

(2011) 03 AHC CK 0390

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 57568 of 2007

Jai Bhagwan Sharma

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-03-2011

Acts Referred:

Uttar Pradesh Basic Education Act, 1972 — Section 2
Uttar Pradesh Basic Schools (Junior High Schools) (Recruitment and, Conditions of Service of Teachers) Rules, 1978 — Rule 18

Citation : (2011) 7 ADJ 720 : (2011) 3 ADJ 570 : (2011) 5 AWC 4928

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri R.K. Ojha, learned Counsel for Petitioner and perused the record.

2. Petitioner's application requesting for transfer from one Primary School to another Primary School has been declined approval by the District Basic Education Officer, Ghaziabad by order dated 26.9.2007 on the ground that the transfer is being sought between two different kind of institutions, namely, from an unaided Primary School to an aided Primary School and in view of Circular dated 1.10.2002 it is not permissible.

3. Learned Counsel for Petitioner submits that under Rule 18 of U.P. Basic Schools (Junior High Schools) (Recruitment and, Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as "1978 Rules"), the only requirement is that institution must be a recognized one and if Management of both the institutions agree, the educational authorities cannot decline approval. He also submits that the circular dated 1.10.2002 issued by Secretary of the Board is contrary to Rules and, therefore, it is also liable to be set aside.

4. However, I do not find any force in the submission of learned Counsel for

Petitioner. 1978 Rules are applicable to all the recognized Junior High Schools whether aided or unaided. Rule 18 thereof provides for transfer of a Teacher from one institution to another and reads as under:

18. Transfer.- (1) A permanent Headmaster or Assistant Teacher of a recognised school may, on application in this behalf, be transferred to another recognised school in which he may be lawfully employed under these rules.

(2) Such application shall be given by the Headmaster or Assistant Teacher, as the case may be, to the District Basic Education Officer through the Manager of the school from which the transfer is sought.

(3) The manager shall alongwith the application for transfer, forward copies of service book and character roll of such Headmaster or Assistant Teacher, as the case may be, to the District Basic Education Officer.

(4) No transfer shall take effect unless it is agreed to by the managements of the concerned recognised schools and is approved under Clause (5).

(5) The approval for the transfer of a Headmaster or Assistant Teacher of a recognised school shall be accorded by:

(i) the District Basic Education Officer in case of transfer from one school to another School within the District;

(ii) the Regional Deputy Director of Education in case of transfer from one School to another School situated in different districts but within the same division;

(iii) Secretary of the Board, in case of transfer from one School to another School situated in different divisions.

5. This Rule has to be read with the provisions of relevant statutes, namely U.P. Basic Education Act, 1972 (hereinafter referred to as "1972 Act") and U.P. Junior High Schools (Payment of Salaries of Teachers and Other Employees) Act, 1978 (hereinafter referred to as "1978 Act") since the recognized aided institutions are admittedly governed by these statutes. 1978 Act provides that liability of payment of salary would be on State exchequer in respect to an institution where the appointments are made. There the term "Institution" has been defined in Section 2(e) which reads as under:

"Institution" means a recognised Junior High School for the time being receiving maintenance grant from the State Government

6. The Institutions governed by 1978 Act are required to function in a regulated manner inasmuch even if they are private institution and recognized by the Board, they cannot employ Teacher on their own but the same have to be against the posts which are created and approved by Director or any other Officer, who may be authorized in this behalf by general or special order by the Director. The Management has no discretion to create post on its own and thereafter claim salary of a person appointed thereon. The said provisions are

not applicable to an unaided institution where the discretion lies upon the Management and only for the purpose of appointment, the procedure prescribed in 1978 Rules have to be followed which contemplates that the person appointed must have the requisite qualification. The number of Teachers and employees in such an institution has nothing to do with educational authorities because there is no bar in respect to unaided institutions. If the contention of learned Counsel for Petitioner that for the purpose of attracting Rule 18 only this much is necessary that institution is recognised and nothing more is accepted, that would create a discrepancy in matter of a person who is appointed in an aided institution as the liability of payment of salary lie with the State exchequer. If the incumbent seeks transfer to unaided institution, he can always say that in view of Rule 18 he is seeking transfer and there is nothing which can deprive him to claim salary from State exchequer since his transfer is in accordance with procedure prescribed. Similarly, a person who is appointed in an unaided institution irrespective of any control of number of vacancies etc. may claim salary from State exchequer merely on the ground that he possess requisite qualification and has been transferred under Rule 18. Rule 18, therefore, has to be read consistent with other statutes, namely, 1972 and 1978 Acts and to this extent there appears to be some gap which has been filled in by the circular dated 1.10.2002 that an order of transfer under Rule 18 contemplate transfer between Teachers of institutions belong to similar category and not dissimilar category.

7. The matter can be looked into from another angle, though takes us to the same conclusion. A transfer does not result in change of status, position, privileges etc. as also change in conditions of service of employee concerned. In case contention of Sri Ojha is accepted, it would result in appointing a Teacher of an unaided institution to an aided institution and vice versa effecting their status and privileges with respect to the obligations of payment of salary. It is well known that the genesis of statutes making it obligatory upon the State to take responsibility of payment of salary to the staff of educational institution has been the wide scale exploitation in the hands of private Management and to exclude this victimization, such statutes were enacted. The unemployed persons apply in larger number in the institutions which are aided since the security of payment of salary is controlled by statute therein in comparison to the institutions which are unaided and the entire responsibility is in the hands of private Management. On paper whatever is placed by such Management but judicial cognizance can be taken that an unemployed person, not being in bargaining position, generally, compromises for something when he is faced with situation of nothing. In case a transfer amongst dissimilar institutions is permitted, this position, which basically relates to status of Teacher, would be effected though a simple transfer does not contemplate such a kind of alteration. It is in these circumstances, normally a transfer is conceived in a situation where all things remain same and only the place of working of the individual is changed. Though in the Rules, there was nothing otherwise but considering the scope of misuse by misinterpretation, this

gap was realized by the educational authorities and, hence, the circular in question has been issued which is more in the nature of clarificatory and cannot be said to run contrary to the provisions pertaining to transfer with which this Court is concerned. This is another reason for which I am inclined to hold that a transfer under Rule 18 between the staff of two dissimilar type of institutions like aided and unaided cannot be permitted.

8. In the circumstances, I do not find the circular dated 1.10.2002 can be said to have infringing Rule 18 of 1978 Rules. An executive order insofar as it fills the gap, can always be issued and has binding effect. In view therefore, the decision of District Basic Education Officer in the case in hand cannot be faulted. The writ petition, therefore, lacks merit. Dismissed.