
(2007) 05 AHC CK 0279
In the Allahabad High Court

Asha Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Uttar Pradesh Intermediate Education Act, 1921 — Section 16(G)
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 16

Citation : (2007) 5 ADJ 552 : (2007) 4 AWC 3926 : (2007) 3 UPLBEC 2497

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Arun Tandon, J.—Heard Sri P.K. Ganguli, Advocate on behalf of the petitioner, Sri Ashok Khare, Senior Advocate assisted by Sri Siddhartha Khare, Advocate on behalf of respondent No. 6, Sri A.K. Yadav, Advocate on behalf of respondent No. 2 and learned Standing Counsel on behalf of respondent Nos. 1,3, and 4. Despite notice being issued to respondent No. 5 by the office of the Court by speed post, nobody has put in appearance nor any counter affidavit has been filed on his behalf.

2. Learned Counsel for the parties agree that the present writ petition may be disposed of finally at the admission stage itself without calling for counter affidavit inasmuch as the facts are not in dispute.

3. Petitioner, Asha Singh alleges to have applied in pursuance to the advertisement published by the U.P. Secondary Education Services Selection Board, Allahabad for appointment as L.T. Grade Teacher in the subject of Physical Education (P.T.). Petitioner was successful in the written examination and was therefore, invited for participation in the Interview on 15th May, 2006. Petitioner claims to be the member of backward category. Petitioner was selected for the post of L.T. Grade Teacher in Physical Education and empanelled against the vacancy which was available in Indian Girls Inter College, Allahabad. Copy of the

Select Panel Notification issued by the U.P. Secondary Education Services Selection Board, Allahabad, has been enclosed as Annexure-3 to the writ petition. The District Inspector of Schools, however, did not forward the name of the petitioner to the institution for appointment of the petitioner on the plea that respondent No. 6, Amita Sinha, who was working in Bapu Balika Intermediate College, Faizabad as L.T. Grade Teacher (P.T.), has been appointed against the same vacancy available in Indian Girls Intermediate College, Allahabad by way of transfer.

4. Sri Ashok Khare, Senior Advocate on behalf of respondent No. 6 has brought to the knowledge of the Court that respondent No. 6, who was a permanent teacher in L.T. Grade in Bapu Balika Inter College, Faizabad, had applied for transfer on 21st June, 2005. The Committee of Management of Indian Girls Intermediate College, Allahabad granted its "No Objection Certificate" to the said transfer under the resolution dated 27th June, 2005. To similar effect, a resolution was passed by the Committee of Management of Bapu Intermediate College, Faizabad dated 15th July, 2005, where respondent No. 6 was working earlier as L.T. Grade Teacher. The Regional Joint Director of Education under the letter dated 12th August, 2005 forwarded the relevant papers to the Director of Education (Secondary) U.P. Lucknow for necessary permission qua transfer. On 8th May, 2006, final order of transfer of respondent No. 6 was passed. She was relieved of her charge on 21st May, 2005. Respondent No. 6 joined at Indian Girls Intermediate College, Allahabad on 27th May, 2006 and is said to be working in the said institution since then.

5. With regard to the vacancy in Indian Girls Intermediate College, it is stated that the vacancy was caused on 26th June, 2002, a requisition in respect thereto was forwarded on 13th January, 2005. The vacancy was actually advertised on 15th September, 2005 under Advertisement No. 01 of 2005. Select panel has been notified on 26th June, 2006.

6. Sri Ashok Khare, Senior Advocate therefore, submits that on the date the select panel has been notified, there was no vacancy in Indian Girls Intermediate College, Allahabad and therefore, the petitioner cannot be offered appointment against a non-existent vacancy. It is further clarified that respondent No. 6 had joined against the vacancy which was available in Indian Girls Intermediate College, Allahabad in the subject concerned on 27th May, 2006 on transfer while select panel was notified one month thereafter i.e., on 26th June, 2006.

7. In these set of circumstances, it is to be examined as to whether the transfer of respondent No. 6 against the vacancy which was requisitioned for direct recruitment by the Committee of Management earlier is legally justified or not, similarly, it is to be examined as to whether the right of the petitioner for being appointed as L.T. Grade Teacher in Physical Education in Indian Girls Intermediate College, Allahabad against a vacancy which was requisitioned and advertised by the U.P. Secondary Education Services Selection Board, Allahabad, stood lost because of intervening appointment by way of transfer of respondent

No. 6 or not.

8. It is needless to emphasise that the Hon"ble Supreme Court of India in the case of Om Prakash Rana Vs. Swarup Singh Tomar and Others, , had held that subsequent to the enforcement of U.P. Secondary Education Services Selection Board Act, 1982, mutual transfer of teacher from one recognised intermediate college to another or individual transfer of teacher against an existing vacancy in another institution is only one of the modes of the appointment and such a mode is not contemplated by Section 16 of the of U.P. Secondary Education Services Selection Board Act, 1982, therefore, appointments by transfer were void ab initio.

9. Subsequent to the judgement of the Hon"ble Supreme Court of India the State Legislature has intervened and by way of amendment to Section-16 appointment by way of transfer has been provided for.

10. Amended Section itself contemplates the procedure to be adopted for such transfer and specifically refers to Regulations 55 to 62 of Chapter-III of the Regulations framed under Section-16(G) of the U.P. Intermediate Education Act, 1921. For ready reference the amended Section-16 reads as follows:

16. Appointment to be made only on the recommendations of the Board.- (1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made thereunder, but subject to the provisions of Sections 12, 18, 21-B, 21-C, 21-D, 33, 33-A, 33-B, 33-C, 33-D and 33-F, every appointment of a teacher shall, on or after the date of commencement of the U.P. Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the Management only on the recommendation of the Board:

Provided that in respect of retrenched employees, the provisions of Section-EE of the Intermediate Education Act, 1921 shall mutatis mutandis apply:

Provided further that the appointment of a teacher by transfer from one Institution to another may be made in accordance with the regulations made under Clause (c) of Sub-section (2) of Section 16-G of the Intermediate Education Act. U.P. Intermediate Education Act. 1921:

Provided also that the dependent of a teacher or other employee of an Institution dying in harness who possess the qualifications prescribed under the Intermediate Education Act, 1921, may be appointed as teacher in Trained Graduate's Grade in accordance with the regulations made under Sub-section (4) of Section 9 of the said Act

(2) Any appointment made in contravention of the provisions of Sub-section (1) shall be void.

11. Thus under the amended Section-16, following six modes of appointment are contemplated:

(a) by way of direct recruitment through process of selection held by U.P.

Secondary Education Services Selection Board, Allahabad ,

(b) by way of promotion within 50% quota, in accordance with the Statutory Rules applicable,

(c) by way of transfer in accordance with the provisions of Regulations 55 to 62 of Chapter-III of Regulations framed under the U.P. Intermediate Education Act, 1921,

(d) by appointment of reserved pool teacher under Sections-21 B to 21 D of the Act of 1982,

(e) by way of regularization of teachers appointed on ad-hoc basis u/s 33-A to 33-D of the U.P. Secondary Education Services Selection Board Act, 1982,

(f) by way of compassionate appointment

12. So far as modes Nos. (b), (d), (e) and (f) are concerned, there being admittedly no dispute with regard to the rights of a teacher thereunder, therefore, it is not necessary to refer to the same, nor any such issue is involved in the present writ petition.

13. The controversy which is up for consideration before this Court is as to whether, once a vacancy has been requisitioned for direct recruitment by Committee of Management of Intermediate College and infact the vacancy has been advertised, is it still open to the Management of the same institution to fill up the vacancy by way of transfer, so as to negate the selection, held by the U.P. Secondary Education Services Selection Board, Allahabad against the same requisitioned vacancy.

14. For the purposes of appreciating the aforesaid dispute it is worthwhile to reproduce Sections-9, 10 and 11 of U.P. Secondary Education Services Selection Board Act, 1982 as well as the Rules-11,12,13 of the U.P. Secondary Education Services Selection Board Rules, 1998 pertaining to the requisition, advertisement, notification of the select panel, which read as follows:

Section 9. Powers and duties of the Board.- The Board shall have the following powers and duties, namely:

(a) to prepare guidelines on matters relating to the method of direct recruitment of teachers;

(b) to conduct examinations, where necessary, and hold interviews and make selection, of candidates for being appointed as teachers:

(c) to select and invite experts and to appoint examiners for the purposes specified in clause (b):

(d) to make recommendations regarding the appointment of selected candidates:

(e) to advise the management in matters relating to dismissal, removal or

reduction in rank of teachers;

(f) to obtain periodical returns or other informations from institutions regarding strength of the teaching staff and the appointment, dismissal, removal, termination or reduction in rank of teachers;

(g) to fix the emoluments and travelling and other allowances of the experts;

(h) to administer the funds placed at the disposal of the Board;

(i) to perform such other duties and exercise such other powers as may be prescribed or as may be incidental or conducive to the discharge of its functions under this Act or the rules or regulations made thereunder.

Section 10. Procedure of selection by direct recruitment. - (1) For the purposes of making appointment of a teacher, by direct recruitment, the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of a post other than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and other Backward Classes of citizens in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes, and other Backward Classes) Act. 1994 and notify the vacancies to the Board in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for direct recruitment to the post of teachers shall be such as may be prescribed:

Provided that the Board shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-section (1).

Section 11. Panel of candidates. - (1) The Board shall, as soon as may be, after the vacancy is notified under Sub-section (1) of section 10. hold examinations. where necessary, and interviews, of the candidates and prepare a panel of those found most suitable for appointment

(2) The panel referred to in Sub-section (1) shall be forwarded by the Board to the officer or authority referred to in Sub-section (1) of section 10 in such manner as may be prescribed.

(3) After the receipt of the panel under Sub-section (2), the officer or authority concerned shall in the prescribed manner intimate the management of the Institution the names of the selected candidates in respect of the vacancies notified under Sub-section (1) of Section 10.

(4) The management shall, within a period of one month, from the date of receipt of such intimation, issue appointment letter to such selected candidate.

(5) Where such selected fails to join the post in such institution within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such candidate is otherwise not

available for appointment, the officer or authority concerned may, on the request of the management, intimate, in the prescribed manner, fresh name or names from the panel forwarded by the Board under Sub-section (2).

Rule 11. Determination and notification of vacancies. - (1) The management shall determine the number of vacancies in accordance with Sub-section 1 of Section 10 of the Act and notify them through the Inspector, to the Commission in the manner hereinafter provided.

(2) The statement of vacancies for each category of post to be filled in by direct recruitment or by promotion, including the vacancies that are like to arise due to retirement on the last day of the year of recruitment, shall be sent separately in quadruplicate in the pro forma given in Appendix A" by the management to the Inspector by July 15 of the year of recruitment and the Inspector, shall after verification from the record of his office, prepare consolidated statement of vacancies of the district subject wise in respect of the vacancies of lecturers grade, and group wise in respect of vacancies of trained graduates (L.T.) grade. The consolidated statement so prepared shall, along with the copies of statement received from the management, be sent by the Inspector to the Commission by July 31 with a copy thereof to the Deputy Director:

...

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of a teacher occurs, the management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send it to the Commission.

(4) Where, for any year of recruitment, the management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of section 15 of the Act and notify them to the Commission in the manner and by the date referred to in the said sub-rule. The vacancies notified to the Commission under this sub-rule shall be deemed to be notified by the management of such institution.

Rule 12. Procedure for direct recruitment. - (1) The Commission, shall, in respect of the vacancies to be filled by direct recruitment advertise the vacancies including those reserved for candidates belonging to Scheduled Castes. Scheduled Tribes and Other Backward Classes of citizens in at least two daily newspapers, having wide circulation in the State, and call for the applications for being considered for selection in the pro forma published in the advertisement. For the post of Principal of an Intermediate College or the Headmaster of a High School the name and place of the institution shall also be mentioned in the advertisement and the candidate shall be required to give the choice of not more than three institutions in order of preference and if he wished to be considered for any particular institution or institutions and for no other institution, he may

mention the fact in his application.

(2) The Commission shall scrutinize the applications and prepare lists for each category of posts on the basis of quality points specified in Appendix B.C. or D. as the case may be, and having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes, and Other Backward Classes of citizens in respect of the posts of teacher in lecturers and trained graduates (L.T.) grade, call for interview such candidates who have secured the maximum quality points in such manner that the number of candidates shall not exceed five times the number of vacancies.

(3) The Commission shall hold interview of the candidates and, for each category of post prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them in the interview. The panel for the post of Principal or Headmaster shall be prepared institutionwise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for the posts in the lecturers and trained graduates (L.T.) grade, it shall be prepared subjectwise and groupwise respectively. If two or more candidates obtain equal marks in interview, the name of the candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the interview as well as the quality points of two or more candidates are equal, the name of the candidate who is older in age shall be placed higher. In the panel for the post of Principal or Headmaster, the number of names shall be three times of the number of the vacancy and for the post of teachers in the lecturers and trained graduates (L.T.) grade, it shall be larger (but no larger than twentyfive per cent) than the number of vacancies.

(4) At the time of interview of candidates, for the post of teachers in lecturers and trained graduates (L.T.) grade the Commission shall, after showing the list of the institutions which have notified the vacancy to it require the candidates to give, if he so desires, the choice of not more than five such institutions in order of preference, where, if selected, he may wish to be appointed.

(5) The Commission shall, after preparing the panel in accordance with Sub-rule (3) allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates (L.T.) grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (A). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in the panel have already been allocated such institutions and there remains no vacancy in them, the Commission may allocate any institution to him as it may deem fit.

(6) The Commission shall forward the panel prepared under Sub-rule (3) along with the name of the institutions allocated to selected candidates in accordance with Sub-rule (5) to the Inspector with a copy thereof to the Deputy Director and also notify them on its notice board.

Rule 13. Intimation of names of selected candidates. - (1) The Inspector shall, within ten days of the receipt of the panel and the allocation of institution under Rule 12.

(i) notify it on the notice board of his office;

(ii) intimate the name of selected candidate to the management of the institution, which has notified the vacancy, with the direction that, on authorization under resolution of the management, an order of appointment, in the pro forma given in Appendix "E", be issued to the candidate by registered post within fifteen days of the receipt of intimation requiring him to join duty within fifteen days of the receipt of the order or within such extended time, as may be allowed to him by the management, and also intimating him that, on his failure to join within the specified time, his appointment will be liable to be cancelled;

(III) send an intimation to the candidate referred to in Clause (ii), with the direction to report to the Manager within fifteen days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him, by the management.

(2) The management shall comply with the directions, given under Sub-rule (1) and report compliance thereof to the Commission through the Inspector.

(3) Where the candidate, referred to in Sub-rule (1), fails to join the post within the time allowed in the letter of appointment or within such extended time as the management may allow in this behalf or where such candidate is otherwise not available for appointment, the Inspector may, on the request of the management, intimate fresh name or names standing next in order of merit on the panel, under intimation to the Deputy Director and the Commission, and the provisions of Sub-rules (1) and (2) shall mutadis mutandis apply.

15. It is no doubt true that it is with the domain of the Appointing Authority to adopt to any of the modes of appointment in respect of the vacancy in question in accordance with the statutory provisions applicable.

16. It may be recorded that against the vacancy, which is required to be filled by direct recruitment, the Committee of Management has a discretion to fill up the vacancy by way of transfer. Such is the language of Section-16. The issue, however, is as to whether such discretion is to be exercised by the Committee of Management within a particular time frame/ upto a particular stage, or at any point of time till actual appointment is made against the vacancy.

17. It is within the discretion of the Committee of Management to adopt any of the two modes of appointment, as power to make appointment by way of transfer (in accordance with the rules) as well as by direct recruitment is available to the same appointing authority and it cannot be said that one mode of appointment shall have precedence over the other.

18. The Hon''ble Supreme Court of India in the case of N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, has clarified that the process of selection starts with the advertisement, and the selection of candidates is to be made in accordance with the existing Rules and Government Orders applicable on that date. The rights of the candidates crystallises on the date of publication of the advertisement (Reference paragraph-11). The process of selection ends with the appointment.

19. In view of the aforesaid judgement of Hon''ble Supreme Court of India, it is held that the process of direct recruitment starts with the issuance of the advertisement, by the U.P. Secondary Education Services Selection Board, Allahabad. It would be logical to restrict the exercise of its discretion by the Committee of Management qua the mode of appointment (i.e., by transfer or by direct recruitment) for filling up the vacancy upto that stage only.

20. This Court may record that once the vacancy is advertised, the Committee of Management must loose its discretion to fill the same vacancy by transfer inasmuch as the process of direct recruitment has been started. Once the advertisement is made by the U.P. Secondary Education Services Selection Board, Allahabad the Committee of Management cannot resort to the mechanics of transfer for the purposes of filling up of the same vacancy, which had already been advertised.

21. It is necessary to restrict the discretion of the Management upto that stage, so as to safeguard the entire proceedings of selection, which had been initiated by the U.P. Secondary Education Services Selection Board, Allahabad. It is with reference to the number of vacancies which have been advertised that the number of candidates to be invited for interview and finally empanelled in their respective categories, has to be determined. Further the selected candidates have to exercise their options qua their empanelment under Rule 12(4) of the U.P. Secondary Education Services Selection Board Rules, 1998 qua the vacancies which were subject matter of advertisement. Any attempt of the Management to fill the advertised vacancy by way of transfer, would result in creating a situation wherein the selected candidates may be deprived of their appointments despite having not been selected in order to merit, inasmuch as after they are empanelled for a particular institution, they will not be permitted to join because of vacancy had been filled by transfer in between. The entire proceedings initiated by the U.P. Secondary Education Services Selection Board, Allahabad will be brought to nought because such change of heart of the Management of the institution. The entire process of section will have to be re-done by the U.P. Secondary Education Services Selection Board, Allahabad so that the selected candidate may exercise his option only in respect of available vacancy. This would neither be practical nor reasonable.

22. This Court, therefore, holds that once the vacancy has been advertised on a requisition made by the Committee of Management by the U.P. Secondary Education Services Selection Board, Allahabad, the Committee of Management

looses its discretion to resort to mode of appointment by way of transfer and than it is only by direct recruitment on the recommendation of the U.P. Secondary Education Services Selection Board, Allahabad that any appointment against the vacancy advertised can be made.

23. In view of the aforesaid, it is provided as follows:

24. The District Inspector of Schools shall call for the original records and shall examine as to whether the final order approving the transfer of respondent No. 6 by the authority concerned was issued prior to the advertisement of the vacancy by the U.P. Secondary Education Services Selection Board, Allahabad or not.

25. The District Inspector of Schools shall take necessary decision in the matter, after affording opportunity of hearing to petitioner, respondent No. 6 as well as Committee of Management of Indian Girls Inter College, Allahabad, by means of a reasoned speaking order, within four weeks from the date a certified copy of this order is filed before him.

26. In case it is found that the vacancy had been advertised first and thereafter appointment by way of transfer had been granted by he final authority, he shall proceed to offer appointment to the petitioner and in that case, necessary orders shall be issued for the respondent No. 6 being reverted back to her original institution i.e., Bapu Intermediate College, Faizabad.

27. However, if the finding is otherwise, petitioner is at liberty to make an application before the U.P. Secondary Education Services Selection Board, Allahabad for being empanelled against any other vacancy in the subject concerned, which was subject matter of Advertisement No. 01 of 2005, and which may be still available for such appointment. The Chairman, U.P. Secondary Education Services Selection Board, Allahabad shall process the application of the petitioner, preferably within four weeks from the date the application along with copy of this order as well as order of District Inspector of Schools referred to above, is filed before the Chairman.

28. It is further provided that in case the petitioner is required to approach the U.P. Secondary Education Services Selection Board, Allahabad for her empanellment elsewhere the U.P. Secondary Education Services Selection Board, Allahabad shall process the application within four weeks from the date the application is so filed in accordance with law.

29. With the aforesaid observations/directions the present writ petition is disposed of finally.