

MRS. SATIMBLA SHARMA AND ORS.

v.

ST. PAUL'S SENIOR SECONDARY SCHOOL AND ORS.
(Civil Appeal No. 2676 of 2010)

AUGUST 11, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

Service Law:

Equal pay for equal work – Claim for, by teachers of private unaided schools – Held: Teachers of private unaided schools have no right to claim salary equal to that of their counter-parts working in Government Schools and Government aided schools – Education/Educational Institutions.

Equal pay for equal work – Claim against private unaided minority schools – Held: Unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) are not State within the meaning of Article 12 – As the right to equality under Article 14 is available against the State, it cannot be claimed against unaided private minority schools – Constitution of India, 1950 – Articles 12, 14 30, 39(d).

Writ:

Writ of mandamus – Issuance of, to a private unaided school to pay salary and allowances to its teachers equal to the salary and allowance payable to teachers of Government/ Government aided Schools – Held: Court cannot issue a mandamus since salary and allowances of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law – State Government directed to consider making rules u/ s.23 r/w

A *s.38(2)(l) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution – Right of children to free and compulsory Education Act, 2009 – ss.23, 38(2)(l) – Article 39(d).*

B *Writ of mandamus – Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid to the teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty – In the instant case, there was no statutory provision and, therefore,*
 C *a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances as were payable to Government institutions.*

D **In 1923, respondent no.1-School was established as a mission school by respondent no.2. Till 1976, the school received grant-in-aid. From 1977-78, the school was not receiving any grant-in-aid from the Government and the teachers were being paid less than the teachers of Government Schools and Government aided schools**
 E **in the State Government. Dissatisfied with their salary and allowances, some of the teachers (appellants) filed writ petitions before the High Court for direction to pay the salary and allowances at par with the teachers of Government Schools and Government aided schools.**
 F **The Single Judge of the High Court allowed the writ petition and directed respondent nos.1 and 2 to pay to the teachers the salary and allowances at par with their counterparts working in the Government Schools. On appeal, the Division Bench of the High Court set aside the judgment of the Single Judge. The instant appeal was**
 G **filed challenging the order of the Division Bench of the High Court.**

Disposing of the appeal, the Court

H **HELD: 1. The Division Bench the High Court rightly**

held that the teachers of private unaided minority schools had no right to claim salary equal to that of their counterparts working in Government schools and Government aided schools. The teachers of Government schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority schools. Similarly, such unaided private schools are not State within the meaning of Article 36 read with Article 12 of the Constitution and as the obligation to ensure equal pay for equal work in Article 39(d) is on the State, a private unaided minority school is not under any duty to ensure equal pay for equal work. [Para 9] [213-D-H]

Frank Anthony Public School Employees' Association v. Union of India & Ors. (1986) 4 SCC 707: 1987 (1) SCR 238 – held inapplicable.

2. The Court could not issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. [Para 11] [215-D-E]

3. Where a statutory provision casts a duty on a private unaided school to pay the same salary and

A allowances to its teachers as are being paid to the
 teachers of Government aided schools, then a writ of
 mandamus to the school could be issued to enforce such
 statutory duty. But in the instant case, there was no
 statutory provision and, therefore, a mandamus could
 B not be issued to pay to the teachers of private recognized
 unaided schools the same salary and allowances as were
 payable to Government institutions. [Para 11] [215-G-H;
 216-A-B]

C 4. In the instant case, there were no executive
 instructions issued by the Government requiring private
 schools to pay the same salary and allowances to their
 teachers as were being paid to teachers of Government
 schools or Government aided schools. [Para 12] [216-E]

D 5. A mandamus cannot be issued to respondent
 nos.1 and 2 on ground that the conditions of provisional
 affiliation of schools prescribed by the Council for the
 Indian School Certificate Examinations stipulate in clause
 (5)(b) that the salary and allowances and other benefits
 E of the staff of the affiliated school must be comparable
 to that prescribed by the State Department of Education
 because such conditions for provisional affiliation are not
 statutory provisions or executive instructions, which are
 enforceable in law. Similarly, a mandamus cannot be
 F issued to give effect to the recommendations of the
 report of Education Commission 1964-66 that the scales
 of pay of school teachers belonging to the same category
 but working under different managements such as
 government, local bodies or private managements
 G should be the same, unless the recommendations are
 incorporated in an executive instruction or a statutory
 provision. [Para 13] [216-F-H; 217-A]

H 6. The Right of Children to Free and Compulsory
 Education Act, 2009 has provisions in Section 23

regarding the qualifications for appointment and terms and conditions of service of teachers. Sub-section (3) of Section 23 provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. Section 38 of the 2009 Act empowers the appropriate Government to make rules and Section 38(2)(I) of the 2009 Act provides that the appropriate Government, in particular, may make rules prescribing the salary and allowances payable to, and the terms and conditions of service of teachers, under sub-section (3) of section 23. Section 2(a) defines "appropriate Government" as the State Government within whose territory the school is established. The State of Himachal Pradesh, respondent no.3 in this appeal, is, thus, empowered to make rules under sub-section (3) of Section 23 read with Section 38(2)(I) of the 2009 Act prescribing the salary and allowances payable to, and the terms and conditions of service of, teachers. Article 39(d) of the Constitution provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. Respondent no.3 should, therefore, consider making rules under Section 23 read with Section 38(2)(I) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution as early as possible. [Para 14] [217-B-F]

State of H.P. v. H.P. State Recognised & Aided Schools Managing Committees and Others (1995) 4 SCC 507; *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666; 1992 (3) SCR 658; *K. Krishnamacharyulu and Others vs. Sri Venkateswara Hindu College of Engineering and Another* (1997) 3 SCC 571; 1997 (3) SCC 571; *Sushmita Basu & Ors. v. Ballygunge Siksha Samity & Ors.* (2006) 7 SCC 680; 2006 (6) Suppl. SCR 506 – referred to.

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Case Law Reference:

1987 (1) SCR 238 held inapplicable Para 5, 10

(1995) 4 SCC 507 referred to Para 6

B

1992 (3) SCR 658 referred to Para 6

1997 (3) SCC 571 referred to Para 6

2006 (6) Suppl. SCR 506 referred to Para 11

C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2676 of 2010.

From the Judgment & Order dated 25.07.2008 of the Division Bench of High Court of Himachal Pradesh at Shimla in LPA No. 48 of 2004.

D

Dhruv Mehta, Sanjay Katyal, Sriram Krishna, Kuldip Singh for the Appellants.

S.K. Dubey, Niraj Sharma, Vikrant Singh Bais, Sumit Kumar Sharma, Naresh K. Sharma for the Respondents.

E

The Judgment of the Court was delivered by

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A. K. PATNAIK, J. 1. This is an appeal against the judgment dated 25.07.2008 of the Division Bench of the High Court of Himachal Pradesh, Shimla, in Letters Patent Appeal No.48 of 2004.

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2. The facts very briefly are that in 1923 the respondent No.1-School (for short 'the School') was initially established as a mission school by the respondent No.2. The School adopted the 10+2 system in 1993 and is presently affiliated to the Himachal Pradesh Board of School Education. Before independence in 1947 the School was receiving grant-in-aid from the British Indian Government and thereafter from the Government of India upto 1950. From 1951 to 1966, the School

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received grant-in-aid from the State Government of Punjab.

SATIMBLA SHARMA AND ORS. v. ST. PAUL'S 209
SENIOR SECONDARY SCHOOL [A.K. PATNAIK, J.]

After the State of Himachal Pradesh was formed, the School received grant-in-aid from the Government of Himachal Pradesh during the years 1967 to 1976. From the year 1977-1978, the School has not been receiving any grant-in-aid from the Government of Himachal Pradesh and the teachers of the School are being paid less than the teachers of Government schools and Government aided schools in the State of Himachal Pradesh.

3. Not satisfied with their salary and allowances, some of the teachers of the School filed a Writ Petition, CWP No.1038 of 1996, in the High Court of Himachal Pradesh for a direction to pay the salary and allowances at par with the teachers of Government schools and Government-aided schools and by judgment dated 11.10.2004 the learned Single Judge of the High Court of Himachal Pradesh allowed the Writ Petition and directed the respondent nos.1 and 2 to pay to the writ petitioners salary and allowances at par with their counter-parts working in the Government schools from the dates they were entitled to and at the rates admissible from time to time. Aggrieved by the judgment of the learned Single Judge, the respondent nos.1 and 2 filed Letters Patent Appeal No.48 of 2004 (for short 'the LPA') before the Division Bench of the High Court and by the impugned judgment dated 25.07.2008, the Division Bench of the High Court set aside the judgment of the learned Single Judge and dismissed the Writ Petition of the appellants.

4. Learned counsel appearing for the appellants submitted that the appellants do the same work as the teachers of Government schools and Government aided schools and yet are being paid lower than the teachers of Government schools and Government aided schools. He further submitted that the Himachal Pradesh State Government Recognized Aided Schools Teachers' Association and others had filed Writ Petitions, C.W.P. No.413 of 1989 and 414 of 1989, in the Himachal Pradesh High Court for appropriate writs/directions

A to the State Government to pay 95% of the grant-in-aid towards
approved expenditure in a school year to the privately managed
recognized schools borne on the grant-in-aid list with a view to
enable the managements of such schools to pay the teachers
and allied staff of the schools, the same pay scales and
allowances as are paid to their counter-parts working in the
B Government schools in the State of Himachal Pradesh and by
order dated 09.09.1992, a Division Bench of Himachal Pradesh
held that teachers of such private recognized aided schools are
entitled to same emoluments as received by their counter-parts
C in the State Government and allowed the writ petitions and
directed the State Government and the management of the
private recognized aided schools to work out the emoluments
of the teachers and pay the same to teachers of the private
recognized aided schools. He further submitted that against the
D order dated 09.09.1992 of the Division Bench of Himachal
Pradesh High Court, the State of Himachal Pradesh came up
in appeal to this Court in Civil Appeal Nos. 1233 and 1234 of
1993 but this Court dismissed these two appeals on
10.05.1995. He vehemently argued that only with a view to
E wriggle out from the liability to pay salary and allowances to its
teachers and staff at par with the salary and allowances of
Government schools, the School has unilaterally decided to stay
out of the grant-in-aid scheme since 1977-1978. He submitted
that the learned Single Judge rightly held in his judgment dated
11.10.2004 in C.W.P. No.1038 of 1996 filed by the petitioners
F that the School, which had been receiving grant-in-aid till 1977-
1978, could not of its own volition stop to receive grant-in-aid
and rightly directed the School to pay to the appellants salary
and allowances at par with their counter-parts working in the
Government schools.

G 5. Learned counsel for the appellants submitted that the
Division Bench of the High Court has set-aside the judgment
of the learned Single Judge after taking an erroneous view in
the impugned judgment that the School was under no obligation
H to have accepted the grant-in-aid which would have led to

diminution of its rights guaranteed under Article 30(1) of the Constitution. He further submitted that the Division Bench of the Himachal Pradesh High Court has also sustained the contention of the School that the teachers of private recognized schools had no right to claim salary equal to that of their counterparts working in Government schools and Government aided schools. He submitted that Rule 45-Q of the Grant-in-Aid Rules of the State of Himachal Pradesh provides that management shall introduce such scales of pay and allowances for teachers and other staff members as prescribed by the Government for corresponding staff in Government schools. He submitted that if the teachers of Government aided schools are entitled to same salary and allowances as the teachers of the Government schools, there is no reason as to why only the teachers of private unaided schools should be denied the salary and allowances of Government schools. He submitted that if the pay and allowances of the teachers of private minority schools such as respondent no.1 are not made the same as that of the pay and allowances of the teachers of the Government schools and Government aided schools, the teachers of private minority schools will suffer discrimination and their right to equal pay for equal work under Article 14 read with Article 39(d) of the Constitution will be violated. He relied on the decision of this Court in *Frank Anthony Public School Employees' Association v. Union of India & Ors.* [(1986) 4 SCC 707] wherein Section 12 of the Delhi School Education Act which made the provisions of Section 10 providing for parity of scales of pay and allowances of the employees of the recognized private schools with that of the schools run by the appropriate authority inapplicable to unaided minority institutions as discriminatory.

6. Learned counsel for the appellants submitted that in *State of H.P. vs. H.P. State Recognised & Aided Schools Managing Committees and Others* [(1995) 4 SCC 507] this Court relying on Mohini Jain case [(1992) 3 SCC 666] held that the right to education is a fundamental right guaranteed under Part-III read with Part-IV of the Constitution of India. He submitted

A that since the right to education is a fundamental right, school
education has a public element in it and the Court can always
issue a mandamus to enforce a public duty in matters of
education. He submitted that in *K. Krishnamacharyulu and*
B *Others vs. Sri Venkateswara Hindu College of Engineering*
and Another [(1997) 3 SCC 571] employees of a non-aided
private educational institution claimed parity in pay-scales with
the employees of Government institutions and this Court held
that the employees had an enforceable right and there was an
element of public interest in such a claim and the teachers of
C a private unaided institution is entitled to avail the remedy
provided under Article 226 of the Constitution and they cannot
be denied the same benefits which were available to other
teachers working in Government institutions.

7. Learned counsel for the appellants submitted that the
D School is provisionally affiliated to the Council for the Indian
School Certificate Examinations and the conditions of
provisional affiliation of schools prescribed by the Council for
the Indian School Certificate Examinations stipulate in clause
(5)(b) that the salary and allowances and other benefits of the
E staff of the school must be comparable to that prescribed by
the State Department of Education. He referred to the report
of the Education Commission 1954-66 to the Ministry of
Education, Government of India, recommending that the scales
of pay of school teachers belonging to the same category but
F working under different managements such as government,
local bodies or private managements should be the same and
this principle of parity should be adopted forthwith. He
submitted that sub-section (3) of Section 23 of the Right of
Children to Free and Compulsory Education Act, 2009 (for short
G 'the 2009 Act') provides that the salary and allowances payable
to, and the terms and conditions of service of, teachers shall
be such as may be prescribed. He referred to Section 38(2)(I)
of the 2009 Act which provides that the appropriate
Government may, by notification, prescribe the salary and
H allowances payable to, and the terms and conditions of service

of, teacher under sub-section (3) of section 23. He submitted that the appropriate Government as defined in Section 2(a) of the 2009 Act, namely, the State Government, therefore, can issue a notification prescribing the salary and allowances payable to, and the terms and conditions of service of, teacher, under sub-section (3) of section 23 of the 2009 Act.

8. Learned counsel for the respondent nos.1 and 2, on the other hand, supported the impugned judgment of the Division Bench of the High Court. He further submitted that if the School is made to pay to its teachers the same salary and allowances of teachers of Government schools and Government aided schools, it will have to increase the school fees and this would affect the students whose parents cannot afford higher school fees.

9. In our considered opinion, the Division Bench the High Court has rightly held in the impugned judgment that the 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 teachers of Government schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority schools. Similarly, such unaided private schools are not State within the meaning of Article 36 read with Article 12 of the Constitution and as the obligation to ensure equal pay for equal work in Article 39(d) is on the State, a private unaided minority school is not under any duty to ensure equal pay for equal work.

A 10. In *Frank Anthony Public School Employees' Association v. Union of India & Ors.* (supra), relied on by learned counsel for the appellants, the scales of pay and other terms and conditions of service of teachers and other employees of the Frank Anthony Public School, New Delhi, which was a private unaided minority institution, compared very unfavourably with those of their counterparts of the Delhi Administration Schools and the Frank Anthony Public School Employees' Association sought equalization of their pay-scales and conditions of service with those of teachers and employees of Government schools. Sections 8 to 11 of the Delhi School Education Act dealt with the terms and conditions of service of employees of recognized private schools. Section 10 of the Delhi School Education Act provided that the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of the recognized private schools shall not be less than those of the corresponding status in schools run by the appropriate authority. Section 12 of the Delhi School Education Act, however, provided that the provisions of Sections 8 to 11 including Section 10 were not applicable to unaided minority institutions. The case of teachers of Frank Anthony Public School was that if Sections 8 to 11 were made applicable to them, they would at least be as well off as teachers and other employees of Government schools. The Frank Anthony Public School Employees' Association therefore challenged Section 12 of the Delhi School Education Act as discriminatory and violative of Article 14 of the Constitution and this Court held that Section 12 of the Delhi School Education Act insofar as it makes the provisions of Sections 8 to 11 inapplicable to unaided minority schools is discriminatory. This was thus a case in which the employees of unaided minority institutions were not given the benefits available to employees of other private institutions under Sections 8, 9, 10 and 11 of the Delhi School Education Act only on the ground that unaided minority institutions enjoy autonomy of administration under Article 30(1) of the Constitution and this Court held that this could not be a rational

basis for differentiation of service conditions, pay and other service benefits between employees of unaided minority institutions and the employees of other private schools and the Court declared Section 12 as discriminatory. In other words, the State by making a statutory provision in Section 12 of the Delhi School Education Act which was discriminatory, had violated the mandate to the State under Article 14 of the Constitution not to deny the equal protection of the laws within its territories. This decision in the case of *Frank Anthony Public School Employees' Association v. Union of India & Ors.* (supra) does not assist the appellants in any manner because the guarantee of equality, as we have said, is not available against an unaided private minority school.

11. We also do not think that the Court could issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. In *Sushmita Basu & Ors. v. Ballygunge Siksha Samity & Ors.* [(2006) 7 SCC 680], the teachers of a recognized private school known as Ballygunge Siksha Sadan in Calcutta filed a Writ Petition in the High Court of Calcutta praying for issuance of writ of mandamus directing the authorities of the school to fix the salary of teaching and non-teaching staff of the school and to remove all anomalies in the scales of pay as recommended by the Third Pay Commission as extended to other Government aided schools and Government schools and this Court held that in the absence of statutory provision no such direction can be issued by the High Court under Article 226 of the Constitution. Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the present case, there

A was no statutory provision requiring a private unaided school to pay to its teachers the same salary and allowances as were payable to teachers of Government schools and therefore a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances
 B as were payable to Government institutions.

12. In *K. Krishnamacharyulu and Others vs. Sri Venkateswara Hindu College of Engineering and Another* (supra), relied upon by the learned counsel for the appellants, executive instructions were issued by the Government that the
 C scales of pay of Laboratory Assistants as non-teaching staff of private colleges shall be at par with the government employees and this Court held that even though there were no statutory rules, the Laboratory Assistants as non-teaching staff of private
 D college were entitled to the parity of the pay-scales as per the executive instructions of the Government and the writ jurisdiction of the High Court under Article 226 of the Constitution is wide enough to issue a writ for payment of pay on par with government employees. In the present case, there are no
 E executive instructions 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.

13. We cannot also issue a mandamus to respondent nos. 1
 F and 2 on the ground that the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in clause (5)(b) that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State
 G Department of Education because such conditions for provisional affiliation are not statutory provisions or executive instructions, which are enforceable in law. Similarly, we cannot issue a mandamus to give effect to the recommendations of the report of Education Commission 1964-66 that the scales
 H of pay of school teachers belonging to the same category but

working under different managements such as government, local bodies or private managements should be the same, unless the recommendations are incorporated in an executive instruction or a statutory provision. We, therefore, affirm the impugned judgment of the Division Bench of the High Court.

14. We, however, find that the 2009 Act has provisions in Section 23 regarding the qualifications for appointment and terms and conditions of service of teachers and sub-section (3) of Section 23 of the 2009 Act provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. Section 38 of the 2009 Act empowers the appropriate Government to make rules and Section 38(2)(l) of the 2009 Act provides that the appropriate Government, in particular, may make rules prescribing the salary and allowances payable to, and the terms and conditions of service of teachers, under sub-section (3) of section 23. Section 2(a) defines "appropriate Government" as the State Government within whose territory the school is established. The State of Himachal Pradesh, respondent no.3 in this appeal, is thus empowered to make rules under sub-section (3) of Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances payable to, and the terms and conditions of service of, teachers. Article 39(d) of the Constitution provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. Respondent no.3 should therefore consider making rules under Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution as early as possible.

15. With these observations, the appeal is disposed of. There shall be no order as to costs.

D.G.

Appeal disposed of.