Abdul Gofur Mondal Vs State of Assam and Others

Court: GAUHATI HIGH COURT

Date of Decision: Nov. 11, 2014

Acts Referred: Assam Non-Government Educational Institutions (Regulation and Management) Act, 2006 - Section 12, 13, 14, 15, 15(1) â€" Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011 - Section 10, 10(2), 11, 2(s), 2(t) â€" Constitution of India, 1950 - Article 12, 14, 16, 226, 30 â€" Penal Code, 1860 (IPC) - Section 302, 34 â€" Right of Children to Free and Compulsory Education Act, 2009 - Section 18, 23, 23(3), 38, 38(2X1)

Citation: (2015) 2 GLT 337

Hon'ble Judges: K. Sreedhar Rao, Acting. C.J.,, J; Arup Kumar Goswami, J; Ujjal Bhuyan, J.

Bench: Full Bench

Advocate: M.U. Mondal, H.R. Ahmed, M. Hussain and M.R. Khandakar, for the Appellant; A.C. Buragohain, A.G., U.K. Goswami, S.C., Education, S. Sarma, S.C., SSA, A. Hussain, Afnu Mollah, R. Islam, D.A. Kayum and J. Rahman, for the Respondent

Judgement

Arup Kumar Goswami, J.Ã¯Â¿Â½Three writ applications, under Article 226 of the Constitution of India, were filed by one Abdul Gafur Mondal and

the applications were registered as WP(C) 4612/2011, WP(C) 6109/2012 and WP(C) 2272/2013. The writ petitions have been placed before

the Full Bench to consider the following question of law:

Whether a writ petition is maintainable against a purely privately managed institution, such as, venture school contemplated in Section 2(s) of the

Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011?

2. It will be necessary, at the outset, to outline only the basic factual matrix of the aforesaid three writ petitions for the purpose of understanding

how the question had arisen for consideration of the Full Bench.

3. The case set out in WP(C) 4612/2011 is that the petitioner is the founder Assistant Teacher of a school, namely, Janakalyan Venture Lower

Primary (VLP) School, established on 01.01.1987, and he was working in the said school till the filing of the writ petition with full satisfaction of all

concerned. Respondent Nos. 8 and 9 were appointed as Assistant Teacher in the said school on 10.03.2008 and 10.03.2010, respectively. Thus,

the petitioner should be treated as the First Assistant Teacher and the respondent Nos. 8 and 9 as the Second and Third Assistant Teacher,

respectively, in order of seniority. The school received financial assistance for the period 2010-2011 and the Managing Committee was constituted

and approved by the Block Elementary Education Officer, Bilasipara. The writ petition was filed, primarily, praying for a writ of mandamus

directing the respondent authorities to prepare a gradation list and to treat the writ petitioner as the First Assistant Teacher of the school in order of

seniority amongst the Assistant Teachers and also for provincialisatin of his services.

(ii) Respondent Nos. 6 and 7, i.e., Secretary cum Headmaster, and the President of the Managing Committee of the Janakalyan VLP School,

respectively, had filed affidavit, wherein it was stated that though the school was established with effect from 01.01.1987, there was no Assistant

Teacher in the school till 1991. Thereafter, by a Resolution dated 30.07.1992, the School Managing Committee appointed one Jahura Khatun as

the First Assistant Teacher, but she was removed by the School Managing Committee by a Resolution dated 02.06.1999 due to her irregular

attendance. Thereafter, by a Resolution dated 01.07.1999, the School Managing Committee decided to appoint the present petitioner as Assistant

Teacher in place of Jahura Khatun and, thus, the petitioner came to be appointed and he had been working as Assistant Teacher till 04.06.2008

without having any formal appointment and without submitting any joining report to that effect. The petitioner was not regular in attending school

and, therefore, the School Managing Committee had adopted a Resolution, dated 02.05.2001, asking him to be regular in attendance.

Subsequently, show-cause notice had been issued to the petitioner, but there was no improvement in his attendance and, therefore, the School

Managing Committee adopted a Resolution, being Resolution No. 1, dated 05.06.2008, whereby the petitioner was terminated/dismissed from

service. After termination of the petitioner, respondent No. 8 was appointed as Assistant Teacher on 20.06.2008 and he had been serving in that

capacity since his date of joining on 23.06.2008. The names of the respondent Nos. 6 and 8 had figured as Head Teacher and Assistant Teacher

in the District Information System for Education (for short, ''DISE'') Code for the years 2010-2011, 2011-2012 and 2012-2013 and forms had

been filled up for provincialisation of their services in terms of the Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011

(for short, "the Act of 2011").

(iii) The respondent No. 8 had taken the same stand as respondent Nos. 6 and 7.

4. WP(C) 6109/2012 was filed asserting that in various Inspection Reports, the petitioner was shown as Assistant Teacher of the school.

However, respondent Nos. 8 and 9 were shown as the First and Second Assistant Teacher, respectively, and the name of the petitioner was

dropped from the DISE Code illegally, as a result of which the petitioner may be deprived of provincialisation of his services. Though he had filed a

complaint, dated 30.11.2012, to the Director of Elementary Education in regard to the aforesaid, no steps were taken. Accordingly, the writ

petition was filed praying for setting aside the DISE data for the period 2010-2011 and to include his name in all DISE data up to date for the

purpose of provincialisation of his service.

(ii) Respondent Nos. 6 and 7 took a stand similar to the stand taken in WP(C) 4612/2011 and stated that as the writ petitioner was no longer in

service as Assistant Teacher, there was no question of submitting particulars for provincialization of his service and, therefore, his name was not

included in the DISE data for the year 2010-2011 to till date.

(iii) In WP(C) 6109/2012, while issuing notice of motion, an interim order was passed on 17.12.2012 to the effect that no government grant or

service benefits should be conferred on the respondent Nos. 8 and 9 by disregarding the petitioner as serving Assistant Teacher of the school since

01.01.1987. A Miscellaneous Application for vacating the said interim order was filed by the respondent No. 8 on 06.04.2013 and the said

application was registered as Misc. Case No. 948/2013.

5. WP(C) No. 2272/2013 was filed by the petitioner alleging that despite the interim order dated 17.12.2012, passed in WP(C) 6109/2012, the

respondent authorities had forwarded the names of respondent Nos. 6 and 8 as Assistant Teachers of the school, in question, by a

recommendation dated 21.03.2013. In this writ petition, the petitioner challenged the Resolution dated 05.06.2008 whereby his service had been

terminated, Resolution dated 20.06.2008 and the appointment order dated 20.06.2008 stating the same to be in violation of Section 15(2) of the

Assam Non-Government Educational Institutions (Regulation and Management) Act, 2006 (for short, "the Act of 2006") and also prayed for

issuing a writ of mandamus to provincialise his service as Assistant Teacher.

(ii) While issuing notice of motion in this writ petition by an order dated 02.05.2013, a learned Single Judge of this Court passed an interim order

providing that the service of respondent No. 8, as Assistant Teacher, should not be provincialised.

(iii) The respondent No. 8 filed a Misc. Application for vacating the interim order dated 02.05.2013 and the said application was registered as

Misc. Case No. 1414/2013.

6. In all the three writ petitions, respondent Nos. 1 to 9 are same. In WP(C) 4612/2011, there are nine respondents. In WP(C) 6109/2012 and

WP(C) 2272/2013, there are 13 respondents. Respondent Nos. 10 to 13 are the same respondents in both the aforesaid writ petitions.

7. It appears that on 03.02.2014, the Misc. Cases as well as the writ petitions were placed for consideration of the Court and, after hearing the

parties, the order was reserved. Thereafter, order was pronounced on 18.02.2014.

8. From a perusal of the order dated 18.02.2014 of the learned Single Judge, it is evident that a preliminary objection was raised with regard to

the maintainability of the writ petitions. The learned Single Judge noticed three judgments of this Court, namely, judgment and order dated

28.07.2010 in WA 227/2010 (Md. Ali Haider v. State of Assam & Ors.), judgment and order dated 03.09.2012 in WA 43/2012 (Anupam

Singha v. State of Assam & Ors) and judgment and order dated 25.09.2012 in WA 257/2012 (Bishnuram Das v. State of Assam & Ors) taking

two different views with regard to the issue of maintainability of the writ petition. While in Ali Haider (supra), the Division Bench held that writ

petition was not maintainable against a venture school, in Anupam Singha (supra) a Division Bench of this Court took a contrary view holding that

the said judgment was in conflict with a judgment of the Apex Court rendered in the case of K. Krishnamacharyulu and Others Vs. Sri

Venkateswara Hindu College of Engineering and Another, . Anupam Singha (supra) was followed in Bishnuram Das (supra).

9. The learned Single Judge noted that there is no dispute at the Bar that the school in question is a venture primary school, which is defined under

Section 2(s) of the Act of 2011, as it is a primary school imparting education up to Class-V, and was established prior to 01.01.2006 by the

people of the locality and not provincialised under any Act enacted by the State Legislature till then. By the said order dated 18.02.2014, learned

Single Judge opined that the conflict of decisions needed to be first heard and resolved by a larger Bench, once for all, for consistency and clarity

and ordered for placing the matter before the Hon''ble the Chief Justice for constituting a larger Bench to consider the question of law which is

already noticed. The Hon''ble the Chief Justice having constituted the Full Bench, the matter is before us.

10. On 10.06.2014, having regard to the nature of controversy and the question referred to the Full Bench, the Full Bench indicated that the matter

would be heard on various aspects, including framing, re-wording and recasting the question referred to the Full Bench and also observing that any

learned counsel who is interested may also participate in the proceeding.

11. In WP(C) 4612/2011 preference was also made to the Act of 2006. Perusal of the order dated 18.02.2014 of the learned Single Judge,

however, demonstrates that the Act of 2006 was not referred to during the deliberations. But, in WP(C) No. 2272/2013, a challenge has been

made to the termination of service of the petitioner on the ground of the same being in violation of Section 15(2) of the Act of 2006. Therefore and

in the course of hearing we felt it necessary to also formulate a question as to whether a writ petition is maintainable against non-government

educational institutions, as defined in Section 2(g) of the Act of 2006, and, accordingly, the following question is framed:

Whether a writ petition is maintainable against a non-government educational institution as defined in Section 2(g) of the Assam Non-Government

Educational Institutions (Regulation and Management) Act, 2006?

12. The parties were also accordingly heard. However, we hasten to make it clear that we are not deciding as to whether the petitioner can invoke

the provisions of Act of 2006 and we leave it open for decision of the learned Single Judge. The Full Bench is deciding the question formulated by

us without any reference to the pleaded facts in the said writ petition and the question referred to the Full Bench.

13. The case set out. in a nutshell, in Md. Ali Haider (supra) is that the petitioner was not allowed to join the service after he was arrested and

released on bail in a case under Section 302/34 IPC. His conviction under Section 302/34 IPC was set aside by the Hon"ble Supreme Court of

India and he was acquitted alongwith other convicted accused Amjed Ali. After such acquittal by the Apex Court, Ali Hider had gone to join the

school, but was not allowed to join and, as a result, the writ petition was filed praying for, amongst others, a direction to allow him to join his duty

as Assistant Teacher in Dakhin Borjana M.E. School, from the date he last discharged his duties, with all other benefits.

14. In Md. Ali Haider (supra), the appellate Court had affirmed the decision of the learned Single Judge that the writ petition was not maintainable.

The Division Bench of this Court had concluded that receipt of some grant from the State or the fact that school is recognized do not convert the

school to a State within the meaning of Article 12 or Article 226 of the Constitution of India. The plea that the school performed public functions

was also negated on the ground that there was nothing to suggest that the control by the State is all pervasive in so far as the school is concerned.

In Anupam Singha (Supra), the view taken by the Division Bench was that a writ petition is maintainable against an educational institution

discharging public functions.

15. In Anupam Singha (supra), apart from other prayers, the writ petitioner had prayed for a direction to the Managing Committee of the school in

question to consider appointment of the petitioner to the post of Headmaster of the school, he being the senior Assistant Teacher of the school.

16. Under Article 12 of the Constitution of India, unless the context requires, ""the state"" includes the Government and Parliament of India and the

Government and legislatures of each of the states and all local or other authorities within the territory of India or under the control of the

Government of India. Article 12 finds place in Part-III of the Constitution of India dealing with Fundamental Rights and significance of Article 12

lies in the fact that various Articles in Part-Ill of the Constitution of India have placed responsibilities, obligations and duties on the state vis-Ã¯Â¿Â½-vis

an individual to ensure constitutional protection and the individual''s rights against the state and also to enforce the Fundamental Rights. Over a

period of time, the range and scope of Fundamental Rights including Articles 14 and 16 have been expanded through the process of judicial

determination, with the result, there has been a corresponding expansion in the judicial definition of the ""State"" in Article 12.

17. In Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, , the Apex Court had laid down that the question

as to whether a body is a State within the meaning of Article 12 of the Constitution of India is to be determined in the light of the cumulative facts

as established regarding whether the body is financially, functionally and administratively dominated by or under the control of the Government.

Such control must be particular to the body in question and must be pervasive. If these attributes are present, then the body is a State within Article

12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

18. In Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, , applying the tests laid down in Pradeep Kumar (Supra), the Apex

Court held that Board of Control for Cricket in India, does not come under the purview of ""other authorities"" for the purpose of Article 12. It is

laid down that even if there is some element of public duty involved in the discharge of the Board''s functions, even then, that by itself would not

suffice for bringing the Board within the net of ""other authorities"". It must however, be noted that Article 12 is relevant only for the purpose of

enforcement of Fundamental Right under Article 32.

19. In Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, ,

the Apex Court stated as follows:

17.....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. In Federal Bank Ltd. Vs. Sagar Thomas and Others, , the Apex Court laid down that a private company would normally be not amenable to

the writ jurisdiction under Article 226 of the Constitution of India. At the same time, it was held that in certain circumstances a writ may issue to

such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. As

illustration, the Apex Court cited legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act, the Air (Prevention and

Control of Pollution) Act, 1981, the Water (Prevention and Control of Pollution) Act, 1974 or statutes of the like nature which fasten certain duties

and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision, the Apex

Court held that a writ would certainly be issued for compliance with those provisions. It was also held that a private body or a person may be

amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligation or such

obligations of public nature casting positive obligation upon it. It was observed in paragraph 27 as follows:

27.....For instance, it a private employer dispenses with the service of its employee in violation of the provisions contained under the

Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that

regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the

private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

21. In Binny Ltd. and Another Vs. V. Sadasivan and Others, , the Apex Court stated as follows:

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is preeminently a public law remedy and is not generally

available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to

discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform

duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private

body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement

of public duty. The scope 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. The duty cast on the public body may be either statutory or otherwise and the source of such

power is immaterial, but, nevertheless, there must be the public law element in such action.....

22. In K. Krishnamacharyula (supra), facts were to the effect that the appellant and six others were appointed on daily wages of the respondent

college to the post of Laboratory Assistants and their writ petition as well as the appeal seeking equal pay had been dismissed by the High Court.

There was an executive instruction issued by the government giving them the right to claim the pay scales so as to be on a par with the government

employees. The question that arose for consideration was whether when there are no statutory rules in that behalf, and the institution, at the

relevant time, being not in receipt of any grants-in-aid, the writ petition under Article 226 of the Constitution will be maintainable. The Apex Court

held that the teachers, who impart education, get an element of public interest in the performance of their duties and, as a consequence thereof,

requires regulation of the conditions of service of those employees on a par with government employees. When an element of public interest is

created and the institution is catering to that element. the teacher being the arm of the institution is entitled to avail the remedy provided under

Article 226 of the Constitution. It was held that a teacher duly appointed to a post in the private institution is entitled to seek enforcement of the

orders issued by the government. Accordingly, writ petition was held to be maintainable and the appellants were held to be entitled to equal pay so

as to be on a par with government employees under Article 39(d) of the Constitution. It was also stated that if the remedy is a private law remedy,

the position would be different.

23. In Mrs. Satimbla Sharma and Others Vs. St. Paul''s Senior Secondary School and Others, , which was placed for consideration, the facts

were that the respondent school was established as a mission school in 1923 and though at one point of time the school received grant-in-aid, from

1977-78 the school did not receive any grant-in-aid and the teachers of the school were paid less than government schools and government-aided

schools in the State of Himachal Pradesh. Some of the teachers of the school filed a writ petition for direction to pay the salary and allowances on

a par with the teachers of government schools and government-aided schools. The writ petition was allowed by a learned Single Judge which,

however, on appeal, came to be dismissed by a Division Bench of the High Court. The Apex Court held that teachers of private unaided minority

schools had no right to claim salary equal to that of their counter-parts working in government schools and government-aided schools. The Apex

Court also opined that court could not possibly issue a mandamus to a private un-aided school to pay the salary and allowances equal to the salary

and allowances payable to teachers of government schools or government-aided schools as the same was a matter of contract between the school

and the teacher and is not within the domain of public law. K. Krishnamacharyula (supra) was not held to be applicable to the facts of the case as

there was no executive instruction issued by the government requiring private schools to pay the same salary and allowances to their teachers as

are being paid to teachers of government schools or government-aided schools. However, in view of Section 23 of the Act of 2009 providing for

qualifications for appointment and terms and conditions of service of teachers as also salary and allowances payable to, shall be such as may be

prescribed under Section 38 of the Act of 2009, the Apex Court directed the State of Himachal Pradesh to consider making of Rules under

Section 23(3) read with Section 38(2X1) of the Act of 2009, prescribing salary and allowances payable to, and the terms and conditions of

service of teachers keeping in mind Article 39 (d) of the Constitution of India.

24. In Ramesh Ahluwalia Vs. State of Punjab and Others, , which was also pressed into service, the Apex Court held that even a purely private

body, where the State has no role over the decisions on the internal affairs thereof, would be amenable to the jurisdiction of the High Court under

Article 226 of the Constitution for issuance of a writ of mandamus provided the private body is performing public functions, which are normally

expected to be performed by the State authorities. In the said case, the Apex Court set aside the judgments of the learned Single Judge as well as

the Division Bench of the High Court of Punjab holding the writ petition to be not maintainable on the proposition that the institution, in question,

was a purely unaided private educational institution. However, considering that the writ petition involved disputed questions of fact, the Apex Court

did not adjudicate the dispute and observed that the matter should be decided by an appropriate tribunal/court.

25. A consideration of the aforesaid judgments of the Apex Court goes to show that the term ""authority"" used in Article 226 has received a more

liberal meaning than Article 12. Under Article 226 of the Constitution of India, High Courts can issue writs for enforcement of Fundamental Rights

as well as legal rights. The expression ""any person or authority"" used in Article 226 is not confined only to statutory authorities and instrumentalities

of the state. The remedy under Article 226 of the Constitution is pre-eminently a public law remedy and is not generally available as a remedy

against private wrongs. While form and identity of the body is not very relevant, the nature of duties cast on the body is of prime importance. If a

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. Even a purely private body, over the internal affairs of which the State has no control, would also be amenable to

jurisdiction under Article 226 of the Constitution of India provided such private body is performing public functions. Thus, the expression ""any

person or authority"" used in Article 226 can cover any other person or body performing public duty and the High Court can issue prerogative writs

to wipe out injustice wherever it is found.

26. In view of the position of law as enunciated by the Apex Court, we are of the considered opinion that the question placed before the Full

Bench as to whether a writ petition will be maintainable against a purely privately managed institution, such as. venture school, and also the

question formulated by us as to whether a writ petition will be maintainable against non-government educational institutions, as defined in Section

2(g), are not capable of being answered either in the affirmative, as emphatically held in Anupam Sinha (supra), or in the negative, as unequivocally

held in Md. Ali Haider (supra). The focal point in both the aforesaid decisions was the body or the form instead of the nature of duties or functions

which such private body discharged or failed to discharge leading to filing of the writ petition. We hold that maintainability of a writ petition under

Article 226 of the Constitution of India will have to be determined not with reference to the body or the form. In case of a private institution or a

private body or an individual, the foremost question that has to be posed is whether the grievances expressed relate to discharge of public function

and denial of any right in connection with public duty imposed on such body. Necessarily, the determination as to whether writ petition will be

maintainable in a given case in case of a private body or institution will have to be judged on the basis of facts and circumstances of the case in the

light of the principles laid down by the Apex Court, as discussed hereinabove, and there cannot be any strait-jacket formula of universal

application.

27. At this stage, we may also take note of some provisions of the Act of 2011 as well as of the Act of 2006.

28. The preamble of the Act of 2011 goes to show that the said Act was enacted to provincialise the services of the employees of the venture

educational institutions in the State of Assam and to restrict further establishment of such educational institutions in the State. Section 2(t) of the Act

of 2011 provides that venture educational institutions mean and include such institutions within the State of Assam from the level of primary school

to Degree College. Each of such educational institutions is defined to mean a school or college established by the people of the locality prior to

01.01.2006 imparting education up to the particular level. They must also fulfill other criteria as per the individual definitions.

29. Section 3 of the Act of 2011 lays down the eligibility criteria for provincialisation of the services of the employees of venture educational

institutions. Under Section 4(1), the services of the employees of all eligible venture educational institutions under Section 3 shall be deemed to

have been provincialised with effect from the date of coming into force of the Act. On such provincialisation, they attain the status of government

employees. Section 4(2) provides that the number of employees, in both teaching and non-teaching cadre in each of the venture educational

institution, services of whom are provincialised or to be provincialised under the Act, shall not exceed the number as specified in the Schedule

appended to the Act, and the proviso thereto stipulates that where the number of such employees exceeds the number as specified in the Schedule,

the provincialisation of the services of employees shall be on the basis of seniority in the respective cadre in the concerned educational institution

and that the State Government shall not have any liability whatsoever in regard to such excess employees.

30. Section 10 of the Act of 2011 provides that there shall be one District Scrutiny Committee, in each district, separately for elementary,

secondary and for higher education to scrutinize service records and other relevant issues of the serving teachers and staff of venture educational

institutions pertaining to provincialisation of their services. Such District Scrutiny Committee, in terms of Section 10(2), is to be constituted by the

respective Deputy Commissioners of the districts. There is a specific role assigned to the District Scrutiny Committee which is that it should first

scrutinize and prepare a list of all venture educational institutions within the district, which are eligible in terms of the provisions of the Act, and shall,

thereafter, proceed to scrutinize and verify the service records of all the serving employees, who are eligible or would become eligible for being

considered for provincialisation of their services. The District Scrutiny Committee, thereafter, is required to forward the verified list of eligible

teachers and staff, school-wise, in accordance with the number of posts specified in the Schedule appended to the Act, to the concerned Director,

who shall, after making such further scrutiny as may be required, forward the same to the concerned department of the State Government for

consideration and for issuing notification in respect of the eligible institutions and employees for getting their services provincialised. Thus,

procedure to scrutinize service records and other service-related issues of the serving teachers and staff of venture educational institutions

pertaining to provincialisation of their services visualizes verification process in three stages - at the District level, at the Directorate level and,

finally, at the State level.

31. Section 11 of the Act of 2011 provides that the services of the employees of the venture educational institutions, which have been established

on or after 01.01.2006, shall not be provincialised and such educations institutions shall not be allowed to remain functional unless it has obtained

(i) affiliation from the affiliating university, if it is a degree college; (ii) permission under the provisions of the Act of 2006 in case of other

educational institutions; and (iii) recognition from the authority notified under the provisions of Section 18 of the Right of Children to Free and

Compulsory Education Act, 2009 (for short, the "Act of 2009") and that all such venture educational institutions, which have obtained the required

affiliation, permission or recognition, as the case may be, shall be allowed to function as purely private or non-government educational institutions.

32. Thus, under the Act of 2011, prior to provincialisation, the venture educational institution remains a purely private institution. However, after

provincialisation, superintendence and control of such institutions shall vest in the State Government and the employees become government

employees. Rules of conduct and discipline applicable to State Government employees of corresponding rank are also made applicable to the

provincialised employees. Therefore, post-provincialisation, remedy of writ jurisdiction will naturally be available to an aggrieved provincialised

employee serving in such institution.

33. But what about the pre-provincialisation stage? As has been noticed, at that stage, a venture institution remains a purely private body. It can

certainly maintain a writ application qua the State if the institution is aggrieved by any action or inaction of the State, say, if the institution is left out

of provincialisation without any or proper justification. In so far as internal affairs of the institution are concerned, a writ petition against the

institution may not be maintainable. However, we say so with a caveat. In case of a seniority dispute between two competing claimants which may

have a bearing on their claim for provincialisation, e.g. allegation that the venture educational institution had forwarded the name of one overlooking

the case of the other or that the District Scrutiny Committee did not properly verify the claim of the aggrieved employee, the writ Court may

intervene in such a case in exercise of its power under Article 226 of the Constitution to direct the District Scrutiny Committee to examine or re-

examine such claim or to issue such directions as may be called for. In a given case, where the decision of the authority under Section 10 of the

Act of 2011 is erroneous on the face of the record or when adequate materials are available before the Court, the writ Court may itself decide to

resolve the issue. The example given above is only illustrative as it is neither possible nor desirable to exhaustively lay down all conceivable

situations where writ jurisdiction against a venture educational institution would be available at a stage prior to provincialisation.

34. The Act of 2006 centers around regulation and management of nongovernment educational institutions as the preamble of the Act of 2006

goes to show. Section 2(g) of the Act of 2006 defines nongovernment educational institutions to mean schools or junior colleges established and

run by an individual or association of individuals, or any non-government organization or society or trust, except the schools established and

maintained by minorities under Clause (1) of Article 30 of the Constitution of India, and imparting education at primary, middle, secondary and

higher secondary level without receiving any grants-in-aid from the State Government excluding the educational institutions run or aided by the

Central Government or the State Government.

35. The statement of objects and reasons of the Act of 2006 shows that it had become necessary to enact a law to regulate the unplanned and

mushroom growth of non-government educational institutions. It is also noted that there is an increasing trend towards commercialization of

education and that many institutions have been established with the sole motive of earning profit. It is also observed that the teaching and non-

teaching staff is paid meager salary and their services are terminated on flimsy grounds without giving reasonable opportunity to defend themselves.

Scant attention is also paid to the infrastructural requirements of the educational institutions. The Act was enacted to address these serious issues.

36. The basic difference between a venture educational institution and non-government educational institution appears to be that while non-

government educational institutions are established and run by an individual or association of individuals, or any non-government organization, or

society, or trust, a venture educational institution is established by the people of a locality and, in that sense, established by a loosely formed body,

which may not have a legal entity as such.

37. Section 3 of the Act of 2006 provides for regulation of all the non-government educational institutions by the State Government. It is provided

in Section 3(2) that on and from the commencement of the Act, the establishment of the non-government educational institutions or the opening of

a higher class, or the closing down of an existing class in any existing non-government educational institution of the State shall be subject to the

provisions of this Act and the Rules framed there under and, any non-government educational institution or higher class, established or opened

otherwise than in accordance with the provisions of the Act shall not be recognised under Section 5 by the Director and shall be closed down

under Section 24 of the Act. Section 4 provides for prior permission for establishment of non-government educational institutions and registration

thereof and Section 5 provides for grant of administrative recognition by the Director.

38. Section 6 of the Act of 2006 provides for registration and administrative recognition of the existing non-government educational institutions

and, for this purpose, they are to submit application for registration of their institutions before the Director by furnishing full particulars and

information etc. and by furnishing copies of government permission or recognition, if any, obtained within 6 months from the date of

commencement of the Act.

39. Section 12 of the Act of 2006 provides for constitution of Managing Committee. By virtue of Section 13, the Managing Committee has control

over the appointment of the employees, disciplinary action against the employees and overall administrative control of the affairs of the institution.

Section 14 requires the Managing Committee to frame a scheme of management for the institution containing the salary structure and other

conditions of service of the employees and the fee structures in all levels of education etc.

40. Section 15 deals with appointment and disciplinary matters. While Section 15(1) relates to appointments, Section 15(2) deals with imposition

of penalty and procedure to be followed and provides that no employee of a non-government educational institution shall be dismissed or

removed, or reduced in rank, or terminated without giving him a reasonable opportunity of being heard and without the matter being referred to the

Managing Committee for its consideration and approval. The procedure to be followed in disciplinary actions against employees are prescribed in

Chapter-IX under Rule 17 to 22 of the Assam Non-Government Educational Institutions (Regulation and Management) Rules, 2007, (for short,

''the Rules of 2007''), framed under Section 31(1) of the Act of 2006.

41. Section 18 of the Act deals with admission and fees. Section 19 prohibits compulsory donations from any student, parents and guardians. The

Director of Elementary Education or the Director of Secondary Education, as the case may be, or any officer authorized by the Director has the

power of inspection or supervision under Section 20 of the Act. The institution is required to furnish an audited statement of accounts at the closing

of every financial year to the Director under Section 22 of the Act.

42. Section 24(1) of the Act of 2006 provides that whenever any non-government educational institution fails to fulfill the requirements or to

comply with the provisions of the Act, or violates any of the provisions of the Act or the Rules framed there under or any order passed by the

State Government or the Director, the State Government may, at any point of time, after giving reasonable opportunity of being heard, order for

withdrawal of the administrative recognition and close down the non-government educational institution. Sub-Section (1) of Section 24 also

provides that non-government educational institutions established and functioning in the state without being registered under Section 4, shall be

liable to be closed down.

43. Section 27 bars the jurisdiction of the Civil Court and it is provided that except as expressly provided in the Act, no decision or order, made in

exercise of any power conferred by or under the provisions of the Act, shall be questioned in any Civil Court. However, Rule 21 (d) of the Rules

provides that any employee, who has suffered a penalty, may prefer an appeal to the ""appropriate Court"". There is also a reference to ""competent

Court"" in Rule 17(4) of the Act, which provides that where a penalty of dismissal, removal or termination from service is set aside by a decision of

a ""competent Court"", such employee shall be deemed to have been placed under suspension from the date of the penalty till re-instatement. When

the interference of the ""Court"" is purely on technical grounds, disciplinary authority may order further enquiry.

44. From a reading of the Act of 2006 and Rules of 2007, it becomes evident that though a non-government educational institution is purely a

private institution, it is statutorily regulated. Being a purely private body, judicial intervention in exercise of the power of judicial review may not be

available in the internal matters of the institution, such as, disputes relating to appointment, seniority or decisions of the Managing Committee etc. It

is difficult, nay, impossible to catalogue situations where writ remedy may be available. As discussed earlier, we may indicate that such a remedy

will be available where there is a violation of statutory provision or where decision of a non-government educational institution affects public

interest. We have noted that in matters relating to discipline and imposition of penalty, the employees are entitled to procedural safeguards which

are statutorily recognized. If one is aggrieved by any imposition of penalty prescribed, he may appeal to the ""appropriate Court"", though ""Court"" is

not defined and at the same time, recourse to Civil Court is barred. In such a situation, perforce, a writ petition may have to be entertained as no

person can be left without any remedy. The issue raised may also involve disputed questions of fact. It is well known that writ Court is not an

appropriate forum for adjudication of disputed questions of fact.

45. It must also be remembered that the remedy by way of a writ petition cannot be relegated to an ordinary or regular remedy. It is an extra-

ordinary Constitutional remedy and it is within the discretion of the Constitutional Court whether to invoke writ jurisdiction or not.

46. In T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , an eleven-Judge Bench of the Apex Court had observed that

disputes between the management and the staff of educational institutions must be decided speedily and without excessive incurring of costs and,

accordingly, considered it appropriate that an Educational Tribunal be set up in each district in a State to enable the aggrieved teacher to file an

appeal against the decision of the management concerning disciplinary action or termination of service. During the course of hearing, we were

informed by the learned Advocate General, Assam, that till date no Educational Tribunal is established in the State of Assam.

47. In view of the above, we issue a writ of mandamus to the State Government to established Educational Tribunals at the districts to adjudicate

disputes relating to the teaching and non-teaching staff of the non-government educational institutions as well as disputes concerning disciplinary

action and claim for provincialisation in respect of teaching and non-teaching staff of venture educational institutions. Till establishment of the

Tribunals, the State Government shall, within a period of 4 (four) months, in consultation with the High Court, designate the District Courts as the

Education Tribunals of the respective districts. The question referred to the Full Bench and also the question formulated by the Full Bench having

been answered as indicated above, the writ petitions will now be listed before the appropriate Bench.