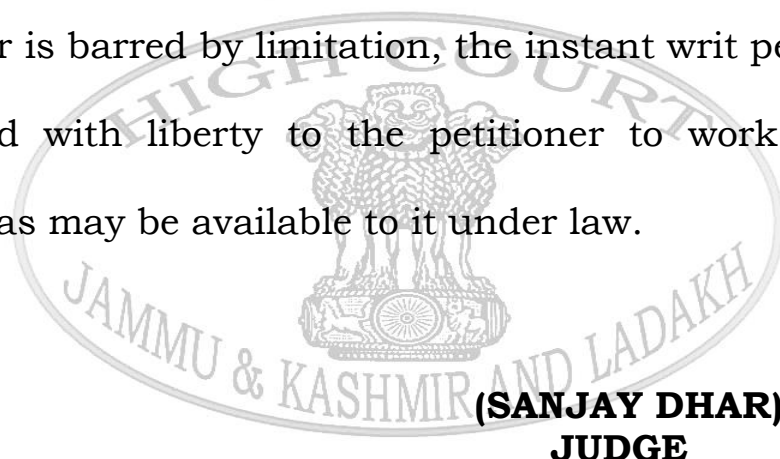
said respondent, but it is a case where the petitioner is seeking enforcement of a contractual obligation which is purely a private matter between the petitioner and respondent No.1. Therefore, in the light of the law discussed hereinbefore, no mandamus would lie against respondent No.1 to enforce such an obligation.

24) A Coordinate Bench of this Court in the case of **Showkat Ahmad Rather & Ors. vs. Government of J&K & Ors.** (WP(C) No.2197/2021 decided on 11.10.2022), has, after discussing the law on the subject, held that in the absence of violation of statutory provision or breach of public duty by a body or person, writ petition for enforcement of private contract of service is not maintainable. Similarly, a Division Bench of the High Court of Delhi in the case of **Rahul Mehra & anr. vs. Union of India**, (2004) 78 DRJ 155, while holding that BCCI is amenable to the writ jurisdiction of the High Court, observed that disputes or acts in the sphere of pure private law having no traces of public law would not be the subject matter of writs, directions or orders to be issued under article 226.

25) From the foregoing analysis of law on the subject, it is clear that, while respondent No.1 is amenable to writ

jurisdiction of the Court in matters that fall within the ambit of public law acts, but no mandamus can be issued against the said respondent in respect of the acts which fall in the sphere of private law.

26) In view of the foregoing discussion, while upholding the objection to the maintainability of the writ petition raised by the respondents, it is held that the instant petition is not maintainable. Therefore, without commenting upon the merits of the case and without commenting on the issue whether the claim of the petitioner is barred by limitation, the instant writ petition is dismissed with liberty to the petitioner to work out its remedy, as may be available to it under law.



(SANJAY DHAR)
JUDGE

Srinagar,
30.12.2022
“Bhat Altaf, PS”

*Whether the order is speaking: **Yes/No***

*Whether the order is reportable: **Yes/No***