

(1991) 05 CAL CK 0010

In the Calcutta High Court

Case No : F.M.A.T. No"s. 329, 3493, 606, 607, 829, 906 of 1990 and 437 of 1991

District School Board, Midnapore and Others

APPELLANT

Vs

Paschimbanga Prathamik Sikshak Sikhan Pratap Bekar-O-Sikhak Samiti, W. Bengal and Others

RESPONDENT

Date of Decision : 10-05-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

West Bengal Primary Education Act, 1973 — Section 105

Citation : 95 CWN 838

Hon'ble Judges : N.P. Singh, C.J; Tarun Chatterjee, J

Bench : Division Bench

Advocate : S.B. Bhuiya, A.P. Chatterjee, Saktinath Mukherjee, Malay Basu, A.P. Sircar, Asoke Maity, N.L. Prodhon, Taimur Khan, R. Bhaduri, Anjan Chakraborty and Pinaki Mittra and Ors, for the Appellant; Amiya Nath Basu, P.K. Roy, P.N. Chatterjee, Amiya Chakraborty, Hidyut Kiran Mukherjee, D.P. Mukherjee, Aloke Biswas, A.K. Dinda, R.L. Moitra, B.C. Biswas, Sofiulla Mondal and A.D. Adhikari and Ors., for the Respondent

Final Decision : Dismissed

Judgement

N.P. Singh, Chief Justice

1. Appeals have been filed on behalf of different District School Boards and District Primary School Councils for setting aside the judgment of a learned Judge allowing two writ applications filed on behalf of the applications seeking appointments as Assistant Teachers in different Primary Schools established, recognised and maintained by the District School Boards/District Primary School Councils. A grievance had been made that the trained candidates having requisite qualifications were being ignored whereas untrained candidates were being empanelled and in due course were being appointed in different Primary schools in the State in contravention of Rules framed by the State Government. The learned Judge held that the appointment of untrained candidates as assistant teachers in different Primary schools was unauthorised and illegal.

According to the learned Judge under the existing Rules, Orders and Circulars framed and issued by the State Government only from time to time trained candidates have to be appointed against the vacancies occurring in different Primary Schools of the State. On that finding a direction has been given to the respondents not to give appointment to any untrained candidates and to appoint only the trained candidates in the recognised Primary Schools in the different districts of the State against the existing vacancies. A further direction has been given to strictly, rigorously and rigidly scrutinise the panel prepared by different Schools Boards for appointment against the posts of teachers in the Primary Schools and to exclude those who are not otherwise legible for being empanelled including the untrained candidates.

2. It was pointed out on behalf of the appellants that the finding of the learned Judge that only the trained candidates can be appointed against the posts of assistant teachers in different Primary schools in against the provisions of the Bengal (Rural) Primary Education Act, 1930 (hereinafter referred to as "the Act") and the Rules framed thereunder which have been amended from time to time.

3. Section 66(1) of the Act vests power in the State Government to make Rules for carrying out the purposes of the Act. The relevant part of Section 66(2) is as follows :

Sec. 66(2) - "In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(p) the conditions referred to in clause (g) of sub-section (1) of Section 23.

Section 23(1) (g) is as follows:-

It shall be the duty of every Board:-

(g) subject to the prescribed conditions, to appoint and fix and pay the salaries (and allowances) of teachers in Primary Schools.

4. It appears that in exercise of the powers conferred by section 66(2) (p) read with Section 23(1)(g) aforesaid, Rules were framed which were published by Notification No. 1493-Edn dated 25th July, 1940.

5. Rule 2 prescribed the minimum qualification for appointment as assistant teacher in a Primary school maintained by a Board and the relevant part whereof was as follows:-

Assistant Teacher - Training.

provided that for a period of ten years from the date on which these Rules came into force the qualifications for appointment of women teacher in such Primary

Schools shall be as follows:

Assistant Teacher - Training or Middle Standard Pass:

Provided further that until an adequate supply of trained teachers is available untrained matriculates (or their equivalents) may be appointed as acting head or assistant teachers and that suitable trained non-matriculates may be appointed as Head Teachers.

Explanation - For the purpose of this rule a Teacher shall be deemed to possess a training when he or she has passed the departmental examination held at the completion of a course of training in school or centre managed, organised or recognised by the Director of Public Instruction for the purpose of imparting such training.

6. By a Notification dated 26th October, 1971 issued in the exercise of power under sub-section (2) of Section 66 of the Act, Amendments were introduced in the Rules referred to above. In Rule 2 prescribing the minimum qualification of the assistant teachers, the following amendment was introduced:-

(b) Assistant Teacher - School Final Pass. Training will be treated as an additional qualification and a trained teacher shall be entitled to the "A" category scale of pay.

7. By yet another Notification dated 21st January, 1974, issued in exercise of the powers conferred by sub-section (2) of Section 66 of the Act aforesaid, an Amendment was introduced in Rule 3B of the Rules. The amendment so introduced is as follows :

In the said rules, after sub-clause 95) of rule 3B, insert the following sub-rule namely :-

6. While preparing panels for appointment to the posts of primary teachers, preference shall be given to trained candidates in such manner that all additional posts sanctioned by Government from time to time due to enhancement in rill strength in existing schools and at least 50% of the normal vacancies in such schools are filled up by trained candidates only if sufficient number of trained candidates are available.

8. It may be mentioned that the Bengal (Rural) Primary Education Act, 1930 was repealed by the West Bengal Primary education Act, 1973 which came in force on 20th September, 1974. The Rules framed under earlier Act and as amended from time to time were kept in force by virtue of Section 105 of the West Bengal Primary Education Act, 1973. The relevant part of Section 105 is as follows:

Repeal and continuance :-

(1) The Bengala (Rural) Primary education Act, 1930, the West Bengal Urban Primary education Act, 1963 and the West Bengal (Rural) Primary Education

(Temporary Provisions) Act, 1969, are hereby repealed.

* * * * *

(4) Notwithstanding the repeal of the Bengal (Rural) Primary Education Act, 1930 all rules, orders and notifications made or issued from time to time under the said Act, applicable to a District School Board and continuing in force immediately before such repeal shall continue in force in so far as they are not inconsistent with the provisions of this Act, until they are repealed or amended.

9. On behalf of the appellants it was urged that initially in the Rules which were notified on 25th July 1940, in respect of assistant teachers, the minimum qualification prescribed was training only. Later, by the Notification dated 26th October 1971 referred to above, Amendment was introduced in Rule 2 aforesaid, because of which training is to be treated as an additional qualification but it is not a "must" in absence of which a person can not be appointed as an assistant teacher in any of the Primary schools. It was pointed out that even in the amendment which was introduced by the aforesaid Notification dated 21st January, 1974 in Rule 3B, it was only required that while preparing the panels for appointment to the posts of Primary Teachers, preference has to be given to the trained candidates in such a manner "that all additional posts sanctioned by the Government from time to time due to enhancement in the roll strength in the existing schools and at least 50% of the normal vacancies in such Schools are filled up by trained candidates only, if sufficient number of trained candidates are available. According to the appellants, under the statutory provisions which are in force, there is no complete bar in respect of the appointment of untrained candidates in Primary Schools, as such, the learned Judge should not have directed to exclude the names of untrained candidates from the panels prepared and to appoint against all vacant posts, only persons, who are trained.

10. It is true that in view of the amendment which was introduced by Notification dated 26th October 1971 in Rule 2 of the Rules, the minimum qualification for appointment as assistant teacher in a Primary School maintained by the Board is School Final Pass; training is to be treated as an additional qualification. We are informed that even when the amendment was introduced in Rule 3B by Notification dated 21st January 1974 substituting a new sub-rule (6), requiring preference to be given to trained candidates and to fill up all additional posts sanctioned by Government from time to time due to enhancement in roll strength of the existing Schools and at least 50% vacancies in such Schools by trained candidates, no amendment was introduced in Rule 2 which prescribes the minimum qualification for assistant teachers for being appointed in a Primary School maintained by the Board.

11. Reading Rule 2 as amended by Notification dated 26th October, 1971 and Rule 3B(6) as amended by Notification dated 21st January 1974 in a harmonious manner, it has to be held that all additional posts sanctioned by the Government from time to time due to enhancement in roll strength in existing Schools have to

be filled up only by trained candidates. So far the normal vacancies in such schools are concerned at least 50% are to be filled up by trained candidates only if sufficient number of trained candidates are available. The controversy remains only in respect of remaining 50% of the normal vacancies in the existing schools.

12. According to the writ petitioners respondents reading all the amendments in the rules properly it should be held that the intention of the framers of the Rules is to fill up all posts of assistant teachers in different Primary schools only by trained teachers. It was pointed out that the framers of the Rules have been attaching importance to the training since the year 1940. When the Rules were initially framed, for an assistant teacher, only training was the required qualification. Even in the year 1971 when Rule 2 was amended and "School Final Pass" became the minimum qualification, still it was said that training will be treated as an additional qualification. The said requirement was further impressed by amendment of Rule 3B(6) in the year 1974 which in substance requires that in due course all the posts of assistant teachers to be filled up only by the trained candidates. Our attention was drawn to the judgment under appeal where the learned Judge has referred to some administrative orders issued by the State Government regarding giving preference to trained teachers. Reference was also made to pay revision commission recommendation saying that untrained candidates will not be recruited if trained candidates are available.

13. It cannot be disputed that the intention of the Rule making authority as well as the State Government and Pay Revision Commission has throughout been to attach importance and to give preference to training while prescribing minimum qualification for appointment of assistant teachers in the Primary Schools. But such administrative orders or even the recommendation of Pay Revision Commission shall not override the statutory provisions. In view of the amendment introduced on 26th October 1971 in Rule 2 referred to above prescribing only School Final Pass as the minimum qualification for appointment, it is difficult to hold that there is a complete ban against the appointment of a candidate who is not trained. If that was the intention, the framers of the Rules would not have made training as an additional qualification instead of minimum qualification. The substituted Rule 3B(6) also does not completely bar the appointment of an untrained teacher. The effect of substituted Rule 3B(6), shall be that all additional posts sanctioned by the Government from time to time due to enhancement in roll strength in existing Schools have to be filled up only by trained candidates. Similarly, at least 50% of the normal vacancies existing in such schools are to be filled up by trained candidates. In respect of remaining 50% of the normal vacancies, the appointing authorities have to consider the claim of trained candidates vis-a-vis untrained candidates on basis of some rational and reasonable principle. It is not possible for the Court to conceive all eventualities especially in connection with the appointments but an illustration can be given which, according to me, can be held to be reasonable. If in respect of a post which is within remaining 50% of the normal vacancies in a school, the choice is to be made between a trained and untrained candidate, if the untrained

candidate has better education qualification or experience than he should be preferred. On the other hand, other qualifications being equal between a trained and untrained candidate the trained candidate should be preferred subject to any binding order in respect of reservation of posts for candidates belonging to special category. It is unfortunate that attention of the learned Judge was not drawn to the aforesaid statutory Rules.

14. During the hearing of the appeals reference was made by the appellants to a communication dated 15.11.1984 issued by the Department of Education, Primary Branch. Para 3 of the said communication is as follows:

3. All additional posts sanctioned for existing Primary Schools owing to increase in enrolment should be filled up by trained candidates only while in normal vacancies and posts sanctioned for new schools trained and untrained teachers should be appointed on 50 : 50 basis. This normal procedure laid down in statutory rules for appointment of teachers in existing Schools however be strictly followed.

15. It was urged on behalf of the appellants that in view of the aforesaid communication 50% of the normal vacancies have to be filled up by untrained candidates only. It is well known that an administrative order cannot supersede a statutory provision. An administrative order can supplement a statutory rule but it cannot supplant it. I have already construed the scope of Rule 3B(6) along with rule 2 of the Rules. It is not possible to read Rule 3B(6) to mean that the remaining 50% must be filled up only by untrained candidates as if those posts have been reserved for untrained candidates. Both Rule 2 and Rule 3B(6) in clear and unambiguous words, require preference and importance to be given to trained candidates. It need not be pointed out that when Rule 3B(6) says that at least 50% of the normal vacancies are to be filled up by trained candidates, it cannot be interpreted to mean that the remaining 50% similarly must be filled up by untrained candidates only. When rule 3B(6) requires preference to be given to the trained candidates while preparing the panels, it is referable only to 50% of the remaining normal vacancies as such while filling up the remaining 50% of the vacancies existing in the Schools the case of untrained candidates has to be examined along with trained candidates on some rational and reasonable principle.

16. Coming to the question as to whether it is open to direct the appellants to scrutinise the existing panels prepared in different districts in the light of the Rules, Orders and Circulars and to exclude the names of the untrained teachers for the purpose of making appointment against the vacancies in different Primary schools, it appears that such Panels were prepared as early as in the years 1983-85. Whether the existing vacancies can be filled up from the candidates whose names had been included in the panel prepared years ago, was examined by the Supreme Court in the case of State of U.P. and Another vs. Ram Gopal Shukla (AIR 1981 SC 1041). From a bare reference to the judgment aforesaid it shall appear that earlier a panel had been prepared. Later a statutory Rule under

article 309 of the Constitution was framed, saying that all appointments have to be made first from amongst the applicants whose names had been included in the panel so prepared. This was challenged on the ground that such Rule was violative of Articles 14 and 16 of the Constitution. That objection was upheld and the statutory Rule was held to be *ultravires*. In that connection it was observed as follows:

There is no denying the fact that the rules regulating the conditions of service are within the executive power of the State or its legislative power under the proviso to article 309 but even so, such rules have to be reasonable, fair and not grossly unjust, if they are to survive the test of Articles 14 and 16 of the Constitution. A rule which contemplates that unless the list of 300 persons is exhausted no other person can be selected, obviously is unjust and it deprives other persons in the same situation of the opportunity of being considered for promotion.

As such, in my view, if any appointment is made from the panels which were prepared in the years 1983-85 it shall be violative of articles 14 and 16 of the Constitution inasmuch as many more meritorious, candidates who have become eligible after the preparation of such panels shall be deprived of their rights to be considered for appointment against the existing vacancies.

17. Apart from that by Notification dated 8th February 1974 issued u/s 66(20) of the act aforesaid a new rule 3E has been introduced substituting the old Rule. Rule 3E is as follows:

3E, A panel of teachers for a district shall remain valid, unless exhausted earlier, for twelve months from the date of its preparation, but the State Government may extend the period of validity of a panel by a period not exceeding six months. When a panel is exhausted or ceases to be valid the Director of Public Instruction, West Bengal shall proceed to prepare a fresh panel in accordance with the provisions of these Rules.

18. In view of the aforesaid statutory Rule 3E, the life of a panel has been fixed for a period of twelve months from the date of its preparation. The State Government may extend the period of such panel by a period not exceeding six months. There is no dispute that the period of twelve months expired long ago. It was stated at the bar that there is no order of the State Government extending the period of the panels. As such, the panels prepared in different districts between the year 1983 and 1985 have lost their existence and no direction can be given to make appointments on the basis of those panels after making necessary scrutiny and examination in the light of the direction given by the learned Judge. Accordingly, taking all the facts and circumstances into consideration, I direct the different District School Boards and the concerned authorities to take immediate steps for preparation of fresh panels in accordance with law and in terms of the Rules referred to above. I further direct that all appointments against the additional posts sanctioned by the State Government

from time to time due to enhancement in the roll strength in the existing Schools in different districts be filled up by trained candidates only. So far as the normal vacancies existing in the Schools are concerned, at least 50% must be filled up by trained candidates only. In respect of remaining 50% of such" vacancies, untrained candidates should be considered along with trained candidates on some rational and reasonable principle.

19. So far as the judgment of the learned Judge declaring the appointments of untrained candidates already made to be illegal and unauthorised, is concerned, the difficulty is that such appointees have not been impleaded as respondents to any of the writ applications. It is well settled that whenever appointments are challenged as illegal having been made against the procedure or conditions prescribed, an opportunity has to be given to such persons of hearing before their appointments are declared invalid. It was pointed out by the Supreme Court in the case of Prabodh Verma and Others Vs. State of Uttar Pradesh and Others, that where persons large in number are likely to be affected by the order of the Court, being not party to the writ application in question individually or in representative capacity then, the writ application should be dismissed on that ground alone. In my view, it is not possible for this Court to declare the appointments of untrained candidates who have already been appointed out of the panels of 1983-85, as invalid without affording an opportunity to them, of being heard. Accordingly, the direction of the learned trial Judge is modified to that extent.

20. The appeals F.M.A.T. Nos. 329/90, 3493/90, 606/90, 607/90, 829/90 filed on behalf of different District School Boards/District Primary School Councils and F.M.A.T. No. 906/90 filed on behalf of some of the untrained teachers are allowed to the extent that the authorities connected with the appointment of assistant teachers in different Primary Schools recognised and maintained by the District School Boards/District Primary School Councils are directed to take immediate steps for preparation of fresh panels for the appointment against the different vacant posts in such Primary Schools in accordance with the statutory Rules. The panels should be prepared within six months from this date and thereafter the appointment be made in accordance with law. I further direct that no appointment shall be made against any of the vacancies from the panels prepared between the years 1983-85.

21. F.M.A.T. No 437 of 1991 has been filed on behalf of West Bengal Primary Organiser Teachers Association against the same judgment of the learned Trial Judge which is under challenge in the appeals mentioned above. According to the appellants of this appeal, on the representation of the authorities of the State, Primary Schools were established in different villages through voluntary services and donations for education of the children in the locality, in the hope that in due course such schools would be given recognition and the teachers organising the schools would be absorbed. According to the appellants instead of recognising such Primary schools, statutory Notifications were issued because of which such

organiser teachers have been deprived of their appointments and the Schools organised by them have not yet been recognised. It was pointed out that the writ applications (C.O. 2107 (W) of 1981 and others) were filed which we heard and disposed of by a learned Judge of this Court on 31st March, 1981. The learned Judge pointed out that the amended Rule 3(D) which was published on 11th September 1980 cannot have any retrospective effect so as to affect the rights conferred on organiser teachers, before the amended Rules came into force. The petitioners of those writ applications were claiming that they had established the schools before coming into force of the amended Rules as such their schools should be recognised. In that background a direction was given to consider and dispose of the applications for recognition filed on behalf of such private schools. The respondents of the writ applications were restrained from setting up or opening new schools in the three villages where the petitioners had claimed to have established Primary Schools. In the six appeals referred to above which have been allowed in part we are not concerned with any right or claim in respect of organiser teachers or in respect of private schools which have not yet been recognised. The controversy in those appeals is in respect of preparation of panels for appointment in existing Primary Schools already established, recognised and maintained by the District School Boards/District Primary School Councils. As such I fail to understand as to why the present appeal has been filed against the judgment of the learned Judge.

22. Our attention was also drawn to some interim order passed in C.O. 13899 (W) of 1990 by a learned Judge of this Court and it was pointed out that the learned Judge has restrained the respondents of that application from setting up any new Primary School or giving the recognition to any new Primary School. I do not understand how any such interim order has any bearing with the controversy involved in the appeals mentioned above.

23. This appeal is, accordingly, dismissed as being without any merit. But I make it clear that I am not expressing any opinion on the rights and claims of Organiser Teachers in connection with Schools said to have been established by them. In the circumstances of the case there will be no order as to costs.

Tarun Chatterjee, J.

I agree.