
(2019) 04 UK CK 0039

In the Uttarakhand High Court

Case No : Special Appeal No. 291 Of 2019

Amar Singh Gariya And Others

APPELLANT

Vs

State Of Uttarakhand And Others

RESPONDENT

Date of Decision : 04-04-2019

Acts Referred:

Right Of Children To Free And Compulsory Education Act, 2009 — Section 1(2), 23(1), 23(2)
Elementary Education Rules, 2012 — Rule 7, 9, 32
Constitution Of India, 1950 — Article 14, 16, 21A, 141

Citation : (2019) 04 UK CK 0039

Hon'ble Judges : Ramesh Ranganathan, CJ; N.S. Dhanik, J

Bench : Division Bench

Advocate : U.K. Uniyal, Sandeep Kothari, Paresh Tripathi, Yogesh Pacholia

Final Decision : Disposed Off

Judgement

Ramesh Ranganathan, CJ

1. This appeal is preferred against the interlocutory order passed by the learned Single Judge in Stay Application No. 3792 of 2019 in Writ Petition (S/S) No. 645 of 2019 dated 27.03.2019.

2. Before we examine the challenge to the validity of the order under appeal, it is necessary for us to take note of the relevant facts. The appellants-writ petitioners are all Shiksha Mitras appointed in the State of Uttarakhand before the year 2010. They invoked the jurisdiction of this Court by way of Writ Petition (S/S) No. 645 of 2019 seeking a writ of certiorari to quash the order passed by the first respondent dated 08.03.2019 directing the second respondent to consider the posts, held by the appellant-writ petitioners, to be vacant, and for an advertisement to be issued for conducting recruitment; and a mandamus directing the respondents to permit the appellants-writ petitioners to continue, in the post of Assistant Teachers (Provisional), Government Primary Schools, in their respective schools.

3. The qualification for being appointed as an Assistant Teacher, in terms of the NCTE Regulations, is a pass in the Teachers Eligibility Test (hereinafter called the "TET"). The appellants-writ petitioners, who are working as Shiksha Mitras, have, admittedly, not passed the TET. Mr. U.K. Uniyal, learned Senior Counsel appearing on their behalf, would submit that the State of Uttarakhand had appointed Shiksha Mitras, from those who had completed their graduation but did not possess the TET qualification, considering the peculiar situation prevailing in the State of Uttarakhand, as a substantial part of the State is in hilly terrain, some of the schools are inaccessible, and as qualified teachers were not available to teach students in these schools. Learned Senior Counsel would submit that earlier, while a learned Single Judge of this Court had opined that appointment of Shiksha Mitras should be examined in the light of the peculiar situation prevailing in the State of Uttarakhand, another learned Single Judge had insisted on compliance with the NCTE Regulations holding them to be mandatory.

4. The genesis of this dispute is traceable to a legislation enacted by the State of Uttar Pradesh for continuance of Shiksha Mitras, despite their not passing the TET. This legislation, which was subjected to challenge, was struck down by the Allahabad High Court. Aggrieved by the aforesaid order of the Allahabad High Court both the State of Uttar Pradesh, and several Shiksha Mitras working in the State of Uttar Pradesh, invoked the jurisdiction of the Supreme Court by filing Civil Appeal No. 9529 of 2017 and batch. In an elaborate order dated 25.07.2017, the Supreme Court held that the Shiksha Mitras were never appointed as Teachers as per the eligible qualifications, and were not covered by the relaxation order under Section 23(2) of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter called the "RTE Act"); they could not be appointed as Teachers in breach of Section 23(1) of the RTE Act; and the State Government was not competent to relax the qualifications. Having so held, the Supreme Court then considered the question as to whether, in the absence of any right in favour of the Shiksha Mitras, they were entitled to any relief or preference. The Supreme Court observed that, in the peculiar fact situation, these Shiksha Mitras ought to be given an opportunity to be considered for recruitment if they had acquired, or they now acquire, the requisite qualifications, in terms of the advertisements, for recruitment for the next two consecutive recruitments; these Shiksha Mitras may also be given suitable age relaxation, and some weightage for their experience, as may be decided by the concerned authorities; and, till they avail this opportunity, the State was at liberty to continue them as Shiksha Mitras on the same terms in which they were working prior to their absorption, if the State so decides.

5. In the meanwhile, the State of Uttarakhand sought a clarification from the NCTE regarding the requirement of qualifying TET in respect of untrained in-service teachers being trained through open and Distance Learning Mode providing D.El.Ed. Course of two years duration approved by the NCTE. In its proceedings dated 17.02.2014, the NCTE took note of various categories of teachers appointed for Classes I to VIII prior to the date of the notification of the

NCTE dated 25.08.2010; and, thereafter, referred to the qualifications issued by the Ministry of HRD, Government of India dated 10.02.2013. The NCTE opined:

".....Keeping all the aspects of the matter it is clarified that these (1278-2374) 3652 untrained in-service teachers (Shiksha Mitras) appointed prior to 25.08.2010 should have acquired the professional qualifications in consonance with the NCTE Determination of Minimum Qualification for Recruitment of Teachers in Schools Notified on 03.9.2001(as amended time to time) which was in-vogue. Further the RTE Act also provides that teachers who do not possess the prescribed qualifications would require to acquire the same within a period of 5 years (1st April 2010 to 31st March 2015). Therefore, TET should not be insisted on the above category of un-trained in-service teachers (Shiksha Mitra).....

6. The validity of the clarification letter of the NCTE dated 17.02.2014 fell for consideration in Writ Petition (S/S) No. 1576 of 2016 and a learned Single Judge of this Court, in his order dated 19.11.2016, held that the exemption from TET granted to Shiksha Mitras, by the State Government, was ultra vires and illegal; and the amendment made in the 2012 Rules, by the amendment in the year 2014 incorporating Chapter Eleven (11) and Rule 32, were ultra vires and unconstitutional being violative of Articles 14, 16 and 21A of the Constitution of India. Aggrieved thereby, Special Appeal No. 54 of 2017 and batch were filed.

7. In its order, in Special Appeal No. 54 of 2017 and batch dated 23.08.2017, the Division Bench held that there was no anomaly between the law declared by the Supreme Court in Civil Appeal No. 9529 of 2017 dated 25.07.2017, and the judgment of the learned Single Judge declaring Rule 7, 9 and 32 of the Elementary Education Rules, 2012 ultra vires as being violative of the Constitution of India, as well as the RTE Act and the NCTE Act; and the Supreme Court had found no error having been committed by the Allahabad High Court, in declaring the exemption granted to Shiksha Mitras of the State of Uttar Pradesh as ultra vires. Holding that the issue had been settled by the judgment of the Supreme Court dated 25.07.2017, the Special Appeal was also disposed of by the Division Bench in terms of the directions issued by the Supreme Court.

8. The Division Bench, thereafter, took note of the directions issued by the Supreme Court, in paragraph no. 26 of its judgment dated 25.07.2017, and dismissed the Special Appeal, in so far as it related to the challenge to the judgment of the learned Single Judge. The respondents therein were, however, directed to deal with the respective cases of Shiksha Mitras in the light of the directions issued by the Supreme Court, particularly as contained in paragraph no. 26 of its judgment dated 25.07.2017. This judgment of the Division Bench has attained finality.

9. Certain teachers, belonging to the OBC Category, invoked the jurisdiction of this Court filing Writ Petition (S/S) No. 1730 of 2014. In his order, in Writ Petition (S/S) No. 1730 of 2014 and batch dated 08.12.2016, a learned Single Judge of this Court disagreed with the contention of the State Government that OBC

candidates were in excess of the quota prescribed for Assistant Teachers in Primary Schools since Shiksha Acharyas, who were working as Assistant Teachers, were treated as Assistant Teachers in Primary Schools; Shiksha Acharyas were ineligible for appointment as Assistant Teachers in Primary School as, admittedly, the only qualification which Shiksha Acharyas possessed was "graduation". The learned Single Judge, thereafter, held that all posts, presently occupied either by Shiksha Acharyas or by Shiksha Mitras, shall be deemed to be vacant; in these posts, duly selected candidates from each category shall be forthwith appointed; and, in case there are no selected candidates, these posts must be declared vacant and duly advertised so that selection and appointment can be made to these posts as expeditiously as possible, but definitely within a period of two months from the date of production of a certified copy of the order.

10. The afore-order of the learned Single Judge was subjected to challenge in Special Appeal No. 82 of 2017 and a Division Bench of this Court, by its order dated 04.09.2017, set-aside the declaration by the learned Single Judge that the posts held by Shiksha Mitras and Shiksha Acharyas must be deemed to be vacant. The Division Bench held that the Shiksha Mitras and Shiksha Acharyas, who were working and had qualified their TET, should be considered for appointment subject to their fulfillment of the conditions prescribed in paragraph no. 26 of the judgment rendered by the Supreme Court in Civil Appeal No. 9529 of 2017 and batch dated 25.07.2017.

11. Contending that the order of the learned Single Judge in Writ Petition (S/S) No. 1730 of 2014 dated 08.12.2016, as affirmed by the Division Bench in Special Appeal No. 82 of 2017 dated 04.09.2017, had not been followed, the contempt jurisdiction of this Court was invoked, and Contempt Petition Nos. 607 and 609 of 2017 were filed. By an elaborate order, passed in these contempt cases, the learned Single Judge held that failure of the second respondent to comply with the order appeared deliberate and intentional, and in derogation of the judgments of the learned Single Judge and the Division Bench. A charge was, accordingly, framed to the following effect:

"As to why respondent No. 2 be not punished for not proceeded with the process of selection as against the backlog vacancies in compliance of the judgment dates 08.12.2016 and 04.09.2017 and continuing with unqualified teachers i.e. Shiksha Acharya to teach."

12. While matters stood thus, the Right of Children to Free and Compulsory Education (Amendment) Act, 2017 came into force, and was notified in the Gazette of India on 10.08.2017. The amendment made to the RTE Act, by Amendment Act No. 24 of 2017, was by insertion of a second proviso to Section 23(2) thereof. In terms of the inserted second proviso, every teacher appointed or in position as on 31 st March, 2015, who did not possess the minimum qualifications as laid down under Section 23(1), was required to acquire such minimum qualifications within a period of four years from the date of commencement of Amendment Act No. 24 of 2017. In terms of Section 1(2)

thereof, the Amendment Act No. 24 of 2017 was deemed to have come into force on the 1st day of April, 2015. Consequently all teachers, appointed on or before 31.03.2015, were required to acquire the minimum qualifications (TET) within four years i.e. on or before 31.03.2019.

13. Pursuant thereto, and also because contempt proceedings had been instituted, the State Government, vide proceedings dated 08.03.2019, directed that a notification be issued inviting applications from all eligible teachers (those who possessed the qualification of a TET) for being considered for appointment to the posts of Assistant Teachers. Aggrieved thereby, the appellants-writ petitioners, who continue to work as Shiksha Mitras and who have not obtained the prescribed qualification of a TET for being appointed as an Assistant Teacher, invoked the jurisdiction of this Court.

14. By the interlocutory order under appeal, in Stay Application No. 3792 of 2019 in Writ Petition (S/S) No. 645 of 2019 dated 27.03.2019, the learned Single Judge, while directing that the writ petition be listed on 06.05.2019, rejected the interim relief application by an elaborate order. The learned Single Judge noted that the State Government had taken a decision not to continue such Shiksha Mitras, who did not possess the requisite qualification for appointment as teachers, beyond 31.03.2019; and this decision appeared to have been taken by the State Government in view of the judgment rendered by this Court in Writ Petition (S/S) No. 1730 of 2014, wherein it was held that all the posts occupied by the Shiksha Mitras shall be deemed to be vacant; and, in these posts, duly selected reserved category candidates shall be appointed. While recording that he was not impressed by the submission of the learned Senior Counsel appearing on behalf of the appellants-writ petitioners, that the decision taken by the State Government was for extraneous reasons and that public interest has been lost sight of, the learned Single Judge held that whatever decision the State Government had taken was in deference to the judgment of this Court which had attained finality.

15. Mr. U.K. Uniyal, learned Senior Counsel appearing on behalf of the appellants-writ petitioners, would contend that, under the threat of contempt, the discretion conferred on the State of Uttarakhand, to continue the appellants-writ petitioners in service till they acquired the requisite qualification of passing the TET before the next two consecutive recruitments, has been curtailed; the discretion conferred on the State Government, by the order of the Supreme Court, cannot be negated by an order of this Court, since the law declared by the Supreme Court is binding on this Court under Article 141 of the Constitution of India; while one recruitment has already taken place, the order of the Supreme Court obligated the State Government to continue the appellants-writ petitioners till they obtain the requisite qualification of passing the TET; and the urgency with which a second recruitment process is being undertaken, would deprive the appellants-writ petitioners of the opportunity of obtaining the requisite qualification of passing the TET in the ensuing examination to be conducted by

the Board.

16. Since the submission of the Mr. U.K. Uniyal, learned Senior Counsel, is based on the order of the Supreme Court in Civil Appeal No. 9529 of 2017 and batch dated 25.07.2017, it is necessary for us to consider whether the submission of the learned Senior Counsel, that the directions to the State Government in paragraph no. 26 of the judgment of the Supreme Court are mandatory, merits acceptance.

17. In paragraph no. 26 of its judgment, the Supreme Court noted that there was no right conferred in favour of the Shiksha Mitras to continue to hold the post without obtaining the qualification of passing the TET. It, however, took a sympathetic view and held that, in the peculiar fact situation, these Shiksha Mitras could be given an opportunity to be considered for recruitment if they had acquired, or they now acquire, the requisite qualification, in terms of the advertisements for recruitment, for the next two consecutive recruitments. This direction of the Supreme Court has not been violated by the State Government since all Shiksha Mitras, who obtained TET qualification on or before 31.03.2019, are held eligible to be considered for appointment as Assistant Teachers. The second limb, of paragraph no. 26 of the judgment of the Supreme Court, merely gives liberty to the State to continue them on the same terms, in which they were working, if the State so decides, till they avail this opportunity.

18. It is not even contended before us that the order of the Supreme Court obligated the State Government to continue the appellants-writ petitioners in service. The submission, on the other hand, is that, by the orders passed in Writ Petition (S/S) No. 1730 of 2014 dated 08.12.2016 and Special Appeal No. 82 of 2017 dated 04.09.2017, fetters have been placed on the discretion conferred by the Supreme Court on the State Government. This argument, though attractive at first blush, is difficult for us to accept for two reasons. Firstly, the order of the learned Single Judge in Writ Petition (S/S) No. 1730 of 2014 and batch dated 08.12.2016, and the order of the Division Bench in Special Appeal No. 82 of 2017 dated 04.09.2017, have attained finality; and its validity cannot be examined in collateral proceedings i.e. in the present appeal which has been preferred against the interlocutory order passed in Stay Application No. 3792 of 2019 in Writ Petition (S/S) No. 645 of 2019 dated 27.03.2019. Secondly, after the judgment of the Supreme Court dated 25.07.2017, Parliament amended the RTE Act by Act No. 24 of 2017 which was notified in the Gazette of India on 10.08.2017, and thereby a second proviso was inserted to Section 23(2), granting the unqualified teachers time till 31.03.2019 to procure the requisite qualification (i.e. of passing TET). It is not even the case of the appellant-writ petitioners that they had passed the TET before 31.03.2019, and yet they are not being considered for appointment as Assistant Teachers.

19. While admitting that they have not obtained the prescribed qualification of passing the TET till date, the appellants-writ petitioners claim that they should be continued in service, and be given another opportunity to pass the TET

examination; and holding a recruitment test now, would disable them from availing the opportunity of obtaining the prescribed qualification of a pass in the TET in the ensuing examination to be conducted by the Board.

20. The order of the Supreme Court, in Civil Appeal No. 9529 of 2017 and batch dated 25.07.2017, does not obligate the State Government to postpone its recruitment for eternity, or wait till each and every Shiksha Mitras passes the TET. On the other hand the opportunity given to the Shiksha Mitras, by the Supreme Court in the aforesaid judgment, was to obtain the requisite qualifications, in terms of the advertisements, for the next two consecutive recruitments. One recruitment has already been held. In the absence of any restriction in conducting the second recruitment, and as they are now obligated to do so in terms of the orders of this Court in Writ Petition (S/S) No. 1730 of 2014 and batch dated 08.12.2016 and Special Appeal No. 82 of 2017 dated 04.09.2017, the State Government cannot be faulted for undertaking the recruitment exercise pursuant to its decision in its letter dated 08.03.2019.

21. When we asked Mr. Paresh Tripathi, learned Chief Standing Counsel, whether the appellants-writ petitioners would be continued in service as Shiksha Mitras atleast till candidates are selected in the recruitment now proposed to be held, and till appointments to the posts of Assistant Teachers are made, learned Chief Standing Counsel expresses ignorance.

22. Since the schools, in which the appellants-writ petitioners are working, would be deprived of teachers till the ensuing selection process is completed, and Assistant Teachers are duly appointed, the State Government shall consider whether these Shiksha Mitras can be continued in service till the ensuing recruitment is completed, and qualified and eligible candidates are appointed as Assistant Teachers.

23. We make it clear that we have not interdicted the process of recruitment, and the State Government is free to proceed with the recruitment of Assistant Teachers. The aforesaid direction is only that they consider whether these Shiksha Mitras, who have been working for past more than a decade, can be continued in service till then.

24. We have dealt with the elaborate submissions put forth, on behalf of the appellants-writ petitioners, by Mr. U.K. Uniyal, learned Senior Counsel, though this appeal is only against an interlocutory order. The observations made by us in this order must, therefore, be treated only as our prima facie opinion. The learned Single Judge shall decide Writ Petition (S/S) No. 645 of 2019 on its merits uninfluenced either by the observations in the order under appeal, or in the order now passed by us.

25. The appeal is, accordingly, disposed of. However, in the circumstances, without costs.