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Neutral Citation No. - 2023:AHC-LKO:33251-DB

RESERVED

Court No. - 1

Case :- SPECIAL APPEAL No. - 228 of 2023

Appellant :- Dr. Ram Manohar Lohia Institute Of Medical Sciences, Lko. Thru. Director And Others
Respondent :- Dr. Charu Mahajan And Others
Counsel for Appellant :- Anupras Singh,Sr. Advocate
Counsel for Respondent :- Gaurav Mehrotra,C.S.C.

Hon'ble Devendra Kumar Upadhyaya,J.
Hon'ble Om Prakash Shukla,J.

(Per Devendra Kumar Upadhyaya, J.)

1. Dr. Ram Manohar Lohia Institute of Medical Sciences, Lucknow (here-in-after referred to as '**Institute**') is before us in this intra-court appeal filed under Chapter VIII Rule 5 of the Rules of the Court challenging an order dated 13.04.2023 passed by the learned Single Judge in Writ-A No.2822 of 2023 whereby the preliminary objection raised on behalf of the appellant-Institute regarding maintainability/entertainability of the writ petition has been overruled and the appellant-Institute has been required to file its counter affidavit to the prayer for grant of interim relief made by the respondent no.1-petitioner in the writ petition.

2. Heard Shri Asit Kumar Chaturvedi, Senior Advocate, assisted by Shri Anupras Singh, learned counsel representing the appellant-Institute and Shri Gaurav Mehrotra, Advocate representing the respondent no.1-petitioner. Learned State Counsel representing the State-respondents has also been heard.

We have also perused the records available before us on this special appeal.

3. At the outset, learned counsel for the respondent no.1-petitioner has argued that this special appeal is not maintainable for the reason that the order under appeal does not decide any issue; rather by the said order learned Single Judge has only entertained the writ petition overruling the objection of the appellant-Institute that against the order under challenge in the writ petition, the respondent no.1-petitioner has got an alternative remedy under section 42 of Dr. Ram Manohar Lohia Institute of Medical Sciences Act, 2015 (here-in-after referred to as '**the Act, 2015'**) before the Visitor, as such writ petition ought not to have been entertained by the learned Single Judge. Thus, the submission against the maintainability of this special appeal is that once the learned Single Judge has decided to entertain the writ petition overruling the objection of there being an alternative remedy, such discretion need not be interfered with by this Court in this special appeal.

4. Replying to the aforesaid submission made by the learned counsel representing the respondent no.1-petitioner regarding maintainability of this intra-court appeal, Shri Chaturvedi, learned Senior Advocate has strenuously argued that in the wake of availability of statutory alternative remedy under section 42 of the Act, 2015, which is efficacious too, learned Single Judge has erred in law in maintaining the writ petition. In his submission, he has urged that the writ petition is not maintainable in view of the aforesaid and it ought to have been dismissed relegating the respondent no.1-petitioner to the remedy under section 42 of the Act, 2015. In support of his submission, Shri Chaturvedi has placed reliance on the judgments in the case of (i) **Dr. G. Sarana vs. University of Lucknow and others,** reported in **(1976) 3**

SCC 585, (ii) State of Goa and others vs. Leukoplast (India) Ltd, reported in **(1997) 4 SCC 82, (iii) A. P. Foods vs. S. Samuel and others,** reported in **(2006) 5 SCC 469, (iv) Transport and Dock Workers Union and others vs. Mumbai Port Trust and another,** reported in **(2011) 2 SCC 575, (v) Ansal Housing and Construction Ltd. vs. State of Uttar Pradesh and others,** reported in **(2016) 13 SCC 305 and (vi) Krishna Kumar vs. Director, Sanjay Gandhi Post Graduate Institute of Medical Sciences,** reported in **(2008) LawSuit (All) 1060.**

5. We have carefully considered the rival submissions made by the learned counsel representing the respective parties.

6. Before dealing with the competing submissions made by the parties, we find it appropriate to notice certain facts, which can be gathered from the pleadings available on record, as also from the submissions made by the learned counsel for the parties.

7. The Institute was initially started as a Centre of Sanjay Gandhi Post Graduate Institute of Medical Sciences to make available super-speciality medical care. It was initially registered under the Societies Registration Act, 1860 and was functioning as autonomous Institution since the year 2006. The State Government, however, decided to provide for conferring on the said Institute status of a University so as to ensure that Institute functions more efficiently as a Teaching and Research Centre to meet the requirement of Higher Education and Research in Medical, Para-Medical and Allied Health Service. Accordingly the State Legislature enacted the Act, 2015 (U.P. Act No.41 of 2018) which *inter alia* provided for establishing of the institute

on the pattern of All India Institute of Medical Sciences, New Delhi.

8. As per section 5 of the Act, 2015 the Institute consists of various members which include the Governor of Uttar Pradesh who is its Visitor (*ex-officio)* and the Chief Secretary of the Government of Uttar Pradesh, who is its President (*ex-officio*). Section 10 of the Act, 2015 provides that the Visitor, the President, the Vice-President, the Director, the Dean of the Institute, the Finance Officer and such other officers as may be required by the Regulation, are the officers of the Institute. Section 11 of the said Act provides that the Governor of Uttar Pradesh shall be the Visitor of the Institute. Sub-section 6 of section 11 provides that subject to the provisions of section 42, the Visitor may, by an order in writing, annul any proceeding of the Institute if the same is not found in conformity with the Act or the Rules or the Regulations made under the Act. As per Section 12 of the Act, 2015 the Chief Secretary of Uttar Pradesh is the President of the Institute and he is also the Chairman of the Governing Body. Section 18 defines the authorities of the Institute which includes Board of Governors. Section 19 states that the Board of Governors shall be the principal governing body of the Institute which shall consist of the Chief Secretary, Government of Uttar Pradesh being its Chairperson (*ex-officio).* Section 26 provides that Professors, Associate Professors, Assistant Professors and Group 'A' Officers of the Institute shall be appointed by the Chairperson of the Governing Body i.e. the Chief Secretary of the Government of Uttar Pradesh. Section 34 empowers the Institute to make regulations with the previous approval of the State Government to provide for the matters enumerated therein. Section 40 empowers the State Government to issue such directions on policy matters from time to time which shall not be inconsistent with the provisions of the Act. It

further provides that such a direction shall be complied with by the Institute. Apart from power of issuing directions, the State Government has also been vested with the power to cause inspection of the Institute.

9. Section 42 of the Act, 2015, with which we are concerned in this case, provides that if an issue arises whether any person has been elected or appointed or is entitled to be a member of the Institute, Governing Body, any authority or any body of the Institute or whether any decision of the Institute, Governing Body or any authority or body of the Institute is in conformity with the Act or the rules or regulations, the matter shall be referred to the Visitor and the decision of the Visitor in that regard shall be final. The first proviso appended to section 42 provides that no reference under the said provision shall be made more than three months after the due date when the question could have been raised for the first time. Further, the second proviso empowers the Visitor to act *suo motu* or entertain a reference after expiry of the period of three months in exceptional circumstances. Section 42 of the Act, 2015 is quoted herein below:

> ***"42. If any question arises whether any person has been duly elected or appointed as or is entitled to be, a member of the Institute, Governing Body, any authority or other body of the Institute or not, or whether any decision of the Institutes, Governing Body or any authority or other body of the Institute is in conformity with this Act or the rules or regulations made thereunder or not, the matter shall be referred to the Visitor and the decision of the Visitor shall be final."***

10. Having noticed the broad scheme of the Act, we now proceed to narrate the facts which engage our attention in this case. An advertisement was issued by the Institute on 08.09.2016 inviting applications for filling up various vacant teaching posts in several departments including two posts of Assistant Professor

in the Department of Obstetrics & Gynaecology. The essential qualification mentioned in the advertisement was as per MCI (Medical Council of India) requirement. The advertisement further provided that medical qualification as essential qualification shall be as provided in the "Minimum Qualification for Teachers in Medical Institutions Regulations, 1998" with amendments. For the post of Assistant Professor, the requisite experience as advertised in the advertisement was three years teaching experience after prescribed Post-Graduate (MD/MS/PhD etc.) at a recognized teaching institution as on 30.06.2016. The post of Assistant Professor, Obstetrics & Gynecology is mentioned at serial no. 29 in the said advertisement. Against the said post the "Minimum Qualification" prescribed is MD/MS (Obstetrics & Gynaecology). Along with educational qualification, the advertisement mentioned requirement of three years post MD/MS teaching experience in the subject in a recognized medical college/teaching institution as Senior Resident/Registrar/ Demonstrator/Tutor/Lecturer.

11. The petitioner considering herself to be eligible made her application for appointment to the post of Assistant Professor (Obstetrics & Gynaecology) against the advertisement dated 08.09.2016 and was subjected to selection. On the basis of selection held, she was appointed on the post of Maternity and Child Welfare-cum-Lecturer/Assistant Professor in the Obstetrics and Gynaecology in the regular scale of pay of Rs.15600-39100 with Academic Grade Pay of Rs.8,700/-.

12. The said appointment was made under the appointment order issued by the Director of the Institute on 16.12.2016. On her appointment, the respondent no.1-petitioner assumed her

charge on the said post and had since then been discharging the functions and duties of her post.

13. A Public Interest Litigation (Civil) No.24194 of 2018 was filed before this Court with the prayer to issue direction to the State Government as also the authorities of the Institute to act upon a report dated 25.04.2018 based on an enquiry conducted by the Director General of Medical Education, Uttar Pradesh against the then Director of the Institute regarding alleged malpractices in selection of teaching faculties at the Institute. The said P.I.L was disposed of, noticing that the Director General, Medical Education had conducted an enquiry and submitted a report dated 28.06.2019 and in the said enquiry certain discrepancies were noticed and the matter was pending before the State Government, with the direction to take appropriate action pursuant to the enquiry report dated 28.06.2016. The matter thereafter appears to have been considered by the Board of Governors in its meeting held on 30.07.2020 wherein it was observed by the Board of Directors that the respondent no.1-petitioner was appointed on the post of Assistant Professor in the concerned department irregularly and accordingly the Board of Directors decided that the Director should take appropriate action for termination of service of the respondent no.1-petitioner treating her appointment to be *void ab initio.*

14. A show cause notice was thereafter issued by the Director on 11.02.2021 intimating the respondent no.1-petitioner that the Board of Directors in its meeting held on 30.07.2020 had taken a decision to terminate her services treating her appointment to be *void ab initio* and accordingly she should explain within a fortnight as to why her services as Assistant Professor, Obstetrics & Gynecology should not be terminated in the light of the

findings recorded and decision taken by the Board of Directors in its meeting dated 30.07.2020. The respondent no.1-petitioner submitted her reply to the said show cause notice on 23.02.2021 denying the allegation that the respondent no.1-petitioner did not fulfill the requisite teaching experience and that there was no illegality in her appointment hence the show cause notice given to her for termination of her services being bad in law, was liable to be recalled.

15. Instead of acting upon the show cause notice dated 11.02.2021 and the reply submitted by the respondent no.1-petitioner to the said show cause notice on 23.02.2021, a charge-sheet dated 18.01.2022 was issued to the respondent no.1-petitioner with the sole allegation that she had applied for appointment in question vide her application dated 26.09.2016 allegedly mentioning wrong facts about her experience and she got her appointment accordingly. The documents relied upon in the said charge-sheet were -- (i) photo copy of application form of the respondent no.1-petitioner, (ii) photo copy of her experience certificates and (iii) photo copy of Enquiry Report submitted by the Director General, Medical Education & Training, U.P. The respondent no.1-petitioner submitted her reply to the said show cause notice on 31.01.2022 stating therein that she had not furnished any wrong facts relating to her teaching experience while making her application against the advertisement. Nothing was done in pursuance of the said charge-sheet dated 18.01.2022, instead another charge-sheet was issued to the respondent no.1-petitioner, dated 04.02.2022 which contained the same allegation as mentioned in the charge-sheet, dated 18.01.2022, except that in support of the charge apart from relying on the three documents as mentioned in the charge-sheet dated 18.01.2022, two more documents were relied upon, one of

which was the photo copy of the advertisement and the other was the MCI Regulations, 1998 as amended till 13th July, 2016.

16. The respondent no.1-petitioner submitted her reply to the said charge-sheet on 22.02.2022 denying the allegations levelled against her and stating therein that the charge had wrongly been framed against her for the reason that the respondent no.1-petitioner did not conceal any fact. She also stated that in case reply/explanation furnished by her is not accepted, she shall cross-examine the members of the Scrutiny Committee, Dr. Reena Srivastava, Professor, Obstetrics & Gynaecology, B. R. D. Medical College, Gorakhpur, Dr. Alka Kriplani, Professor, Obstetrics & Gynaecology, All India Institute of Medical Sciences, New Delhi, Dr. Deepak Malviya, Member of the Selection Committee and the Director General Medial Education, U.P., another member of the Selection Committee.

17. The respondent no.1-petitioner also furnished a supplementary reply to the charge-sheet on 12.04.2022. The Enquiry Officer submitted the enquiry report which was served upon the respondent no.1-petitioner by means of a letter dated 04.07.2022 by the Executive Registrar of the Institute requiring her to submit her response to the enquiry report. The respondent no.1-petitioner accordingly submitted her comments on the enquiry report vide letter dated 20.07.2022 stating *inter alia* that she had requested for an oral enquiry to cross-examine five persons as mentioned by her in the reply submitted to the charge-sheet and hence it was obligatory on the part of the enquiry officer to have fixed a date for such oral enquiry after calling the witnesses. She also stated that the enquiry officer had relied upon the opinion of the Director General, Medical Education, U.P., who despite request, was not produced during the course of

enquiry permitting her to cross-examine him. The appellant-petitioner also challenged the findings recorded by the enquiry officer in the enquiry report and lastly submitted that the enquiry conducted against her was *inter alia* against the principles of natural justice.

18. Thereafter an office order dated 22.02.2023 has been passed by the Director with the approval and in compliance of the order of the President of the Institute whereby the respondent no.1-petitioner has been dismissed from service of the Institute without any bar for applying for future recruitment under the Government.

19. It is the aforesaid order dated 22.02.2023 issued by the Director with the approval of the President whereby she has been dismissed from service which has been challenged by the respondent no.1-petitioner by instituting Writ-A No.2822 of 2023. Apart from challenging the office order dated 22.02.2023, the respondent no.1-petitioner has also challenged the resolution of the Board of Directors dated 30.07.2020 whereby it was decided that treating the appointment of the respondent no.1-petitioner to be *void ab initio*, the Director must take appropriate decision for terminating her services.

20. The objection regarding the very maintainability of the writ petition as argued by the appellant-Institute, has been overruled by the learned Single Judge by means of the order which is under appeal before us. The learned Single Judge has decided to exercise his discretion to entertain the writ petition.

22. In the aforesaid facts and circumstances, the question which falls for our consideration is as to whether the order dated

13.04.2023 passed by the learned Single Judge which is under appeal herein, whereby the writ petition filed by the respondent no.1-petitioner has been entertained and the learned Single Judge has decided to exercise his discretion in the matter, is liable to be interfered with in this special appeal or not?

22. Quoting the judgment of Hon'ble Supreme Court in the case of ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others,*** *reported in* ***(1998) 8 SCC 1,*** learned Single Judge has observed that the facts of the case presented before him, persuaded him to exercise his discretion for entertaining the writ petition.

23. There cannot be any quarrel on the legal proposition that exercise of jurisdiction under Article 226 of the Constitution of India by the High Courts is discretionary. There is also no dispute to the legal principle that availability of alternative remedy provided by the relevant statute is not an absolute bar to entertain a writ petition; rather the High Court has discretion whether to entertain the writ petition or not bearing in mind the facts of the case being brought before the Court. One of the self- imposed restrictions on entertaining a writ petition is that this Court should not normally entertain the writ petition where effective and efficacious alternative remedy is available, however, simultaneously it should also be borne in mind that mere availability of an alternative remedy not exhausted by the party approaching this Court invoking writ jurisdiction, does not oust the jurisdiction of the Court that will render a writ petition not maintainable.

24. Underlying the distinction between "entertainability and maintainability" of writ petition in the wake of availability of alternative remedy, the Hon'ble Supreme Court in a latest

pronouncement in the case of ***Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority and others,*** reported in ***2023 SCC OnLine SC 95,*** has held that the exceptions carved out in the case of ***Whirlpool Corporation (supra)*** to entertain a writ petition even in the wake of availability of alternative remedy have to be kept in mind. Paragraphs 4 to 8 of the judgment in the case of ***Godrej Sara Lee Ltd.(supra)*** are relevant which are extracted hereunder:

> ***"4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and***

discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (State of Uttar Pradesh v. Mohd. Nooh) had the occasion to observe as follows:

> ***"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, Certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of Certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of Certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. ***"***

6. At the end of the last century, this Court in paragraph 15 of the its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation v. Registrar of Trade Marks, Mumbai) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:

(i) where the writ petition seeks enforcement of any of the fundamental rights;

(ii) where there is violation of principles of natural justice;

(iii) where the order or the proceedings are wholly without jurisdiction; or

(iv) where the vires of an Act is challenged.

7. Not too long ago, this Court in its decision reported in 2021 SCC OnLine SC 884 (Assistant Commissioner of State Tax v. Commercial Steel Limited) has reiterated the same principles in paragraph 11.

8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh v. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India v. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."

25. The exceptions carved out in the case of ***Whirlpool Corporation (supra)*** are as under:

(i) where the party approaching the Court seeks enforcement of any of the fundamental rights,

(ii) there is violation of principles of natural justice,

(iii) where the order or the proceedings are wholly without jurisdiction or

(iv) where the vires of an Act is under challenge.

26. Before the judgment by the Apex Court in the case of ***Godrej Sara Lee Ltd. (supra)*** similar observations were made and legal principle was enunciated by Hon'ble Supreme Court in the case of ***M/s Radha Krishan Industries vs. State of Himachal Pradesh and others, decided on 20.04.2021,*** reported in **(2021) 6 SCC 771.** After discussing various judgments, Hon'ble Supreme Court has also considered the legal principle evolved by the Apex Court in the case of ***Whirlpool Corporation (supra)*** and enunciated the principle of law in para 24 of the said judgment. One of the legal principles evolved by Hon'ble Supreme Court in the case of **M/s Radha Krishan Industries (supra)** is that there are certain exceptions to the rule of alternative remedy and such exceptions are that where a writ petition has been filed for enforcement of fundamental right protected by Part-III of the Constitution of India, where there has been a violation of principles of natural justice, where the order or the proceedings are wholly without jurisdiction and where the vires of legislation is challenged. Hon'ble Supreme Court in the said case of **M/s Radha Krishan Industries (supra)** has also held that an alternative remedy by itself does not divest the High Court of its power under Article 226 of the Constitution of India in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious and alternative remedy is provided by law. It has also been held in the said case by the Apex Court that Rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion. Paragraphs 24 to 27 of the Judgment in the case of **M/s Radha Krishan Industries (supra)** read as under:-

"24. The High Court has dealt with the maintainability of the petition under Article 226 of the Constitution. Relying on the decision of this Court in CCT v. Glaxo Smith Kline Consumer Health Care Ltd. [CCT v. Glaxo Smith Kline Consumer Health Care Ltd., (2020) 19 SCC 681 : 2020 SCC OnLine SC 440] , the High Court noted that although it can entertain a petition under Article 226 of the Constitution, it must not do so when the aggrieved person has an effective alternate remedy available in law. However, certain exceptions to this "rule of alternate remedy" include where, the statutory authority has not acted in accordance with the provisions of the law or acted in defiance of the fundamental principles of judicial procedure; or has resorted to invoke provisions, which are repealed; or where an order has been passed in violation of the principles of natural justice. Applying this formulation, the High Court noted that the appellant has an alternate remedy available under the GST Act and thus, the petition was not maintainable.

25. In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In Whirlpool Corpn. v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1] , a two-Judge Bench of this Court after reviewing the case law on this point, noted : (SCC pp. 9-10, paras 14-15)

> "*14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".*
>
> *15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where*

> ***the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."***
>
> ***(emphasis supplied)***

26. Following the dictum of this Court in Whirlpool (supra) , in Harbanslal Sahnia v. Indian Oil Corpn. Ltd., this Court noted that :

> ***"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn.v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."***
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> ***(emphasis supplied)***

27. The principles of law which emerge are that:

1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

> ***3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.***
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> ***4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.***
>
> ***5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.***
>
> ***6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."***

27. Yet in another case reported in **(2009) 2 SCC 630, Committee of Management and another vs. Vice-Chancellor and others,** which had emanated from a judgment of this Court in relation to the provisions contained in Section 68 of U.P. State Universities Act, 1973 which is similarly worded as section 42 of the Act 2015, Hon'ble Supreme Court has held that alternative remedy is not an absolute bar and relegation to alternative remedy will not be warranted where an order passed by an authority is without jurisdiction or the same is in violation of principles of natural justice. Section 68 of the U.P. State Universities Act,1973, in respect of which Hon'ble Supreme Court has made the aforesaid observations in the case of **Committee of Management and another (supra)** is extracted herein below:

> **"*68. Reference to the Chancellor.—If any question arises whether any person has been duly elected or appointed as, or is entitled to be, member of any authority or other body***

of the University, or whether any decision of any authority or officer of the University (including any question as to the validity of a Statute, Ordinance or Regulation, not being a Statute or Ordinance made or approved by the State Government or by the Chancellor) is in conformity with this Act or the Statutes or the Ordinance made thereunder, the matter shall be referred to the Chancellor and the decision of the Chancellor thereon shall be final:

Provided that no reference under this section shall be made —

(a) more than three months after the date when the question could have been raised for the first time;

(b) by any person other than an authority or officer of the University or a person aggrieved:

Provided further that the Chancellor may in exceptional circumstances—

(a) act suo motu or entertain a reference after the expiry of the period mentioned in the preceding proviso;

(b) where the matter referred relates to a dispute about the election, and the eligibility of the person so elected is in doubt, pass such orders of stay as he thinks just and expedient;

(c) * * * *"

28. Thus, from the legal principles as propounded by Hon'ble Apex Court in the aforementioned judgments, it is abundantly clear that exercise of discretionary jurisdiction under Article 226 of the Constitution of India depends on the facts of each case. It is also equally settled that availability of alternative statutory remedy is not an absolute bar, it is rather a rule of self-imposed discipline/restriction and public policy, and in certain cases falling within the exception as carved out by Hon'ble Supreme Court in the case of **Whirlpool Corporation (supra)**, even in the wake of availability of alternative statutory remedy, this Court can decide to exercise its discretion under Article 226 of the Constitution of India.

29. Now, if we apply the aforesaid legal principles in the present case, the question which arises for our consideration is as

to whether the facts of the case presented before the learned Single Judge by the respondent no.1-petitioner in her writ petition make out a case for exercise of discretion under Article 226 of the Constitution of India in the wake of availability of alternative statutory remedy under Section 42 of the Act 2015 or not.

30. We have already noticed the facts of the case which have led the respondent no.1-petitioner to institute the proceedings of Writ-A No.2822 of 2023. One of the grounds taken to challenge the order of dismissal dated 22.02.2023 is that during the course of enquiry, though the respondent no.1-petitioner had categorically requested that certain witnesses be produced for cross-examination, however, the said prayer was denied to her. In this regard we may state that while submitting her reply to the charge-sheet dated 04.02.2022 vide her letter dated 22.02.2022 the respondent no.1-petitioner had clearly indicated therein that in case the enquiry officer did not agree with the explanation/reply submitted by her to the charge-sheet she intended to cross-examine five persons which included the members of the Scrutiny Committee which had initially scrutinized the application form submitted by the respondent no.1-petitioner and also two Professors in the department of Obstetrics & Gynaecology, one in the State Medical College at Gorakhpur and the other at All India Institute of Medical Sciences and also two members of the Selection Committee. We may also note that while submitting her comments to the enquiry report the respondent no.1-petitioner had again mentioned that she had desired an oral enquiry and to cross-examine five persons while submitting her reply to the charge-sheet and hence it was obligatory on the the part of enquiry officer to have fixed a date for recording such oral evidence after calling the witnesses.

31. We also notice that despite the aforesaid request in categorical terms for cross-examining the witnesses, there is nothing on record before us which can establish that the respondent no.1-petitioner was permitted to cross-examine the said persons. We may also note that the witnesses whom the respondent no.1-petitioner intended to cross-examine during the course of enquiry cannot be said to be irrelevant in the context of the subject matter of enquiry for the reason that the members of the Scrutiny Committee who had initially examined the application form submitted by the respondent no.1-petitioner and further that the members of the Selection Committee which comprised of experts of the field also did not find anything wrong with the application form submitted by the respondent no.1-petitioner. Thus, *prima facie* we are of the opinion that there existed a rationale for the prayer made by the respondent no.1-petitioner to cross-examine certain witnesses during the course of enquiry. Denial of cross-examination of witnesses or denial of summoning the witnesses as per the prayer made by the respondent no.1-petitioner during the course of enquiry without any justifiable reason, would certainly amount to violation of principles of natural justice. Neither the enquiry report nor the order dated 22.02.2023 dismissing the respondent no.1-petitioner from service contains any recital that her prayer for cross-examining was denied by giving reasons.

32. In this view, the pleading as available on the writ petition, *inter alia,* assert that the enquiry on the basis of which the order impugned in the writ petition has been passed, suffers from the vice of violation of principles of natural justice.

33. Accordingly, the case as set up by the respondent no.1-petitioner falls within one of the exceptions as carved out by the Hon'ble Supreme Court in the aforementioned judgments in the

case of **Whirlpool Corporation (supra), M/s Radha Krishan Industries (supra) and Godrej Sara Lee Ltd. (supra).**

34. So far as the judgments relied upon by the learned counsel for the appellant-Institute, Shri Chaturvedi, learned Senior Advocate, are concerned, we may note that judgment in the case of **Dr. G. Sarana (supra)** which is based on Section 68 of U.P. State Universities Act, 1973 does not have any application to this case for the reason that in the said matter the recommendations made by the Selection Committee were yet to be approved/disapproved by the Executive Council and hence challenge to the recommendations made by the Selection Committee without its consideration by the Executive Council of the University concerned was held to be untenable by instituting the writ petition under Article 226 of the Constitution of India. We also note that in the case of **Dr. G. Sarana (supra)** Hon'ble Supreme Court did not interfere with the decision of the High Court whereby writ petition was not entertained giving the reason that the petitioner in the said writ petition had pleaded personal bias against the members of the Selection Committee, however, despite knowing all the relevant facts he had not raised the said issues before appearing or at the time of interview against the constitution of the Selection Committee. In this view, the judgment in the case of **Dr. G. Sarana (supra),** in our opinion, does not have any application to the facts of this case.

35. So far as other judgments cited by the learned Counsel for the appellant-institute are concerned, they have been rendered in the facts and circumstances of the case. However, the said judgments can be said to run contrary to the law laid down by the Apex Court in the case of **Whirlpool Corporation (supra), Radha Krishna Industries (supra)** and **Godrej Sara Leel Ltd. (supra)**.

36. One of the arguments made by the learned Senior Advocate representing the appellant-institute is that having regard to the language occurring in Section 42 of the Act, it is the decision of the Visitor which is final in case any question arises as to whether any decision of the institute or governing body or any authority is in conformity with the Act or Rules or Regulations made therein. His submission thus is that finality to the decision of the President dismissing the services of the respondent No.1-petitioner as communicated by the Director vide Office Order dated 22.02.2023 can be attached only once an order in that regard is passed by the Visitor. The aforesaid submission of the learned Counsel for the appellant is absolutely misconceived and fallacious. If we minutely read the language of Section 42 of the Act, 2015, what we find is that the decision of the Visitor is final only if any Reference is made to the Visitor under Section 42 of the Act, 2015. The finality clause as available in Section 42 of the Act, 2015 has to be read *qua* the order which may be passed by the Visitor and not *qua* the order which may be passed by the governing body or any authority or any body of the Institute. To say that the order passed by the President which has been communicated in this case by the Director vide Office Order dated 22.02.2023 is not final and the same will become final only once the Visitor will exercise his jurisdiction under Section 42 of the Act 2015, is absolutely misconceived. The occasion before the Visitor to examine an order passed by the governing body or an authority or any other body of the institute will arise only if the Visitor receives any reference in respect of such an order or he decides to entertain the reference *suo motu*.

37. In the instant case, the respondent No.1-petitioner has not taken recourse to Section 42 of the Act 2015, rather has challenged the order of the President as communicated to her by

the Director of the Institute by means of the order dated 22.02.2023. Thus, it cannot be said that the order of dismissal from service could not be challenged by filing writ petition under Article 226 of the Constitution of India unless it is given finality by the Visitor of the Institute. The said submission of the learned counsel for the appellant-Institute in our opinion, merits rejection which is hereby rejected.

38. Even otherwise it is not a case where the writ petition filed by the respondent No.1-petitioner can be said to be not maintainable. As already pointed out above, there lies a difference between entertainability and maintainability of a writ petition under Article 226 of Constitution of India. If a writ petition for any lawful reason is not maintainable, such a situation has to be viewed differently. However, in case of objection regarding entertainability of a petition under Article 226 of the Constitution of India, if this Court for valid reasons decides to exercise its discretion, in our opinion, such an order cannot be faulted with.

39. For the reasons aforesaid, we do not find any good ground to interfere with the order passed by the learned Single Judge dated 13.04.2023 in Writ-A No.2822 of 2023, which is under appeal herein.

40. Resultantly, the Special Appeal is hereby **dismissed.**

41. However, there will be no order as to costs.

(Om Prakash Shukla, J.) (D. K. Upadhyaya, J.)

Order date:15.05.2023
akhilesh

Digitally signed by :-
AKHILESHWAR KUMAR
High Court of Judicature at Allahabad,
Lucknow Bench