

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA.

W.P.O. 2432 of 2022

DR. NIRJHAR BAR

VS.

UNION OF INDIA AND ORS.

For the Writ Petitioners	:	Mr. Subir Sanyal, Adv. Ms. Sumouli Sarkar, Adv. Mr. Sagnik Roy Choudhury, Adv.
For the respondents nos. 1 and 2	:	Mr. Dhiraj Trivedi, ASG. Ms. Sanchita Barman Roy, Adv.
For the respondents nos. 12 and 14	:	Mr. Tanay Chakraborty, Adv. Mr. Chhandak Dutta, Adv. Mrs. Vaswati Chakraborty, Adv. Mr. Priyanjit Kundu, Adv.
For the respondent no. 17	:	Mr. Rajiv Lochan Chakraborty, Adv. Mrs. Ashmita Chakraborty, Adv. Mrs. Snigdha Saha, Adv.
For the State		Mr. Bhaskar Prasad Vaisya, Adv. Mr. Joydip Banerjee, Adv.
Last Heard on	:	01.12.2022.
Delivered on	:	16.12.2022.

Moushumi Bhattacharya, J.

1. The petitioner is an Assistant Teacher of St. James' School, Kolkata and prays for a declaration that administration of Covid-19 vaccine is not mandatory when it conflicts with a person's personal religious beliefs. The petitioner also seeks a mandamus commanding the respondent School to forthwith allow the petitioner to continue his work as a teacher and release his salary with all arrears from October 2021.

2. The petitioner's objection to being administered the Covid-19 vaccine is specific to the Covishield manufactured by AstraZeneca; on the ground that the clinical trials as documented in journals show that the vaccine has been experimented on foetuses (or foeti), which according to the petitioner, is against Christian beliefs. The petitioner says that the Covishield vaccine has hence become 'tainted' and cannot be forced on a devout, practising Christian. The petitioner is unsure of the methods employed in the clinical trials for the Covaxin vaccine and is hence resistant (ideologically) to any form of forced vaccination. The petitioner is outraged at having been denied entry into the School by reason of his refusal to be vaccinated. The grievance extends to deprivation of salary and not being permitted to carry on with his teaching commitments.

3. The petitioner is particularly aggrieved by a Notice issued by the School on 28th September, 2021, asking the staff to submit their Vaccination Certificates by 30th September, 2021, failing which the staff would be considered on leave without pay. Since the petitioner chose not to take the Covishield vaccine - or any other vaccine for that matter - the

petitioner was not allowed to enter the School premises since October 2021. The petitioner accordingly seeks a direction on the Principal, St. James' School, to cancel the said Notice.

4. The respondent School, through learned counsel, has raised a point of maintainability of the writ petition. Counsel submits that the writ petition against St. James' School, which is a private unaided school, cannot be maintained.

5. Counsel for the petitioner, on the other hand, urges that the School performs a public function in imparting education to students, and would hence come within the purview of Article 226 of the Constitution of India.

6. The question of maintainability of the writ petition, in light of the decisions shown, is being answered first.

7. The debate of which 'person or authority' can be pulled within the sweep (or stranglehold, as the case may be) of Article 226 of the Constitution of India has found expression in numerous decisions of the Supreme Court. Although the decision on amenability to writ jurisdiction may vary on the particular facts of a case, the focus on private bodies has shifted to and settled on the nature of the duties being performed by the private body. The emphasis is not on the source of power but on the performance of a function which can be equated to that of the State.

8. The consensus developed on the subject through the case laws is that a person or authority adorning the trappings of a State under Article 12 of the Constitution would inexorably be drawn into the fold of Article 226. This however excludes private law rights which would not be enforceable in writ

jurisdiction as the underlying rationale of judicial review is a challenge to an action under administrative law which is separate and distinct from contractual relationships between parties or tortious liabilities arising from such relationships. The action must satisfy the test of public law in the form of discharge of public functions with the object of achieving a collective benefit for the public with the body having the authority to perform functions of a public nature.

9. Without doubt, private bodies can exercise public functions or functions with a public element, affecting a section of the public with public law implications. In other words, the functions performed by the private body must transcend the limitations of the nature of the body or the source of the power and affect the rights of the public akin to that of the functions performed by the State in its sovereign capacity. The decision which is sought to be enforced or challenged must be in the discharge of a public function, the denial of which can be deflected back to the public duty imposed on the body. The right-duty pairing for enforcement of a right against a private or a public body has found articulation in judicial decisions through the years.

10. The argument of the petitioner on the public law element is on the School imparting education to students. This Court is however of the view that imparting of education simpliciter is not sufficient for bringing all unaided and minority private schools and colleges under the cover of Article 226. The enquiry as to whether the function can be equated with that of the

State must delve a level deeper to ascertain the link between the impugned act and the function of imparting education by the entity concerned.

11. The question would thus be: *what is it that the petitioner seeks to be redressed by way of the present writ petition?*

12. The petitioner seeks a mandamus on the school to allow the petitioner to enter the school premises and teach students, that is, to resume his duties as an Assistant Teacher, but without being vaccinated against the Covid-19 pandemic. The petitioner also seeks release of his monthly salary from October, 2021, along with interest. The petitioner has not taken classes from October, 2021 pursuant to the impugned notice asking staff members to submit their Vaccination Certificates to the Vice Principal of the School. The cause of action pleaded shows that although the petitioner has urged violation of his rights under Articles 21 and 25(1) of the Constitution of India, the relief prayed for is essentially for disbursement of salary. The petitioner is simply seeking to enforce his contract of service with the School and to circumvent the embargo from continuing with his services as an Assistant Teacher (on the ground of not being vaccinated against Covid-19).

13. Articles 21 and 25(1) of the Constitution of India preserve the life and personal liberty of individuals and the freedom to profess, practice and propagate the religion of one's choice, respectively. Both the rights are subject to reasonable limits according to the procedure established by law. There is little doubt that the impugned notice which is under challenge - requiring teachers and staff to submit their Vaccination Certificates to the School - does not impinge either upon the personal liberty of the petitioner

or his right to profess and practice the religion of his choice. The petitioner claims to be a practising Christian and objects to taking the Covishield vaccine manufactured by AstraZeneca on the allegation that the said vaccine used abortion derived cell lines which is against Christian tenets.

14. There are too many loopholes in this argument.

15. First, the complete grey area - and random logic as it were - in the link drawn between clinical trials of the Covishield vaccine and violation of Christian beliefs. There is a total absence of confirmed medical data before the Court for forming an opinion that the Covishield vaccine has been developed through trials which offend the Christian faith. It would also not be out of place to point out that a writ court is not vested with the jurisdiction or the expertise to assess a large body of scientific evidence – even if produced – to draw a conclusion on the alleged un-Christian trials for developing a vaccine.

16. Second, the petitioner does not have an answer as to the reason why the petitioner has not settled for the Covaxin vaccine or any of the other available vaccines in the market, as required by the School. The argument that the petitioner does not have sufficient data at his disposal with regard to the Covaxin clinical trials is not a satisfactory answer for taking a favourable view of the petitioner's alleged religious dilemma.

17. The most important consideration is that the petitioner's right to remain un-vaccinated must be balanced with the right of the children and other teachers and staff of the School to be protected against the Covid-19 pandemic. The risk of exposure of the children and staff of the School to an

un-vaccinated teacher cannot be ruled out. The petitioner's argument in attaching a public element to education for maintaining the writ petition while projecting his individual right to teach students without being vaccinated is indeed dichotomous.

18. Contrary to the case sought to be made out, the larger public element is in fact the safety of the students, teachers and staff of the School who will perpetually be exposed to the petitioner if the pandemic makes a resurgence in the near future. This Court is also alive to the fact, that simply by declaring that administration of Covid- 19 vaccines as not being mandatory where personal/religious tenets interdicts use of a vaccine will not afford the relief which the petitioner is looking for (prayer (a)). Permitting the petitioner to continue with his teaching duties is what the petitioner really wants.

19. The above reasons dissuade this Court to grant the relief prayed for. The purely personal and pragmatic case for monetary relief fixed on lofty (and vexing) religious speculation cannot be sustained and that too against a private un-aided School.

20. The recent decision of the Supreme Court in *St. Mary's Education Society vs. Rajendra Prasad Bhargava*; 2022 SCC OnLine SC 1091 is a lucid statement of the law on the circumstances in which a High Court can invoke Article 226 of the Constitution. The appellant no. 1 before the Supreme Court was a society which ran a private unaided educational institution. The respondent no. 1, an office employee of the appellant no. 1 was served with a show cause-cum-suspension order by the appellant no. 1 alleging misconduct in service. Several grounds were urged against the respondent

no. 1 in the charge-sheet and the termination notice which followed. The learned Single Judge of the Madhya Pradesh High Court rejected the writ petition as not being maintainable; the Division Bench set aside the judgment of the first court and allowed the appeal holding that the writ petition challenging the order of termination from service was maintainable under Article 226 of the Constitution of India. The Supreme Court set aside the judgment of the Division Bench and held that the writ petition was not maintainable. One of the issues before the Supreme Court was whether a service dispute in the private realm involving a private educational institution and its employees can be adjudicated in a writ petition filed under Article 226 of the Constitution.

21. The related question was whether all the public functions of a body were subject to judicial review? The Supreme Court came to the view that a person or body discharging public duties must be shown to owe an obligation to the public involving a public law element. The Supreme Court considered *Ramesh Ahluwalia vs. State of Punjab*; (2012) 12 SCC 331 and took notice of the fact that several of the earlier decisions passed by the Supreme Court were not considered in *Ramesh Ahluwalia*. *Marwari Balika Vidyalaya vs. Asha Srivastava*; (2020) 14 SCC 449 was distinguished on the fact that in the said case the removal of a teacher from service was subject to the approval of the State Government. The Supreme Court also considered a Full Bench decision of the Allahabad High Court in *Uttam Chand Rawat vs. State of U.P.*; (2021) 6 All LJ 393 (FB) which held that the act must fall in the domain of public law and not under common law. This is

significant as the petitioner has relied on *Ramesh Ahluwalia and Marwari Balika Vidyalaya*.

22. The decision as to whether a private entity or unaided institution is subject to writ jurisdiction is ultimately a decision on the particular facts of the case. There is no set formula which can be applied for determining the maintainability of a writ petition against such an entity. The expanded contours of Article 226 of the Constitution making space even for private individuals discharging public duties or public functions cannot become the justification for entertaining writ petitions for disputes where the right in question is purely in the realm of private law and cannot be wedded to the public duties performed by the entity. The writ court must unearth the public law element in the act complained of.

23. Even if it is assumed that imparting of education transforms a private unaided institution to a body discharging public functions, the act complained of must have a direct or even a discernible nexus with the discharge of the public function described as such. Even activities which may have a traditional association with public duty, for instance a hospital, not be amenable to writ jurisdiction; Ref: *Ramakrishna Mission vs. Kago Kunya*; (2019) 16 SCC 303. In *Binny Limited vs. V. Sadasivan*; (2005) 6 SCC 657 the Supreme Court reiterated that a writ of mandamus can only be issued against a private body which is not "State" within the meaning of Article 12 of the Constitution if there is a public law element in the discharge of functions by the private body. The Supreme Court noted the absence of a public element in the termination of the employees by the

appellant and hence opined that the remedy available to the respondent was to seek redressal in civil law especially in view of the disputed questions involved in the matter.

24. The question of maintainability of the writ petition is answered against the petitioner in view of the above reasons. This Court holds that the present writ petition against a private unaided institution / School is not maintainable since the right sought to be enforced is purely of a private contractual character.

25. WPO 2432 of 2022 is accordingly dismissed without any order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)