
(2009) 11 RAJ CK 0039
In the Rajasthan High Court

Baldev Singh and Others

APPELLANT

Vs

Sate of Rajasthan and Others

RESPONDENT

Date of Decision : 05-11-2009

Acts Referred:

Constitution of India, 1950 — Article 226(3)

Citation : (2010) 2 RLW 1547 : (2009) 3 SLR 299

Hon'ble Judges : Deo Narayan Thanvi, J;A.M. Kapadia, J

Bench : Division Bench

Judgement

Deo Narayan Thanvi, J.—By these two different Special Appeals, petitioner appellants who were not appointed as "Prabodhak" by the District Education Officer cum CEO (Preliminary Education) Zila Parishad, Jodhpur, have challenged the order of learned Single Judge dated 27.3.09 passed in S.B. Civil Writ Petition No. 8066/2008 and dated 5.5.2009 passed in S.B. Civil Writ Petition No. 8151/2008. These orders were passed on the application of the respondent State under Article 226(3) of the Constitution of India seeking vacation of the exparte stay order passed by the learned Single Judge on 16.10.08, whereby the respondents were restrained to fill up all un-filled remaining posts of "Prabodhak" in district Jodhpur. By these two different orders, the learned Single Judge also modified the order dated 16.10.08 by directing the respondents No. 1 and 2 viz; the State Govt. and the Distt. Education Officer to make appointments on the post of Prabodhak" as per the select list and from among the persons, who are placed in reserved list, however, such appointments shall be subject to final decision of this petition for writ. It was also made clear in the order that if the petitioner stands in merit, then appointment shall be accorded to him also and no appointment shall be given to any person having lesser merit marks than the petitioner before considering his candidature.

2. Since the common questions of law and fact are involved in both these appeals, one filed by Baldev Singh and 31 others being D.B. Civil Special Appeal No. 461/09 and the other filed by Jaswant Singh being D.B. Civil Special Appeal

No. 448/09, therefore, they are being disposed of together by this common judgment.

3. The controversy involved in these appeals is that the State Government invited applications for the 1260 posts of Prabodhak" vide advertisement dated 31.5.08 which were later increased to 1738, and were called for interview. The State Government by order dated 29.9.08 provided appointments to 1423 persons in district Jodhpur. It has been alleged in the writ petition that none of the teachers teaching in the private institutions were given to only those, who were working as Para Teachers/Shiksha Karmi/Madarsa School Teacher under the various schools, running under the Govt. projects and Schemes. It is further alleged that the respondent State provided 25 bonus marks for the candidates working under various schools running under Govt. projects and only 10 marks were provided to the candidates, who were working under the various recognized private institutions for maximum five years experience under the garb of directions issued by the Panchayati Raj Department, whereas under the Rajasthan Panchayati Raj Prabodhak Service Rules, 2008, hereinafter referred-to as "the Prabodhak Rules", there was no such provision of bonus marks to the candidates, who were having experience in the Govt. projects. The main challenge in these appeals is with regard to modification of the order dated 16.10.08 by impugned orders dated 27.3.09 passed in S.B. Civil Writ Petition No. 8066/2008 and dated 5.5.2009 passed in S.B. Civil Writ Petition No. 8151/2008, whereby while keeping the petitions pending and reserving the rights of the candidates subject to the decision of the writ petition, their cases have not been considered for appointment.

4. We have heard learned Counsel for the parties and the law cited by them on the point.

5. It is contended by the learned Sr. Counsel Mr. M. Mridul & Mr. Manoj Bhandari, for the appellants, that the Prabodhak Rules and the directions issued in pursuance to these rules are contrary to the Rajasthan Panchayati Raj Rules, 1996, hereinafter referred to as "the Rules of 1996" and the scheme of the Rajasthan Panchayati Raj Act 1994, later styled as "the Act of 1994", particularly with reference to Sections 89 and 102 thereof, in which written test is a condition precedent for selection. According to the learned Counsel, petitioners/appellants were also having experience of teaching in the recognized private Institutions but they have been denied the appointment under the pretext that those who have been given appointment, were working as Para Teachers under the Govt. Schemes or projects, hence the direction issued under the garb of Prabodhak Rules providing two marks per year to the experience holders of recognized private institutions and five marks per year to the candidates working under the Govt. projects, is a hostile discrimination being violative of Article 14 of the Constitution vis-a-vis right to education guaranteed under Article 21A of the Constitution of India. According to the learned Counsel for the petitioners/appellants, even if the Prabodhak rules have not been challenged in the writ

petition, this Court while exercising powers under Rule 134 of the Rajasthan High Court Rules, can declare the rules being ultravires, as the Prabodhak Rules have not been approved by the" legislative Assembly.

6. From the side of the State, it has been contended by the learned Addl. Advocate General Mr. R.L. Jangid and Mr. N.M. Lodha that all the appointments on the post of Prabodhak were given under the policy of the State Government framed by the Rajasthan Panchayati Raj (Amendment) Act, 2008, the object of which was to provide primary education facility in remote villages and dhanis of the State for which a new service Rajasthan Panchayati Raj Prabodhak Service was constituted. According to the learned Counsel, Sections 89 and 90 of the Act of 1994 were amended for empowering the State Govt. to frame new service rules. According to the learned Counsel for the respondents, the bonus marks have been given as per the rules and the directions issued therein, which empowers the State Government to give bonus marks to those candidates who served as Para Teachers or similar to it under the Govt. institutions and Govt. projects of remote areas, whereas the petitioners/appellants were working in the private recognized institutions and were not serving in the remote areas but in the Cities or towns. Learned Counsel for the respondents have also raised a preliminary objection with regard to the maintainability of the appeal under Rule 134 of the Raj. High Court Rules, being the impugned order as interlocutory.

7. Having bestowed our anxious considerations on the rival contentions put forth by the parties, we are of the view that the appointments on the post of Prabodhak have been given on the basis of bonus marks as per the directions issued vide Annex. A/5 which has been filed by the appellants in D.B. Civil Special Appeal No. 461/09. In these directions, it is stipulated at direction No. 4 that the appointment to the post of Prabodhak shall be made under the Rajasthan Panchayati Raj Prabodhak Service Rules, 2008 and the process of selection has been given at direction No. 8, whereby for each academic session, two bonus marks per year will be given, subject to a maximum of 10 marks in case of experience in teaching in private institutions and if this experience is under any project or scheme run by the State Govt., then it will be five marks per year, subject to maximum of 25 marks. Of course, the Prabodhak Rules nowhere provide about these bonus marks but under its Schedule, the qualification has been given, being Senior Secondary School Certificate or intermediate or equivalent, with five years continuous teaching experience without any break in any recognized Govt. educational project. Under the Rajasthan Panchayati Raj Act as argued by the learned Counsel for the appellants, there are two provisions for the purpose of the present controversy, which empowers the State Govt. to frame the rules. First is Section 89 which defines the Constitution of the Rajasthan Panchayat Samiti and Zila Parishad Service & second is Section 102 dealing with the powers of the State Govt. to make the rules. Ofcourse with regard to the power of framing rules under the service matter, Rule 89 is much relevant. The Rajasthan Panchayati Raj Rules 1996 which have been framed under the Act also provide for appointment and

service conditions in Chapter XII commencing from Rule 258 to R. 277 for the purpose of direct recruitment. Under these rules, as contended by the learned Counsel for the appellant, there is a specific provision of written test under Rule 273 for the post of LDC, VLW cum Secretary and Primary School Teacher but the written test has been dispensed with in case of drivers and class IV. If we examine the Rules of 1996 with reference to Prabodhak Rules of 2008, these rules have been framed while exercising powers conferred by Section 102 read with Section 89 of the Rajasthan Panchayati Raj Act, 1994. When a new service named as Prabodhak has been introduced for which separate rules have been framed by the State Govt., then the new rules over-ride the earlier rules, as they have no effect on the later rules for a particular category of service. In this regard, the State Govt. has also made amendment in Section 89 of the Panchayati Raj Act vide Raj. Panchayati Raj (Amendment) Act, 2008 (12 of 2008) by adding Clause (v) in Sub-section (2) thereof, which reads as under:

(c) after the existing Clause (iv), the following new Sub-section shall be added, namely: (v) Prabodhak and Senior Prabodhak.

8. After the existing Sub-section (6-A), a new Sub-section (6B) has been added to Section 89, which reads as under:

(6-b) Appointment on the posts specified in Clause (v) of Sub-section (2) shall be made by additional Chief Executive Officer-cum-District Education Officer (Elementary Education) of the District concern in accordance with the rules made in this behalf by the State Govt. from out of persons selected for the posts by the recruitment committee constituted by the Government in accordance with the rules made by the State Govt. in this behalf:

Provided in case of the posts reserved for widows and divorcee women, selection shall be made in such manner and by such screening committee as may be prescribed by the State Government.

9. This amendment was published in the Rajasthan Rajpatra "Bhag 4 Ka" dt. 5th April, 2008 vide Notification dt. 5th April, 2008 and was duly approved by the Rajasthan Legislative Assembly. The object and reason for this amendment was to provide primary education facility in remote villages and dhanis of the State of Rajasthan. When this amendment in Section 89 has been made, as referred to above and a new service vide Rajasthan Prabodhak Service Rules, 2008 has been encadred after this amendment, then the provisions contained in Rule 258 to R. 277 of the Rules of 1996 with regard to procedure for direct recruitment including the written test as enumerated in Rule 273 of the Rules of 1996 goes away and a new cadre of Prabodhak has been added, whereby appointments are being given on the basis of higher bonus marks of five per year as referred to above to those, who have earlier served in villages and dhanis under Govt. projects in contrast to two marks per year to those who have served in private recognized institutions of Cities and towns. Without expressing any final opinion on the outcome of the validity of the Prabodhak Rules, if we glance at these

Rules, Rule 2(k) which is a definition clause, speaks as under:

(k) "Teaching experience" for the purpose of direct recruitment includes the experience gained in supervisory capacity in any recognized educational institution or project.

This definition clause nowhere restricts the power of the State Govt. in issuing directions for giving bonus marks on the basis of experience in villages and dhanis.

10. The contention of the learned Counsel for the appellants that these Prabodhak Rules have not been approved by the State Assembly by virtue of Sub-section (3) of Section 102 of the Act of 1994 has also got no bearing on the facts of the present case because these Prabodhak Rules have been framed not only u/s 102 but also u/s 89 of the Act of 1994, where Sub-section (3) of Section 102 has no bearing. That apart, in the Amendment Act of 2008 by insertion of Sub-section (6B) of Section 89, it has been clearly mentioned that the State Govt. is empowered to frame the rules and in that Section, there is no provision that it should be laid before the State Assembly. Further, under the provision of Sub-section (3) of Section 102 of the Act of 1994, a rule is said to be void, only when it is disapproved by the State Assembly. Even if for the sake of argument it is presumed that these Prabodhak Rules have not been placed before the State Assembly for approval but at the same time, they have not been disapproved so far, therefore, its validity is unquestionable in these appeals.

11. Now, the question for our consideration is as to whether the direction issued vide Annex. A/5, which has been filed by the appellants in D.B. Civil Special Appeal No. 461/09, granting bonus marks to those candidates, who have served under the Govt. projects; is valid or not. Of course, this matter is still pending in the writ petition before the Single Bench and we have been told that the validity of Prabodhak Rules has not been challenged in the writ petition. Even if the petitioner appellants desire to challenge the validity of these rules, then also, it transpires, from the impugned order that the order under challenge clearly speaks that the respondents shall give appointment on the post of Prabodhak as per select list subject to the final decision of the writ petition. It has also been made clear in the order that if the petitioner stands in merit, then appointment shall be accorded to him also but no appointment shall be given to any person having lesser merit marks than the petitioner before considering his candidature. When such a clarity has been given in the order passed in the writ petition itself, then whether the directions issued pursuant to the Prabodhak Rules are Constitutionally valid or not, is also a question open for answer by the learned Single Judge in the writ petition.

12. Even if the directions have been issued for giving bonus marks with regard to the experience gained in any Govt. institution or project, until the controversy is resolved finally, prima facie it cannot be said that it has in any way adversely affected the rights of the petitioners/appellants. Under the garb of unchallenged

rules, this Court cannot give a direction withholding appointment to those candidates, who are eligible for appointment, as providing employment to its citizens is the primary duty of a welfare State. However, if the petitioner appellants succeed in the writ petitions, they are also eligible to be appointed. The impugned orders of the learned Single Judge appear to be interlocutory in nature and not the final, as no valuable right has been affected by way of final adjudication. The Special Appeal under Rule 134 of the High Court Rules is maintainable only if the same is preferred against the judgment or final order. Undoubtedly, the impugned orders are not final orders. Our view is fortified from the decisions of the Hon''ble Supreme Court cited by learned Counsel Mr. N.M. Lodha in *Jethanand and Sons Vs. The State of Uttar Pradesh, Tarapore and Co. Vs. V/O Tractors Export, Moscow and Another*, and *Mammu Vs. Hari Mohan and Another*, The law cited by Mr. Manoj Bhandari in *Employer in Relation to Managment of Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another*, has no bearing on the facts of the present controversy, as in the cited case, the employer was directed to pay full back wages instead of 40% back wages awarded by the tribunal, therefore, it was in the form of a judgment.

13. The law cited by the learned Counsel for the appellants in this regard has no bearing on the facts of the present case. In the case of *Renu Sharma v. State of Rajasthan* reported in RLW 2001(3) Raj. 1615, the validity of Rule 296 of the Raj. Panchayati Raj Rules, 1996 was declared unconstitutional because it gave unfettered powers to the Executive to relax the eligibility criteria including the qualification, age and experience and the appointments made under the garb of Rule 296 were by way of pick and choose. The issue involved in the cited case was with regard to assessment of merit of the candidates on the basis of the marks secured in Secondary. Thereafter, the merit criteria was changed before finalisation of the selection process.

14. In *Rajesh Kumar Gupta and Others Vs. State of U.P. and Others*, the question was with regard to preparation of the merit list on the basis of district level instead of State level as earlier advised and, therefore, held to be arbitrary and violative of Articles 15 and 16 of the Constitution and plea of promissory estoppel taken by the State was turned down on the ground that criteria was abruptly changed after receiving applications.

15. In *Kailash Chand Sharma Vs. State of Rajasthan and Others*, the matter was with regard to weightage of place of residence which was held to be violative of Articles 14 & 16 of the Constitution. In this case, while upholding the view of full bench decision of this Court dt. 18.11.99 in *Kailash Chandra's* case with certain modification, the Hon''ble Apex Court further held that any attempt at giving weightage to the rural candidates should be backed up by scientific study and considerations germane to the Constitutional guarantee of equality. However, it was observed that the directions in the judgment were under Article 142 of the Constitution and may not be treated as a binding precedent in any other case that may arise in future.

16. In *State of Bihar and Others Vs. Project Uchcha Vidya, Sikshak Sangh and Others*, while discussing scope of promissory estoppel, it was held that adopting policy decision to establish large number of High Schools in the State & taking over some of them & paying salary to its teachers without fulfilling the mandatory provisions of Articles 162 & 166, is violative of Article 300-A of the Constitution.

17. The controversy in *All India SC and ST Employees Assn. and Another etc. Vs. A. Arthur Jeen and Others etc.*, was also with regard to inclusion in the panel of selected candidates and it was held that it does not confer any indefeasible right even against existing vacancies. In the cited case, panel of selected candidates equal to the number of increased vacancies was prepared without inviting applications for the increased vacancies after conducting interview over a period of several months.

18. The judgment of Hon''ble Supreme Court in *Modern School Vs. Union of India (UOI) and Others*, was with regard to the right of private institutions to provide education. The question involved in the cited case was with regard to running of education institutions for getting profit.

19. In *Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra*, it has been held that the administrative instructions are not to supplement or supersede the Act and the Rules and cannot take away rights vested in a person governed by the Act. But here in the present case, as discussed above, the administrative instructions have been issued under the Prabodhak Rules, which empowers the State with regard to teaching experience under Rule 2(k).

20. To sum up, we would like to add that in the present appeals, appointments have already been made and the appellants also participated in the process of selection and when they obtained lesser marks, under the guidelines issued in pursuance to the Prabodhak Rules, they preferred writ petitions before this Court by treating the act of the State authorities as administrative instructions as held by the Hon''ble Supreme Court in the case of *Sadananda Halo and Others Vs. Momtaz Ali Sheikh and Others*, that unsuccessful candidates after participating in the selection process, could not indulge in a roving enquiry.

21. Though, it cannot be said at this stage that the appellants are unsuccessful candidates but their fate is subject to decision of the writ petitions.

22. Consequently, in the light of the discussion made above, we dismiss these appeals and affirm the order of the learned Single Judge dated 27.3.09 passed in S.B. Civil Writ Petition No. 8066/2008 as also the order dated 5.5.2009 passed in S.B. Civil Writ Petition No. 8151/2008. Interim orders passed by this Court on 13.5.2009 in D.B. Civil Misc. Stay Petition No. 7635/09 filed in D.B. Civil Special Appeal No. 461/09 and D.B. Civil Misc. Stay Petition No. 7408/09 in D.B. Civil Special Appeal No. 448/09 are hereby vacated. All the applications of those candidates, who have not been appointed and have moved applications for impleading them as party respondents alongwith application under Article 226(3)

of the Constitution for vacating the interim order, are disposed of accordingly. However, the parties are left to bear their own costs.