IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE MILIND RAMESH PHADKE

WRIT PETITION No. 5202 of 2016

Between:-

MRITUNJAYA SHUKLA,

…..PETITIONER

(BY MS. SMRTI SHARMA - ADVOCATE)

AND

1. **CENTRAL BOARD OF SECONDARY EDUCATION THROUGH ITS SECRETARY, PREETI VIHAR, DELHI-92.**
2. **G.D. GOENKA PUBLIC SCHOOL SHIVPURI LINK ROAD GWALIOR M.P. THROUGH ITS CHAIRMAN, R/O HOTEL VINAYAK, PADAV GWALIOR (MADHYA PRADESH)**
3. **DIRECTOR, G.D. GOENKA PUBLIC SCHOOL, SHIVPURI LINK ROAD, GWALIOR M.P. HOUSE NO.21 PATEL NAGAR, GWALIOR (MADHYA PRADESH)**
4. **DISTRICT EDUCATION OFFICER,**

DISTRICT GWALIOR (MADHYA PRADESH)

…..RESPONDENTS

(BY SHRI D.P. SINGH – ADVOCATE FOR RESPONDENT NO.1 & SHRI YOGESH CHATURVEDI – ADVOCATE FOR RESPONDENTS NO.2 & 3.)

Reserved on 22/07/2022

Delivered on __/08/2022

This petition coming on for admission this day, the court passed the following:

ORDER

(1) The present petition under Article 226 of the Constitution of India had been filed by the petitioner being aggrieved by illegal and arbitrary action of the respondents No. 2 & 3 in not disbursing the payment of his terminal dues even after his repeated request and directions issued by the Collector vide letter dated 18/06/2014 to respondents No.2 & 3 on a complaint made by the petitioner.

(2) Draped with brevity, the facts necessary for adjudication of the matter as stated in the petition are that the petitioner on 18/04/2013 was offered appointment on the post of Principal by respondents No.2 & 3 and on the same date the petitioner joined his services. In the midst of his service on 06/05/2014 respondent

No.2, without assigning any reasons terminated the services of the petitioner. But even after terminating the services of the petitioner respondents No. 2 & 3 didn't clear his terminal dues, constrained he approached the Chairman of respondent No.2 on 21/05/2014, who denied the payment. On 23/06/2014 respondent No.3 restrained the petitioner from entering in the school and even instructed the guard not to allow the petitioner to enter the school premises. On 22/06/2014 and again on 26/06/2014 the petitioner requested respondents No 2 & 3 to issue his relieving letter and clear his terminal dues, but no heed was paid to his request.

(3) In the above circumstances complaints were made to respondents, through e-mail on 28/05/2014 and by hand on 02/06/2015. A complaint was also made to the Collector, Gwalior, on which an action was initiated and respondents No. 2 & 3 were directed to settle the matter through dialogue and ensure to make the payment to the petitioner. It was also directed that within 2 months the matter be reported back. So far as allegations of harassment to the petitioner was concerned, he was directed to approach the concerned Police Station and initiate action against respondent no.2 & 3, but even after clear instructions of the Collector, the directions were not complied with, inhibited the petitioner again approached the Collector, but no further directions were given by the Collector also in the matter. Hence this petition.

(4) A reply was filed by respondent No.1 stating that

respondent No.2 is an autonomous body under the H.R.D. Ministry, UOI, governed by the provisions of Societies Registration Act. It being a running institution, having its own bye-laws, rules and regulations, doesn't fall within the purview of Article 12 of the Constitution of India, therefore, the present writ petition is not maintainable and prayed for dismissal of the same. On merits it was stated that as per affiliation bye-laws of respondent No.1enshrined in Chapter V, Clause 17 & 18, whereby the affiliated school is bound to act upon as per norms and bye-laws and the bye-laws also administers the provisions of "Service Rules for Employees" in Chapter VII. In clause 24 there is a condition engrafted that each school affiliated with the Board shall frame service rules for its employees which will be as per Education Act of the State and therefore, the affiliated school is bound to act upon the same and strictly adhere to the directions contained in the bye-laws. Since respondent No.1 had no concern with regard to action proposed/taken by respondents No.2 & 3, it is not a necessary party and thus, prayed for dismissal of the writ petition.

(5) A rejoinder was filed on behalf of the petitioner stating therein that clause 19(2)(a)(i) of the Rules of Respondent No.1, empowers it to withdraw the affiliation of the school which are found guilty of not paying salaries and allowances to teachers and other employees, hence it cannot wave off from its liability.

(6) Learned counsel for the petitioner vehemently argued that

private institutions imparting education to students perform a public duty; such a public duty is in the nature of State function and accordingly such institutions become amenable to the Court‘s writ jurisdiction under Article 226 of the Constitution of India. By emphasizing on the decision of the Hon'ble Supreme Court rendered in **Unnikrishnan, J.P. Vs. State of Andhra Pradesh, reported in (1993) 1 SCC 645**, which unequivocally had held that the right to education was a fundamental right which finds its genesis from Article 21 of the Constitution of India, it was argued by the counsel for the petitioner that the Parliament of India, in its wisdom, passed the 86th Amendment Act in 2002 which introduced Article 21A into Part-III of the Constitution of India and enshrined the right to education as a designated fundamental right. Such an amendment made the right to education for all children, a fundamental right. In furtherance of giving effect to such fundamental right, the Parliament passed the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as “RTE Act”). The State of Madhya Pradesh additionally, empowered by Section 38 of the RTE Act, framed the rules named Right of children to Free and compulsory Education Rules, 2011. In furtherance of his arguments it was contended that given the change in the development of education laws based on the Hon'ble Supreme Court‘s decision in **Marwari Balika Vidyalaya Vs, Asha Srivastava reported in (2020) 14 SCC 449**, the Hon'ble Apex Court while examining the issue of

termination of an Assistant Teacher in a private unaided institution, had held that a writ application is indeed maintainable in such cases even as against the private unaided educational institutions. Thus, with no alternative and efficacious remedy available, the petitioner has pressed this writ petition seeking a redressal of this *lis*.

(7) It was further argued by the counsel for the petitioner with utmost humility at her command that the decision of **Bela Saxena Vs State of M.P. and others passed in WA 614/2020 on 24/07/2020** relied upon by the respondents has no bearing on the matter as on the judgment of Hon'ble Supreme Court on which it had placed reliance i.e. the matter of **Trigun Chand Thakur Vs. State of Bihar reported in (2019) 2 SCC 695**, had not decided in absolute terms the question whether private unaided school would be amenable to writ jurisdiction under Article 226 of the Constitution of India or not, therefore, the *ratio decidendi* as laid in the matter of **Marwari Balika Vidyalaya (supra)** would prevail and the present writ is maintainable.

(8) At the onset of their submissions learned counsel for the respondent No. 1, 2 & 3 stated that in this case there is neither a violation of any statutory right nor any fundamental right guaranteed under Part III of the Constitution of India, as alleged by the petitioner. Further, respondent No.2 & 3 is a privately funded institution and is not a recipient of any financial contribution from the Union Government or any State

Government. Based on such categorization it was submitted that the said school in question, cannot be considered to be a 'State' as defined under Article 12 of the Constitution of India. In view of the learned counsel for respondents, the jurisdiction under Article 226 could only be exercised by a Constitutional Court if, and only if, an element of public law is involved; this remains a *sine qua non* for the invocation of this Court's powers under Article 226 of the Constitution and such power is not to be trifled with merely to enforce private contracts of service/or service related contracts entered into between two conscious and competent parties and in the absence of any statutory requirement, a contract of employment cannot ordinarily be enforced against an employer and the appropriate remedy, is not to file a writ petition, but instead to sue for damages in a civil court of appropriate jurisdiction. To bolster his submissions reliance was placed in the matter of **Bela Saxena (supra).**

(9) I have heard the learned counsels appearing on behalf of both the parties and have perused the materials on record.

(10) In pursuance of the arguments advanced by the learned counsels appearing on behalf of both the parties, the issue which arises for the Court's consideration at this stage is whether the respondent school is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India in spite of being an unaided private educational institution?

ANALYSIS BY THE COURT:

(11) At first instance jurisdiction of the High Courts under Article 226 is discussed. The power of judicial review by the High Courts in the country emanates from Article 226 of the Constitution of India. Akin to the power bestowed to the Hon'ble Supreme Court of India under Article 32 of the Constitution which is placed in Part III of the Constitution of India thereby making it a fundamental right in its own standing.

(12) It would be quite appropriate to fall back upon the exposition on this point of law by a Constitution Bench in its decision rendered in **Calcutta Gas Co. Ltd. Vs. State of West Bengal reported in AIR 1962 SC 1044**:

> "5. The first question that falls to be considered is whether the appellant has locus standi to file the petition under Article 226 of the Constitution. The argument of learned counsel for the respondents is that the appellant was only managing the industry and it had no proprietary right therein and, therefore, it could not maintain the application. Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the court seeking a relief thereunder. The article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction

> that the relief asked for must be one to enforce a legal right. In State of Orissa v. Madan Gopal Rungta [(1952) SCR 28] this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the court under Article 226 of the Constitution. In Chiranjit Lal Chowdhuri v. Union of India [(1950) SCR 869] it has been held by this Court that the legal right that can be enforced under Article 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the court for relief. We do not see any reason why a different principle should apply in the case of a petitioner under Article 226 of the Constitution. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified".
>
> (Emphasis supplied)

(13) A similar opinion was enunciated by Full Bench of the Hon'ble Apex Court when it rendered its decision in the landmark case of **Bandhua Mukti Morcha Vs. Union of India, reported in (1984) 3 SCC 161**:

> "15. We may point out that what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Article 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional

> jurisdiction and it is conferred in the same wide terms as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Article 226. In fact, the jurisdiction of the High Courts under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights."
>
> (Emphasis supplied)

(14) A more recent view was reiterated by the Hon'ble Supreme Court in **K.K. Saksena Vs. International Commission on Irrigation & Drainage reported in (2015) 4 SCC 670**:

> "33. In this context, when we scan through the provisions of Article 12 of the Constitution, as per the definition contained therein, the State includes the Government and Parliament of India and the Government and legislature of each State as well as all local or other authorities within the territory of India or under the control of the Government of India. It is in this context the question as to which body would qualify as other authority has come up for consideration before this Court ever since, and the test/principles which are to be applied for ascertaining as to whether a particular body can be treated as other authority or

> not have already been noted above. If such an authority violates the fundamental right or other legal rights of any person or citizen (as the case may be), a writ petition can be filed under Article 226 of the Constitution invoking the extraordinary jurisdiction of the High Court and seeking appropriate direction, order or writ. However, under Article 226 of the Constitution, the power of the High Court is not limited to the Government or authority which qualifies to be State under Article 12. Power is extended to issue directions, orders or writs to any person or authority. Again, this power of issuing directions, orders or writs is not limited to enforcement of fundamental rights conferred by Part III, but also for any other purpose. Thus, power of the High Court takes within its sweep more authorities than stipulated in Article 12 and the subject-matter which can be dealt with under this article is also wider in scope."
>
> (Emphasis supplied)

(15) An important caveat was appended by the Hon'ble Supreme Court in K.K. Saksena (supra) whereby the Court had ruled that even if an authority was deemed to be a 'State' under Article 12 of the Constitution, the Constitutional Courts before issuing any writ, particularly that of mandamus, must satisfy that such impugned action of the authority concerned which is under challenge, forms a part of the public law as opposed to private law. The Hon'ble Supreme Court had held:

> "43. What follows from a minute and

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

(16) Relying upon **K.K. Saksena (supra)**, the Hon'ble Supreme Court in **Ramakrishna Mission Vs. Kago Kunya reported in (2019) 16 SCC 303** had held that:

> "34. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this

> principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in K.K. Saksena this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed."
>
> (Emphasis supplied)

(17) Therefore based on the principles outlined in **K.K. Saksena (supra) as well as Kago Kunya (supra)**, a thorough examination is required to fathom, if there is a character of public law involved in the present *lis* and if that is there and the petitioner has felt that he stands violated of his precious fundamental right or any legal right for that matter, then this is Court's bounden duty to inspect the propriety of the same. However, the hurdle which remains to be crossed is to examine if the said school, being an unaided school, is amenable to the writ jurisdiction under Article 226 of the Constitution of India.

(18) The above aspect is now being evaluated as under:

To impart education is a State function, it is the obligation of the welfare State to ensure that children are imparted education, which is one of the directive principles of State Policy enshrined in Article 41 of the Constitution of India. The State can, however, delegate its functions to the private sector educational institutions and while doing so, the State has created its limbs as it was in the

case of companies and corporation to discharge its constitutional obligation of imparting education at all levels from primary to higher education.

(19) The Hon'ble Supreme Court in the matter of **Unni Krishnan reported in AIR 1993 SC 2178** held that private educational institutions discharge public duties irrespective of the fact they receive aid or not. The absence of aid does not detract from the public nature of the duty. These institutions supplement the effort of the State in educating the people which is the principal duty cast upon the State under the constitutional scheme. Relevant excerpt is quoted below:

> "83. The emphasis in this case is as to the nature of duty imposed on the body. It requires to be observed that the meaning of authority under Article 226 came to be laid down distinguishing the same term from Article 12. In spite of it, if the emphasis is on the nature of duty on the same principle it has to be held that these educational institutions discharge public duties. Irrespective of the educational institutions receiving aid it should be held that it is a public duty. The absence of aid does not detract from the nature of duty."

(20) The case of Unni Krishnan came to be partly overruled by the subsequent eleven Judge Bench in **T.M.A. Pai Foundation and others Vs. State of Karnataka and others reported in AIR 2003 SC 355**, however, the *ratio decidendi*, insofar educational institution discharging public function and it is the duty of the

State to provide education to children from the age of six to fourteen years held to be fundamental right was affirmed.

(21) The Hon'ble Supreme Court again got an opportunity to examine the issue as to whether private institution imparting education in higher studies to students is discharging 'public function' and whether, Deemed University notified by the Central Government under Section 3 of the University Grants Commission Act, 1956 which, inter alia, provides for effective discharge of public function, namely, education for the benefit of public is an authority within the meaning of Article 12 of the Constitution then as a necessary consequence, it becomes amenable to writ jurisdiction of High Court under Article 226 of the Constitution. The Court in the case of **SRM University reported in AIR 2006 SC 73** held that the institution engaged in/and imparting higher studies to students is discharging 'public function' by imparting education. Relevant excerpt is quoted below:

> "This we say for the reasons that firstly, respondent No. 1 is engaged in imparting education in higher studies to students at large. Secondly, it is discharging "public function" by way of imparting education. Thirdly, it is notified as a "Deemed University" by the Central Government under Section 3 of the UGC Act. Fourthly, being a "Deemed University", all the provisions of the UGC Act are made applicable to respondent No. 1, which inter alia provides for effective discharge of the

> public function - namely education for the benefit of public. Fifthly, once respondent No. 1 is declared as "Deemed University" whose all functions and activities are governed by the UGC Act, alike other universities then it is an "authority" within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an "authority" as provided in Article 12 then as a necessary consequence, it becomes amenable to writ jurisdiction of High Court under Article 226 of the Constitution."

(22) Further, the eleven Judge Bench in **T.M.A. Pai (supra)** while considering the relationship between the management and the employees/teachers of private technical and higher education though being contractual in nature but, in the case of educational institutions, the Court was of the opinion that requiring a teacher or a staff to go to civil court for the purposes of seeking redress is not in the interest of education. The Court held that: (Extract of Para 50)

> "In the case of educational institutions, however, we are of the opinion that requiring a teacher or a member of the staff to go to a civil court for the purpose of seeking redress is not in the interest of general education. Disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs."

(23) If further this aspect is analysed the Parliament of India, in its wisdom, passed the 86th Amendment Act in 2002 which introduced Article 21A into Part-III of the Constitution of India

and enshrined the right to education as a fundamental right for all children. In furtherance of giving effect to such fundamental right, the Parliament passed the RTE Act, 2009 which has been in effect from April 1, 2010 onwards. Section 2(n) of the RTE Act, defines "School" in the following terms (Relevant extract) is reproduced below:

> "(n) — school means any recognized school imparting elementary education and includes—
> (i) ……..
> (ii) …….
> (iii) ……
> (iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority."

Clause (n) to sub-section (2) of Section 38 of the RTE Act provides the appropriate Governments (as defined under section 2(a) of RTE Act) with the power to make subsidiary Rules with regard to such grievance redressal mechanism and in pursuance of the powers conferred under Section 38 of the RTE Act, the State of Madhya Pradesh had framed the Rules in the name of Right of children to Free and compulsory Education Rules, 2011 (referred at as Rules of 2011) and under rule 16(8) of the said rules there is a Grievance Redressal Mechanism, which castes responsibility on the school to develop such mechanism and if there is no such mechanism developed by the school a patent manifestation of the violation of rights of an employee under the RTE Act read with

the Rules of 2011 would be apparent, which makes it a fit case for judicial review under Article 226 of the Constitution of India. Similarly Central Board of Secondary Education Affiliation Bye-laws, which came into existence from 28th of January, 1988, defines private unaided school under clause xxii:

> "xxii) Private Unaided School" means a school run by a Society/Trust duly constituted and registered under the provisions of Central/State Acts not getting any regular grant-inaid from any Government source(s)."

Clause 17 (2a)(i) of the said bye-laws lays about withdrawal of Affiliation of Provisionally Affiliated Schools under CBSE:

> "17 (2 a). Proceedings for withdrawal of affiliation may be initiated by the Board in case the schools are found guilty of following after reasonable notices:- i) Not paying salaries and allowances to teachers and other employees, at least at par with those obtaining in State/Union Territory institutions; default or delay in payment of salaries and allowances".

Therefore, the organic inference that follows is that since the said school which is run by respondent No.2, being an unaided school, by virtue of the Section 2(n) of the RTE Act, coupled with Rules of 2011 and CBSC affiliation Bye-laws had come to discharge a public duty as was cast upon it by the said statutes. Such a public duty stands obligatory, in my opinion, in terms of both Article 21A of the Constitution of India as well as the RTE Act, Rules of 2011 and CBSC Affiliation Byelaws which gave effect to the

fundamental right in unequivocal terms.

(24) Therefore, I am of the informed opinion, that the quoted provisions of the RTE Act read with quoted provisions of the Rules of 2011 and CBSC Affiliation Byelaws, indeed regulates the contract of service of the petitioner, and this thereby falls within the exception as stated in **K.K. Sakesna (supra) and Kago Kunya (supra)**.

(25) Furthermore, in my opinion, in light of the law laid down in **Marwari Balika Vidyalaya Vs. Asha Srivastava reported in (2020) 14 SCC 449** relied upon by the learned counsel for the petitioner, the issue of a private unaided educational institute being amenable to the writ jurisdiction of this Court is no longer *res integra*. The Hon'ble Supreme Court was seized with this significant issue wherein the facts of that case were that an Assistant Teacher, working for gain in a private unaided educational institution, was terminated from such service by a stigmatic order and without either procuring the approval of pertinent authorities or holding a disciplinary enquiry. The Hon'ble Supreme Court had relied on its former decisions rendered in **Ramesh Ahluwalia Vs. State of Punjab, reported in (2012) 12 SCC 331 and Raj Kumar Vs. Director of Education, reported in (2016) 6 SCC 541**, and had ultimately held:

> "It is apparent from the aforesaid decisions that the writ application is maintainable in such a matter even as against the private unaided educational institutions."
>
> (emphasis supplied)

(26) Thus, I am of the considered view that there is a patent manifestation of the violation of the petitioner‘s rights which makes it a fit case for judicial review under Article 226 of the Constitution of India.

(27) Now the second question which requires to be answered that whether in the light of the decisions of the Division bench of this Court in the matter of **Bela Saxena Vs State of M.P. and others passed in WA 614/2020 on 24/07/2020,** whereby the order of Single Judge dismissing the Writ Petition against some private school in the light of decision of Hon'ble Supreme Court in the matter of **Trigun Chand Thakur Vs. State of Bihar reported in (2019) 7 SCC 513** was upheld, this present petition would also be liable to be dismissed?

(28) Before adverting to the instant issue, it is expedient to quote Article 141 of the Constitution of India, to connote as to which precedent of Hon'ble Supreme Court would be binding :

> “Article 141: “ The law declared by the Supreme Court shall be binding on all Courts within the territory of India.”

(29) The decisions of the Hon'ble Supreme Court have binding force upon all subordinate courts under Article 141 of the Constitution of India. In a number of judgments the Hon'ble Supreme Court has emphasized the importance and validity of Article 141 of the Constitution within the ambit of following certain general rules, i.e. *Obiter-Dictum', Ratio-Decidendi', Stare decisis', Per incuriam*' Prospective Overruling and Legislative

provisions etc.

(30) The issue of *ratio decidendi* has been explained by the Hon'ble Supreme Court in **Director of Settlements, Andhra Pradesh and Others Versus M.R. Apparao and Another' [AIR 2002 SC 1598]** wherein it was observed by the Hon'ble Supreme Court that Article 141 of the Constitution unequivocally indicates that the law declared by the Hon'ble Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Hon'ble Supreme Court to declare the law.

(31) It is, therefore, an essential function of the Court to interpret legislation. The statements of the Court on matters other than law like facts may have no binging force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence.

(32) In **Islamic Academy of Education and Another versus State of Karnataka and Others** [(2003) 6 SCC 697] the Hon'ble Supreme Court observed that:

> "The *ratio decidendi* of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the Judgment is what is set out in the Judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the Judgment and not in isolation. In case of any doubt as regards

> any observations, reasons and principles, the other part of the Judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire *ratio decidendi* of the judgment."

(33) In **State of Uttar Pradesh and another versus Synthetics and Chemicals Ltd. and another [(1991) 4 SCC 139]** it was observed that a decision which is not expressed and is not founded on reasons, nor it proceeded on consideration of issue, cannot be deemed to be a law declared to have binding effect as is contemplated by Article 141. Relevant para is quoted below:

> "Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of *sub-silentio*. A decision passed *sub-silentio*, in the technical sense that has come to be attached to that phrase, when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In **Lancaster Motor Company (London) Ltd. Vs. Bremith Ltd., [1941] IKB 675** the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in **Municipal Corporation of Delhi**

> **Vs. Gumam Kaur, [1989] 1 SCC 101**. The Bench held that, 'precedents *sub-silentio* and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In **Shama Rao Vs. State of Pondicherry, AIR 1967 SC 1680** it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

(34) The Hon'ble Supreme Court referring to **Muktul vs. Manbhari, AIR 1958 SC 918**; and relying upon the observations of the Hon'ble Apex Court in **Mishri Lal vs. Dhirendra Nath (1999) 4 SCC 11**, observed in **Union of India vs. Azadi Bachao Andolan (2003) 263 ITR at 726**, had explained the doctrine of "stare decisis":

> "A decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal proceedings or in other ways, will generally be followed by courts of higher authority other than the court establishing the rule, even though the court before whom the matter arises afterward might be of a different view."

(35) The Hon'ble Supreme Court of India in the matter of **Municipal Corporation Of Delhi vs Gurnam Kaur reported in AIR 1989 SC 38**, while considering the doctrine of *sub-silentio* had held:

> "In Gerard v. Worth of Paris Ltd. (k)., [1936] 2 All E.R. 905 (C.A.), the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd. Vs. Bermith, Ltd., [1941] 1 KB 675. the Court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided.

> We went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. **Precedents sub silentio and without argument are of no moment**. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

(36) The doctrine of judicial precedents has further been considered in the realm of judicial system in India by Hon'ble Supreme Court in **Union of India Vs. Raghubir Singh (AIR 1989 SC 1933)** and it has been held that:

> "The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

(37) Thus, in the light of the above discussion and the legal

pronouncements, the Judgment of Supreme Court in the matter of Trigun Chand (supra) on which the order of Division Bench of this Court in the matter of Bela Saxena (supra) is based, is a decision which is not express and not founded on reasons nor it proceeds on consideration of issue seized therein, cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141.

(38) Now turning to the facts of the present case, in sum and substance respondent no.2, though a private institution, is imparting education to students, which is otherwise a primary function of the State, in the light of the pronouncements of Supreme Court as discussed above would said to be performing a public function/public duty and accordingly it is amenable to the Court's writ jurisdiction under Article 226 of the Constitution of India. Further since action under challenge falls in domain of public law, as Respondent No.2 has been discharging a public duty under the prescriptions of a statute and subsidiary rules made thereunder, i.e. Right to Education Act, 2009, rules framed under the RTE Act by State of Madhya Pradesh named as The Right of Children to Free and compulsory Education Rules, 2011 and CBSC affiliation Bye-laws, for denial of any right of his rights in connection with the public duty imposed on such body, public law remedy can be enforced and as the service conditions of the Petitioner has direct nexus with the discharge of a public duty, his case would be covered under the exception clause, would be

amenable to writ jurisdiction under Article 226 of the Constitution of India.

(39) Agreeing with the arguments advanced on behalf of the petitioner, I am of the considered view that the present writ petition against respondents No 2 & 3 is maintainable. Respondents No.2 & 3 are therefore, directed to make the payment of all terminal dues due to the petitioner and also issue his relieving certificate. The entire exercise should be completed within a period of 1 month from the date of receiving of certified copy of this order, else amount due would carry interest at the rate of 6% from the date it fell due till its realization.

(40) Before parting with the case it is apt to contemplate the extent/nature of a legal right enforceable against a private institution by issuance of writ of mandamus under Article 226 of the Constitution of India. It is a settled principal of law that the scope of writ of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced.

(41) The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm

of public law, be it a legislative act or the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. The Courts intervenes in exercise of jurisdiction under Article 226, whenever the service conditions are regulated by 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. Thus, to sum up, a public duty, to be enforceable by writ of mandamus, 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.

(42) To conclude, this Court deems necessary to quote Lord Denning on “Scope of Judicial review as explained in his book ‘The Closing Chapter, Page 122’ ”:

> "At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth.

> But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.
>
> The Statute is phrased in flexible terms. It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The result is that the courts are not bound hand and foot by the previous law. They are to 'have regard to' it. So the previous law as to who are and who are not public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing."
>
> (Unquote).

(43) With above observation and direction the petition is disposed of, with no orders as to costs.

(Milind Ramesh Phadke)
Judge

Pawar*