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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 9134/2022 & CM APPL. 27482/2022(Interim Relief), CM APPL. 27484/2022(Virtual Hearing)

PRAKASH SINGH ..... Petitioner
Through: Mr. Raghav Awasthi, Adv.

versus

UNION OF INDIA & ANR. ..... Respondents
Through: Mr. Piyush Beriwal and Ms. Geetanjali Tyagi, Advs. for UOI.
Mr. Krishnan Kartik, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

% 02.06.2022

CM APPL. 27483/2022 (for exemption)

Allowed, subject to all just exceptions.

The application shall stand allowed.

W.P.(C) 9134/2022 & CM APPL. 27482/2022(Interim Relief), CM APPL. 27484/2022(Virtual Hearing)

This writ petition has been preferred laying allegations against the second respondent of racial discrimination and harassment against the petioner.

The first issue which arises is with regard to the maintainability of the writ petition itself.

Learned counsel for the petitioner drawing the attention of the Court to Annexure -15, points out that the second respondent has been constituted by an Act of Parliament of France. It is pointed out that its essential functions

would indicate that it is an autonomous civil entity which has been constituted for the following purposes:-

> "1. To seek out, in France as well as abroad, the elements of a complete and objective information service;
> 2. To place that information at the disposal of users in exchange for payment."

The attention of the Court has also been drawn to Article 2 of the aforesaid charter which is reproduced hereinbelow:-

> "Article 2
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> The activities of Agence France-Presse must comply with the following fundamental obligations:
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> 1. Agence France-Presse may under no circumstances take account of influences or considerations liable to compromise the exactitude or the objectivity of the information it provides; it may under no circumstances fall under the control, either de facto or de jure, of any ideological, political or economic grouping;
> 2. Agence France-Presse must, to the full extent that its resources permit, develop and enhance its organisation so as to provide French and foreign users with exact, impartial and trustworthy information on a regular and uninterrupted basis;
> 3. Agence France-Presse must, to the full extent that its resources permit, ensure the existence of a network of facilities giving it the status of a worldwide information service."

Learned counsel submits that the respondent press agency clearly performs a public function and since allegations of racial discrimination have been levelled, the writ petition would clearly lie. The Court finds its unable to sustain the submission for the following reasons.

While it may be true that the second respondent had been constituted by an Act by the Parliament of France, it becomes relevant to note that the newspaper or an agency engaged in the dissemination of news cannot be viewed as performing a public function. Regard must be had to the fact that

the expression *"public function"* and *"public duty"* have been understood to be those which are akin to functions performed by the State in its sovereign capacity. The Court further notes that the contract of service between the petitioner and the second respondent is not imbued with any statutory flavour. The Court bears in mind the following principles as were enunciated by the Supreme Court in **Ramakrishna Mission & Anr. vs. Kago Kunya & Ors.** [(2019) 16 SCC 303].

> "24. In *G. Bassi Reddy* v. *International Crops Research Institute* [*G. Bassi Reddy* v. *International Crops Research Institute*, (2003) 4 SCC 225] , a two-Judge Bench of this Court dealt with whether the International Crop Research Institute for the Semi-Arid Tropics (ICRISAT) which is a non-profit research and training centre, is amenable to the writ jurisdiction under Article 226. The dispute concerned the termination of employees of ICRISAT. The Court held that only functions which are similar or closely related to those that are performed by the State in its sovereign capacity qualify as "public functions" or a "public duty": (SCC p. 237, para 28)
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> > "*28.* A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty … ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities."
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> Applying the above test, this Court upheld the decision of the High Court that the writ petition against ICRISAT was not maintainable.
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> 30. Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.

32. Before an organisation can be held to discharge a public function, the function must be of a character that is closely related to functions which are performed by the State in its sovereign capacity. There is nothing on record to indicate that the hospital performs functions which are akin to those solely performed by State authorities. Medical services are provided by private as well as State entities. The character of the organisation as a public authority is dependent on the circumstances of the case. In setting up the hospital, the Mission cannot be construed as having assumed a public function. The hospital has no monopoly status conferred or mandated by law. That it was the first in the State to provide service of a particular dispensation does not make it an "authority" within the meaning of Article 226. State Governments provide concessional terms to a variety of organisations in order to attract them to set up establishments within the territorial jurisdiction of the State. The State may encourage them as an adjunct of its social policy or the imperatives of economic development. The mere fact that land had been provided on a concessional basis to the hospital would not by itself result in the conclusion that the hospital performs a public function. In the present case, the absence of State control in the management of the hospital has a significant bearing on our coming to the conclusion that the hospital does not come within the ambit of a public authority.

33. It has been submitted before us that the hospital is subject to regulation by the Clinical Establishments (Registration and Regulation) Act, 2010. Does the regulation of hospitals and nursing homes by law render the hospital a statutory body? Private individuals and organizations are subject to diverse obligations under the law. The law is a ubiquitous phenomenon. From the registration of birth to the reporting of death, law imposes obligations on diverse aspects of individual lives. From incorporation to dissolution, business has to act in compliance with law. But that does not make every entity or activity an authority under Article 226. Regulation by a statute does not constitute the hospital as a body which is constituted under the statute. Individuals and organisations are subject to statutory requirements in a whole host of activities today. That by itself cannot be conclusive of whether such an individual or organisation discharges a public function. In *Federal Bank* [*Federal Bank Ltd.* v. *Sagar Thomas*, (2003) 10 SCC 733] , while deciding whether a private bank that is regulated by the Banking Regulation Act, 1949 discharges any public function, the Court held thus: (SCC pp. 758-59, para 33)

> "*33.* … in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. 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 obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. *Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India*. The respondent is not trying to enforce any statutory duty on the part of the Bank."
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> (emphasis supplied)
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> 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* [*K.K. Saksena* v. *International Commission on Irrigation & Drainage*, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] 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."

Although learned counsel for the petitioner further places reliance upon the judgement rendered by the Supreme Court in **Binny Ltd. Vs. Sadasivan** [(2005) 6 SCC 657], the Court takes note of the following pertinent observations as were made by the Supreme Court in that decision itself:-

> "9. The superior court's supervisory jurisdiction of judicial review is invoked by an aggrieved party in myriad cases. High Courts in India are empowered under Article 226 of the Constitution to exercise judicial review to correct administrative decisions and under this jurisdiction the High Court can issue to any person or authority, any direction or order or writs for enforcement of any of the rights conferred by Part III or for any other purpose. The jurisdiction conferred on the High Court under Article 226 is very wide. However, it is an accepted principle that this is a public

law remedy and it is available against a body or person performing a public law function. Before considering the scope and ambit of public law remedy in the light of certain English decisions, it is worthwhile to remember the words of Subba Rao, J. expressed in relation to the powers conferred on the High Court under Article 226 of the Constitution in *Dwarkanath* v. *ITO* [(1965) 3 SCR 536 : AIR 1966 SC 81] (SCR, pp. 540 G-541 A):

"This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary from of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

10. The writ of mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the Sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporations which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the *Administrative*

Law (9th Edn.) by Sir William Wade and Christopher Forsyth (Oxford University Press) at p. 621, the following opinion is expressed:

"A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on *Judicial Review of Administrative Action* (5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24, it is stated thus:

"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or

participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the State. Charities, self-regulatory organisations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to 'recognise the realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted'. Non-governmental bodies such as these are just as capable of abusing their powers as is Government."

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently 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. Sometimes, it is difficult to distinguish between public law and private law remedies. According to *Halsbury's Laws of England*, 3rd Edn., Vol. 30, p. 682,

> "*1317.* A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit."

> There cannot be any general definition of public authority or public action. The facts of each case decide the point."

Accordingly and for all the aforesaid reasons, the Court holds that the present writ petition is not maintainable. It is accordingly dismissed along with the pending applications.

YASHWANT VARMA, J.

JUNE 2, 2022
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