

(2004) 05 AHC CK 0146

In the Allahabad High Court

Case No : C.M.W.P. No's. 560 and 7541 of 2004

Dinesh Bahadur Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 14-05-2004

Acts Referred:

Uttar Pradesh Intermediate Education Act, 1921 — Section 16G(2)

Uttar Pradesh Intermediate Education Regulations, 1921 — Regulation 55, 56, 57, 58, 59

Uttar Pradesh Secondary Education Service Selection Board Rules, 1998 — Rule 11(2)

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 — Section 16

Citation : (2004) 4 AWC 2945

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : Ashok Khare and R.C. Dwivedi, for the Appellant; B.D. Mandhyan and Satish Mandhyan, S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sunil Ambwani, J.—Heard Sri Ashok Khare assisted by Sri R. C. Dwivedi for petitioner and Sri B. D. Mandhyan assisted by Sri Satish Mandhyan for respondent No. 7.

2. Brief facts giving rise to this case are that the Panchayat Inter College, Bodarwar, District Kushi Nagar is an educational institution recognised under the U. P. Intermediate Education Act, 1921. The salary of teachers and other employees is paid and regulated by U. P. High School and Intermediate Colleges (Payment of Salaries to Teachers and Other Employees) Act No. 24 of 1971. Sri Krishna Murarl Shukia, the Principal of the college retired on 30.6.2002. The petitioner as a seniormost lecturer in the college was asked by the District Inspector of Schools to officiate as Principal. He started officiating as Principal w.e.f. 1.7.2002 and his signatures were attested. The last elections of the Committee of Management of the college were held in 1988. It is contended by

the petitioner that thereafter no elections were held and that the same Committee of Management is continuing. There were allegations regarding financial irregularities against the Committee of Management, on which an order was passed by the State Government appointing an Administrator. Sri Pitamber Tiwari, respondent No. 5 filed a Writ Petition No. 3195 of 2001 before the Lucknow Bench of this Court in which an interim order was passed on 1.11.2001 staying the appointment of Administrator.

3. The District Inspector of Schools, Kushi Nagar passed an order on 15.7.2002, for single operation of the accounts. The District Inspector of Schools thereafter passed another order recognising the Committee of Management of which Sri Pitamber Tiwari is the Manager, to continue to manage the institution. It appears that the management dispute is still pending but there are no specific order against the functioning of the Committee of Management of which respondent No. 5 is the Manager. It is contended that the vacancy on the post of Principal has been requisitioned to be filled up from the Board under the U. P. Secondary Education Services Selection Board Act, 1982 (In short U. P. Act No. 5 of 1982). The Board has not advertised the post so far.

4. Sri Rajesh Kumar Yadav, respondent No. 7 was the Principal of Marwar Inter College, Pilakhuwa, Ghaziabad. He was facing a disciplinary enquiry in which the Committee of Management of the college awarded punishment. The order of punishment was not approved by the Board. The management has filed a writ petition against the order of disapproval. He made a request for transfer to the Panchayat Inter College, Bodarwar, Kushi Nagar. The Committee of Management of both the colleges have given their consent and that by impugned order dated 2.1.2004 the Additional Director of Education (Secondary) U. P. has transferred him to Panchayat Inter College, Bodarwar, Kushi Nagar.

5. Sri Ashok Khare, senior advocate appearing for the Petitioner / officiating principal, has challenged the transfer of respondent No. 7, on the ground that Section 16 of U, P. Act No. 5 of 1982, does not permit, by way of the proviso, to fill up the post of Principal by way of transfer. Section 10 (1) of U.P. Act No. 5 of 1982 regulate every vacancy covered by direct recruitment to be notified to the Board. Section 10 (2) of the Act further provides that the procedure of selection of candidates for direct recruitment shall be such as may be prescribed. Similarly Section 12 of the Act provides for procedure of selection by promotion. Section 12 (2) prescribes that the procedure of selection of candidates for promotion shall be such as may be prescribed. The word "prescribed" carries the meaning of prescription of rules in exercise of these powers. The U. P. Secondary Education Services Selection Board Rules, 1998, have been framed prescribing the procedure. Rule 11 (2) (b) of the 1998 Rules provides to refer the names of two senlormost teachers to be forwarded along with requisition for the post of Principal. Rule 14 prescribes the procedure for selection for promotion. He submits that the Commission/Board in exercise of powers under the U. P. Act No. 5 of 1982, has framed guidelines for selections. Under these guidelines the two

seniormost teachers are called for interview apart from 5 direct applicants. At the stage of interview total number of 7 candidates including the two seniormost teachers are considered. In case the senior most teacher secures highest marks in interview amongst the 7 candidates then such senior most teachers is declared as duly selected for the concerned institution. If he falls to secure such highest marks, the post is thrown upon to be filled from outside candidates. This procedure has been considered and discussed in detail in *Indra Raj Singh v. U. P. Secondary Education Services Selection Board* 1984 UPLBEC 510.

6. Sri Khare submits that this right of seniormost teacher for his consideration by the Board for appointment, is akin to promotion and not direct recruitment. For this proposition, he has relied upon a judgment of this Court in *Raja Ram Shukla Vs. U. P. Secondary Education Services Commission, Allahabad and others*, Sri Khare submits that the rules of 1998 are to be treated as part of the Act itself. The various provisions existing under the act for appointment, read with rules must be so harmonized that no provision is rendered redundant. In case the post of Principal is filled by promotion under the proviso to Section 16, the right of the seniormost teachers for consideration for appointment as principal by the Board, which is a right akin to promotion shall be rendered meaningless and will affect the right guaranteed under Article 16 of the Constitution of India. He relies upon a Judgment of Supreme Court in *Hiraman v. State of U. P.* where the Supreme Court held that the promotion quota on Class III posts reserved for Class IV posts in educational institutions, cannot be filled by compassionate appointment.

7. Sri Khare submits that even otherwise the proviso permitting transfer to the main Section 16 of the U. P. Act No. 5 of 1982 requires all appointments to be made on recommendation of the Board. In view of the very nature of the proviso, the said proviso must be interpreted as narrowly as possible and there is no justification for interpreting the said proviso liberally so as to encompass of vacancy of teachers. Relying upon *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, , he submits that the proviso to Section 16 must be read down, by making it applicable only for the post of teachers, excluding the principal and confining it to only such posts who are not covered by the quota for promotion so as to harmonize it with other provisions.

8. Sri Khare lastly submits that in *Narendra Kumar v. State of U. P.* 2002 (1) ESC 214 the learned single Judge has rejected the argument that Article 14 of the Constitution of India is not applicable to employment in privately managed and aided institution. This view according to counsel for petitioner is flawed and does not take into account various decisions of this Court where Articles 14 and 16 were made applicable to the employment in recognised and aided educational institutions. He relies upon *Krishna Nand Dwivedi v. District Inspector of School, Ghazipur* 1994 (2) AWC 758 ; 1994 (1) UPLBEC 461 ; *Radha Raizada v. Committee of Management* 1994 (3) UPLBEC 1551 and *Ganapathi National Middle School Vs. M. Durai Kannan (dead) by LRs. and others*, and submits that in Writ Petition 34450 of 2001 connected with Writ Petition No. 36980 of 2001, I

have differed with the Judgment in Narendra Kumar's case, and a reference has been made to a Division Bench.

9. Sri B. D. Mandhyan, on the other hand, submits that there is no order by any competent authority or Court by which Sri Pitamber Tiwari was restrained as acting as Manager of the institution. The order of dismissal passed against Sri Rajesh Kumar Yadav respondent No. 7, by the Committee of Management, Marwar Inter College, Pilkhuwa, Ghaziabad, was disapproved by the Board u/s 21 of U. P. Act No. 5 of 1982, and that there is no interim order in the writ petition filed by the Committee of Management. Sri Mandhyan submits that the post of Principal is required to be filled under Rule 10 of Rules of 1998 only by direct recruitment. In *Om Prakash Rana Vs. Swarup Singh Tomar and Others*, , it was held that after the enforcement of U. P. Act No. 5 of 1982 a Principal of intermediate college cannot be transferred from one college to another inspite of specific provision for transfer in the intermediate Education Act, 1921, and the Regulations. The Section 16 was amended adding a proviso permitting transfer of a teacher from one institution to another in accordance with Regulations made under Clause (c) of sub-section (2) of Section 16G of the intermediate Education Act, 1921 and that after such amendment the transfer of a Principal is permissible, in law.

10. The Court is called upon to decide a question, whether the scheme of the intermediate Education Act, 1921, the Regulations made under the Act, U. P. Secondary Education Services Selection Board Act, 1982, and the Rules made thereunder namely, U. P. Secondary Education Services Selection Board Rules, 1998, permit the transfer of a Principal of a recognised and aided intermediate college to another such college and whether the seniormost teachers of such college have any right to promotion, which may be effected, by such transfer, and,secondly, whether in the fact and circumstance of the case at hand, the consent of the management for transfer of a Principal, who was subject to disciplinary action which was disapproved by the Board and against which a writ petition is pending, is permissible in law.

11. In *Om Prakash Rana Vs. Swarup Singh Tomar and Others*, the precise question involved before the Supreme Court was whether in view of the enactment of U. P. Act No. 5 of 1982 and Rules framed thereunder, the provisions contained in Section 16G (2) (c) of the U. P. Intermediate Education Act, 1921 and Regulations 55 to 62 in Chapter III of the Regulations framed under that Act in respect of transfer of a Principal from one intermediate college to another continue to be operative and effective. After considering the provisions of U. P. Act No. 5 of 1982 it was held that there was no duality in source of power, contemplated in the matter of filling the office of principal of a college. The Supreme Court held in para 11 of the report, that it was not possible to contemplate that transfers can be effected with the approval of the District Inspector of Schools under the Education Act, and the Regulations, while appointment (other than by transfer) can be made upon the recommendations of

the Commission. Control over all such appointments in exercise of a single source of power namely the Commission. It is no longer possible to invoke Section 16G (2) (c) of the Education Act and its Regulations and transfer of Principal from one institution to another. These provisions have stood completely superseded by the corresponding provisions of the Service Commission Act, its Rules and Regulations. Section 16 of the Act begins with the non obstante clause and scheme set forth in the Services Commission Act enacts a complete Code in the matter of selection of teachers, and resort is no longer permissible to the provisions of the Education Act and the Regulations.

12. Thereafter the U. P. Act No. 5 of 1982 was amended. Several exceptions have been culled out by these amendments in the matter of appointment. Section 16 of U. P. Act No. 5 of 1982, as it stands today is quoted below :

"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, 21B, 21C, 21D, 33, 33A, 33B, 33C, 33D and 33F, every appointment of a teacher, shall on or after the date of the commencement of the Uttar Pradesh 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 16EE 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 subsection (2) of Section 16G of the Intermediate Education Act, 1921 :

Provided also that the dependent of a teacher or other employee of an institution dying in harness who possesses the qualifications prescribed under the Intermediate Education Act, 1921, may be appointment as teacher in Trained Graduate's Grade in accordance with the regulations made under subsection (4) of Section 9 of the said Act.

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

13. The amendments provide for appointments by regulations, appointment of retrenched employees under the first proviso, appointment by way of transfer under the second proviso, and compassionate appointment under the third proviso. These exceptions have been culled out in the mandate, that no appointments shall be made except on the recommendation of the Board. Section 2 (k) includes a Principal or Head Master in the definition of the word "teacher". The procedure of transfer provided in the regulations in Chapter III, made in exercise of powers u/s 16G (2) (c), has also undergone a change after

the amendments made in Regulations 55 to 61, These amendments made by notification dated 9.9.1997 and 22.9.1997, provide for a scheme in which both the committees of management give their assent and that the application is processed by Committee set up for that purpose under Regulation 59. Regulation 59 (1) (d) provides that where an application of a teacher in lecturer's grade and of a head of an institution is made it shall be forwarded to the Additional Director of Education (Madhyamik) if the transfer is sought to an institution situate in other region and that the inspector shall after consulting the management of the institution to which the transfer is sought, through the inspector concerned if the institution is situate within the region, and on receipt of written consent of such institution forward the application to the Additional Director of Education (Madhyamik). Amended Regulation 59 as such specifically provides for transfer of the head of an institution to be considered by the Additional Director of Education (Madhyamik) after " following the prescribed procedure.

14. Rule 10 (a) of the Rules of 1998 provides only one source of recruitment for the post of Principal of an Intermediate college, or Head Master of high school and this source is by way of direct recruitment. The same rules, however, provides 50% quota for promotion of teachers in lecturers grade and 50% for teachers of trained graduate's grade. The entire argument of Sri Khare hinges upon the rights of two seniormost teachers who are required to be considered by the Board for the post of Principal or Head Maser. Rule 11 (2) (b) of the rules of 1998 is quoted as below :

"(b) With regard to the post of Principal or Headmaster, the Management shall also forward the names of to seniormost teachers, along with copies of their service records (including character rolls) and such other records or particulars as the Board may require, from time to time.

Explanation.-For the purpose of this sub-rule "seniormost teacher" means the seniormost teachers in the post of the highest grade in the institution, irrespective of total service put in the institution."

15. The above quoted rule requires the management to forward the names of two seniormost teachers with regard to post of a Principal or Head Master. It is contended that priority is to be given in selection to the seniormost teacher provided he secures highest marks in interviews. Sri Khare relies upon the guidelines framed by the Board for this purpose. These guidelines do not have any statutory sanction. The Rules of 1998 provide a detailed procedure for direct recruitment, and promotion, as well as ad hoc appointments of direct recruitment and ad hoc appointments by promotion as well as regularisation of the appointments. These rules, however, do not give any right of preference to the two seniormost teachers for appointments by direct recruitment to the post of Principal or Head Master. The guidelines have been made by the Board for its own convenience and for ensuring fairness in the selections, but the guidelines cannot be raised to the level of conferring rights which have not been conceded by the Act or the Rules. There is nothing in Rule 11 (2) (b) to give any such right

of preference to the two seniormost teachers. The object of sending names of two seniormost teachers appears to ensure fairness to the seniormost teachers of the institution who may not have applied for any reason whatsoever. This right cannot be raised to the level of right of promotion, A concession of such a right will invoke all the principles applicable in service jurisprudence to the right attached to the promotions. It will bring in not only right of equality under Articles 14 and 16 of Constitution of India but also equitable principles of a legitimate expectation and promissory estoppel. It will also bring in right to claim quota for promotion which is not contemplated by U. P. Act No. 5 of 1982 and the Rules of 1998.

16. The promotion in service jurisprudence means an upward movement on a higher post or a grade. This right can be claimed either under Statue or a subordinate legislation or even by administrative instructions. The consideration of two senlormost teachers along with other applicants from open market for appointment to the post of Principal by the Board, has to be made subject to the fulfilling of the qualifications, eligibility, suitability and all other considerations contemplated by the Act and the Rules. The mandatory requirement of forwarding the names of two seniormost teachers along with copies of their service records and such other records or particulars as the Board may require, for selection to the post of Principal or Head Master, cannot be treated as a right of promotion of the seniormost teacher to the post of Principal or Head Master. I do not find any substance in the submission of Sri Ashok Khare that the transfer of principal to the vacancy, which has been forwarded to the Board, will defeat the rights of two seniormost teachers for promotion and that there is any need to harmonize the provisions of the Act and the Rules to confired the the right of promotion under the proviso to Section 16, to only teachers 2004 (4) AW in the quota of direct recruitment.

17. By referring the order dated 23.5.2002, I have disagreed with the judgment in Narendra Kumar v. State of U. P. 2002 (1) ESC 2140, only on one issue namely whether the consentC, given by the authorised controller can be treated to be the consent of the management as provided under Regulations in Chapter III for transfer of a teacher or a head master. The issue with regard to applicability of fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India to the office of the Principal of a private college, have been decided in the case of Krishna Nand Dwivedi (supra) ; a Full Bench judgment in Radha Raizada (supra) and Ganpati National Middle School (supra) and are not subject matter of any dispute. A recognised and aided educational institution serves public purpose and that the statutory rights given to the Principal and teachers to such institutions are protected by the rights of equality guaranteed under Articles 14 and 16 of Constitution of India.

18. In the present case, the disciplinary action did not succeed against respondent No. 7, as the order of punishment did not meet the approval of the Board u/s 21 of U. P. Act No. 5 of 1982. The pendency of the writ petition of

Committee of Management will not affect the rights of respondent No. 7 to seek transfer or to declare him as unsuitable. His transfer has received the approval of the Committee of Management. I do not find any legal error in the order of transfer made by the Additional Director of Education (Madhyamlk), dated 2.1.2004, transferring Sri Rajesh Kumar Yadav, respondent No. 7 to Panchayat Inter College, Bodarwar, Kushi Nagar.

19. In the result, both Writ Petition No. 560 of 2004 challenging the order of transfer dated 4.1.2004, and the Writ Petition No. 7541 of 2004 praying for quashing the attestation dated 20.1.2004 of signatures of Sri Rajesh Kumar Yadav as Principal of the college are dismissed, with no order as to costs.