

(2013) 07 UK CK 0059

In the Uttarakhand High Court

Case No : Writ Petition (S/S) No's. 669, 735, 738, 750, 756, 774, 775, 779, 781, 783, 786, 788, 789, 790, 792, 794, 795, 797, 798, 799, 808, 809, 812, 814, 815, 816, 818, 820, 823, 824, 828, 831, 837, 838, 841, 842, 843, 848, 849, 850 and 852 of 2013

Mahipal Singh Rathor and Others

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Citation : (2013) 3 UPLBEC 9

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : C.D. Bahuguna, assisted by Sri A.K. Verma, Sri Sandeep Tiwari, Sri M.S. Bisht, Sri K.K. Tiwari, Ms. Sangeeta Bhardwaj, Sri Ramji Srivastava, Sri K.C. Tiwari, Sri K.N. Joshi, Sri Shobhit Saharia, Sri Anup Kumar Verma, Sri Sandeep Kothari, Sri Amish Tewari, Sri M.S. Chauhan, Sri P.C. Petshali, Sri Pankaj Purohit, Sri Narendra Bali, Sri B.S. Negi, Sri Narayan Har Gupta, Sri Sanjay Raturi and Sri Siddhartha Singh, for the Appellant; K.P. Upadhyay, Chief Standing Counsel for the State of Uttarakhand, for the Respondent

Final Decision : Dismissed

Judgement

Sudhanshu Dhulia, J.—All the petitioners in the above bunch of writ petitions are teachers working in different Government Schools in the State of Uttarakhand. These teachers belong to various grades of schools. Some of them are teachers in primary schools or upper primary schools. Others are teachers in Government Higher Secondary Schools or Government Intermediate Colleges. The common factor in all these writ petitions is that all the petitioners are presently aggrieved by their transfer from one Government School to another. Another factor which is common to all these writ petitions is that such transfer orders have been passed by the Education Authorities in the State of Uttarakhand in accordance with the Transfer Rules framed for teachers in the year 2013, which are known as Uttarakhand Teacher (Schools Education) First Appointment, Promotion and

Posting on Transfer Rules, 2013 (hereinafter referred to as Transfer Rules). Although in some of the writ petitions, the vires of the Transfer Rules has also been challenged, with a prayer that the Transfer Rules, 2013 itself be declared unconstitutional, yet in majority of the writ petitions what is under challenge is the system of "grading" and the "points" given to both schools and to its teachers who are teaching in such schools, which has formed the basis of these transfers. The petitioners while challenging these grading contained in Rule 4 of the Transfer Rules, 2013 have called it arbitrary, illegal, irrational and illogical.

2. It is an admitted position that prior to Transfer Rules framed in 2013, the transfer of teachers in the State of Uttarakhand was being made on the basis of policies formulated in terms of Government Orders, which were being issued from time to time. There were no rules governing transfer of such teachers. In fact, to put it plainly, the transfer being an incidence of service in public employment and it being such an essential component of the whole system of Government service, there need not be specific rules governing transfer or giving powers to the authority or even elaborating who would become liable for transfer and when and where! The parameters which govern service and transfer of teachers are already there in Fundamental Rule 15 which reads as under:

15. (a) A Government servant may be transferred from one post to another; provided that, except-

(1) on account of inefficiency or misbehavior, or

(2) on his within request,

a Government servant shall not be transferred substantively to, or, except in a case covered by Rule 49, appointed to officiate in, a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had his lien not been suspended under Rule 14.

(b) Notwithstanding anything to the contrary contained in these Rules, the Governor may in the public interest transfer a Government servant to a post in another cadre or to an ex-cadre post.

(c) Nothing contained in clause (a) of this Rule or in clause (13) of Rule 9 shall operate to prevent the retransfer of a Government servant to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of clause (a) of Rule 14.

3. Moreover neither any prior consent or prior approval of a Government servant is required before one is transferred to another place, and lastly transfer orders can be challenged on very limited grounds. Firstly, when it is in violation of any rules or conditions of service and secondly, when it is passed due to mala fide reasons.

4. Be that as it may, the fact of the matter is that the State Government has chosen to frame Rules. These Rules have been framed under Article 309 of the

Constitution of India. On a query of this Court as to what was the big need for such Rules, the learned Chief Standing Counsel Mr. K.P. Upadhyay, who is arguing this case on behalf of the Government, while defending these Rules, made a candid statement that the Transfer Rules had become extremely necessary as the Government wants to bring a transparency in the matter, as well as a degree of certainty as to who is liable to be transferred and when, so that there is as little room for bias or favouritism in the matter. Moreover, such transfers are made on regular basis every year and the State Government is faced with hundreds and thousands of representations by such teachers, against their transfer. Though even earlier broad policies were laid down in the Government orders regarding transfer, yet these policies are not elaborate and thus there was a frequent challenge to such transfers on the grounds of arbitrariness! It is to remove arbitrariness or any doubt for arbitrariness in the matter, that these Rules have been framed and henceforth all transfers will now be made in accordance with these Transfer Rules. Further while defending the Rules, the learned Chief Standing Counsel has also submitted that the territorial region in Uttarakhand consists of plain areas, semi hill areas and hill areas and further in hill areas some are remote or extremely remote hill areas. Even within a district the difference between one school and another may be largely in terms of its accessibility to roads, post offices, hospitals, markets and other amenities in terms of another school which may have little or no access to such facilities. Therefore, what has been done is firstly various schools have been categorized into two categories i.e. Category "X" and Category "Y". In category "X" would fall such schools which are in a "comfortable zone" whereas in category "Y" would fall schools which are in a "non-comfortable zone", just to give a nomenclature to them. Although no such nomenclature has been given under the Rules but in common parlance category "X" and category "Y" would denote "Sugam" and "Durgam" areas respectively, which if roughly translated in English would mean "comfortable" and "non comfortable" zones respectively. We would therefore for our purposes call them as comfortable zone and non-comfortable zone, which is "X" and "Y" respectively. Further breakup between "X" category is made into "A", "B" and "C", where "A" would denote an extremely comfortable area and "B" and "C" would be such schools in descending order of comfort. Similarly in "Y" category schools have been further divided into "D", "E" and "F" category. Whereas within "Y" category "D" would be better of than "E" and "E" would be better of than "F". The categorization of these schools have been done in terms of a Government order dated 21.5.2013 whereby marks have been given to each category of schools in terms of its accessibility to motor roads, post offices, hospitals and other amenities. Meaning thereby, if there is a school which is in the centre of the city, let us say in Dehradun, it would come in category "A" and, at the same time, if there is a school of the same grade in a remote hill area in the hill district of Chamoli, let us say somewhere in Kedarnath or Badrinath, which are remote, not easily accessible to road, post office, hospital and other amenities, it would then fall perhaps in category "E" or "F" in "Y" category. This is just a broad illustration in order to show what the Government had in its mind

while making these categories. However, while deriving these categories the Government has given gradings in terms of the Government order dated 21.5.2013, relevant extract of which reads as under:

Subject: Determination of standards for compulsory transfer under Uttarakhand Teacher (School Education), Posting on First Appointment, Promotion and Transfer Rules, 2013.

Sir,

On the aforesaid subject, after due consideration of the letter of the Director, Primary Education No. Pra. Shi. Sthanantaran Rules/14931-32/2012-13 dated 11.3.2013, under Rule 4 of Uttarakhand Teacher (School Education), Posting on First Appointment, Promotion and Transfer Rules, 2013 the standards for categorization of school and determination of maximum quality point for that are being made as under:-

5. After categorizing the schools, 40 per cent of the schools have been put in category "X" and 60 per cent schools have been put in category "Y". It was a lengthy exercise undertaken by the Government wherein such categorization had to be made of 18,755 schools in Uttarakhand. Since for primary and upper primary schools transfers have to be made at district level only, there was a district level committee constituted to categorize such schools and for higher secondary and intermediate level it was a regional committee and so on. After these schools were categorized and put in category "X" and "Y" and they were subdivided into "A", "B", "C" and "D", "E", "F" respectively after examining the profile of all the Government teachers. A formula was devised for transfer of teachers from "X" to "Y" category which is as follows:

Total service rendered in "C" category (in days) + service rendered in "B" category (in days) X 1.5 times + service rendered in "A" category (in days) X 2 times = total ? 365 = total service quality points rendered in school of "X" zone.

6. The formula would indicate that if a person has put in greater number of service in category "A" School, he would be getting more points and hence he would be more vulnerable for a transfer. Similarly if within "X" category a teacher has put in large part of his service in category "C", he would be getting lesser grade points and hence he would be less vulnerable for transfer from "X" category to "Y" category. The same set of Rules and formula have been adopted for transfer from category "Y" to category "X".

7. The main challenge of the petitioners before this Court is that the very categorization of these schools into "X" and "Y" and further into "A", "B", "C" and "D", "E" and "F" is totally arbitrary and is neither based on logic nor common sense. This challenge made on behalf of the petitioner can be summarized by way of an illustration. The petitioners would argue that this categorization of schools have been made in terms of accessibility of roads, hospitals, post offices and other amenities, in terms of conditions as they are prevailing today. As an

illustration an example is given of a school which is in District Tehri Garhwal which in the year 2013, when such evaluation has been made, comes in category "A" or "B" in "X" as it presently has motor roads, hospitals, post office and other amenities such as market, etc., but then there is a teacher called "T" who had put in 10 years of service in this school or 10 years of combined service in 2 or three such similar schools when these schools had no such facilities, yet his service of 10 years in a school which was in a remote area or a non-comfortable area is to be counted as comfortable zone because evaluation is done in 2013 and not of 1999 or 2000 or 2001 when such a school was not accessible to the motor roads or post offices or hospital. Consequently, it is argued that the entire exercise is bereft of the logic, reasoning or even common sense as the very reasons for giving this "grading" is wrong and as such no transfer ought to be made on such gradings, according to the petitioners.

8. This argument is indeed attractive in the first blush as even a judicial notice can be taken of the fact that there may be some schools which were in an uncomfortable zone, not accessible to motor roads, hospitals, post office, etc. 10 to 15 years back, but now have all these facilities. This is a possibility. Then why should a teacher suffer! The argument, however, on a closer examination becomes irrelevant for more reasons than one. First and foremost is that since a policy has to be formulated now, it has to be formulated on the basis of the condition as it exists today. After all the Rules have been framed in the year 2013. To start with the ground realities of 2013 was the only practical solution. Already the Rules are quite complicated, to give a year-wise grading and evaluation would have further complicated these Rules which would have gone beyond comprehension of a layman. Moreover, no useful purpose would have been served as at best the difference can be that a school may come in category "A" though it should be in category "B" or it comes in category "D" though it should be in category "E" or "F". It is also possible that it may come in category "C" though it ought to be in category "D" in category "Y". This is a possibility. But then this is a possibility not for all schools. Moreover, at best the difference can be of a one grade only from "B" to "A" or from "D" to "C". It is highly unlikely that a school was in category "F" ten years back and now has come in category "A". Also when such elaborate Rules are framed for transfer, as are presently being framed by the Government, such discrepancies which are minor in nature are bound to come, but looking at the overall picture it is clear that there has been an honest effort on the part of the Government to declare in advance the points a teacher has gathered for the past services in different category of school and therefore in advance a teacher would know whether he is vulnerable for the next transfer or whether he is in the safe zone! If there is no mala fide on the part of the Government and if the grading itself on which such transfers are made are not irrational or alien to the ground realities, then no interference is called for. The fact of the matter is that interference cannot be made merely because there are some minor discrepancies in the "gradings" of this system. Even assuming if there are some minor discrepancies, they exist for all and it is

not the case of the petitioners, nor can it be the case of the petitioners, that this has been done in order to give benefit to a particular category of teachers and harm another category of teachers. Therefore there can be no serious challenge to the grading system. Let us now come to the Rules itself.

9. Mr. C.D. Bahuguna, Senior Advocate in Writ Petition (SS) No. 750 of 2013 has argued that Government of Uttarakhand has framed an Act known as Uttarakhand School Education Act whereas u/s 58 powers have been given to the State Government to frame Rules which would mean also to frame Rules governing the transfer of teachers. The argument of learned Senior Advocate would be that once the powers were already given to the Government u/s 58 of the Uttarakhand School Education Act to frame Rules, such Rules could only have been framed by the Government exercising its power u/s 58 of the Act and not under Article 309 of the Constitution of India. This argument, however, is totally misconceived.

10. Article 309 of the Constitution of India reads as under:

309. Recruitment and conditions of service of persons serving the Union or a State.--Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act.

11. Learned Senior Advocate relies upon the proviso to Article 309 and more particularly to the part of the proviso which says that such Rules can only be framed by the Government "until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act" 20.

12. The argument would be that once Uttarakhand School Education Act has come and Rule making powers have been given to the Government such Rules should only have been framed by the Government exercising its power u/s 58 of the Act. However, learned Senior Advocate has not been able to convince this Court as to how the field was already occupied by any existing set of Rules or statute. Reliance has been placed on Section 58 of the Act, which reads as under:

58. The services of teachers and employees of Basic Shiksha Parishad to be under the control of State Government.--All the teachers, officers and employees

of Basic Shiksha Parishad, including any supervising or inspecting officer or employee working immediately before the date of the commencement of this Act shall be transferred to the State Government and they shall become teachers, officers and employees of the State Government and their services shall be governed by the service rules prescribed by the State Government.

13. The above provision only relates to teachers of primary and upper primary schools. Before the creation of State of Uttarakhand which came into existence on 9.11.2000, it was a part of the erstwhile State of Uttar Pradesh and while it was a part of State of Uttar Pradesh, the primary school teachers as well as upper primary school teachers were under a body known as U.P. Basic Shiksha Parishad. They were not directly under the employment of State Government. After the creation of State of Uttarakhand, such primary and upper primary school teachers here came under de facto control of the State Government. The Government of Uttarakhand chose not to constitute a body such as Uttarakhand Basic Shiksha Parishad to govern service conditions of primary and upper primary teachers in the State of Uttarakhand. Therefore, the Act became necessary to include such teachers also under the purview of Government teachers. It is for this purpose that for the condition of service Rules could be framed but the Government of Uttarakhand has not framed any Rules either for primary or higher secondary or intermediate schools, as already referred above. It is for the first time that elaborate service Rules were framed which governs the transfers of teacher, be it teacher of primary school, upper primary school, higher secondary school or teachers of intermediate colleges. In other words, till such Rules are separately framed for primary school teachers or other teachers by the Government, the present Rules will govern the service condition of teachers relating to their transfer.

14. It must also be stated that in the present bunch of writ petitions, the petitioners are aggrieved by their compulsory transfers. Under Rule 10 of the Transfer Rules, there are four categories of transfers. First is compulsory transfer, second is transfer on personal request, third is mutual transfer and the fourth is transfer on administrative ground. We are only concerned with the compulsory transfers where an elaborate system of "X" and "Y" category and thereafter a sub-division of these two categories, as already referred and discussed above.

15. Lastly, this Court has also been informed that these teachers before this Court, as stated by learned Chief Standing Counsel, are either teaching in the primary school or in higher secondary school or intermediate colleges, working in the same district or school for the last many years, some of them for the last more than 10 years. They are now to be transferred from a comfortable zone to a non-comfortable zone which has to be done in terms of the Transfer Rules 2013, as because of their long stay in a "comfortable zone", they were the most likely candidates for the transfer. Therefore, they are relying on hyper technicalities in order to substantiate their claims and to prove arbitrariness in the transfer policy. On consideration of all aspects, this Court finds that all the

claims of the petitioners either regarding arbitrariness of grading or on the vires of the Rules are clearly misplaced.

16. The fact of the matter is that the transfer is an exigency of service. It is not the petitioners' case that their services are not transferable. It is also not their case that they are being transferred for mala fide reasons on the part of any education authority. Their transfer is being made in accordance with the parameters laid down in the Transfer Rules, 2013. It can be the case of the petitioners that these Rules are slightly complicated. If they are complicated, they are so because they are elaborate. Moreover merely because they are complicated, it would not mean that they are also defective or suffer from some inherent fault. An effort has been made by the State Government to be transparent. It has clearly laid down its cards in advance and this effort must be appreciated.

17. In view of the above, the challenge of the petitioners as to the validity of the Transfer Rules or even as to the validity, propriety and legality of the grading system is concerned fails and all the writ petitions are hence dismissed. All the same, while disposing of these writ petitions, a limited interference is presently being made as the Court has been informed that due to the recent calamity which has befallen in the State of Uttarakhand particularly in the hill areas of Uttarakhand many roads and bridges have been damaged and communication disrupted, and therefore there is a logistical problem as the teachers may find it difficult to join their new place of posting.

18. This has also been recognized by the State Government as there is an order placed before the Court which is dated 15.6.2013 of the Chief Secretary, Government of Uttarakhand which has been passed under instructions of the Hon'ble Chief Minister, whereby all the transfers of state employees have been stayed until further order. The learned Chief Standing Counsel has informed the Court that this has been done in view of the difficulties faced by the employees due to the recent calamity in Uttarakhand.

19. Under the present Rules, there is an authority constituted to look into the grievance of teachers regarding their transfer, where teachers can move their representations against transfers. For primary school teachers, it is a Regional Additional Education Director (Primary Education), for inter district transfers of State Primary Schools or for transfer from one division to another, Director Primary Education, for transfer of Assistant Teachers L.T. Grade and Lecturer, Director Academic Shiksha. As per the Rule, such representations raising grievance against transfers are liable to be made to the said authorities within one month of their transfer, 24.9.2013 to the new transferred place, in case their representation is rejected, but only after giving joining to the transferred place. Although no interference is being made of the said Rules, including Rule 26 as the same is in public interest, yet for the reasons stated above, only as a one time measure the petitioners will be at liberty to move a representation to the authorities constituted under Rule 26 within 15 days from today, and that

authority shall dispose of such representations within a period of one month thereafter i.e. positively on or before 15.9.2013, irrespective of the stipulated pre-condition of joining contained in the Rules. Till then such transfer orders will remain in abeyance. The petitioners must give their joining, on or before 15.9.2013 to the new transferred place, in case their representation is rejected. Interim order dated 26.6.2013 as also extended from time to time are hereby vacated.

20. All the writ petitions are dismissed. No order as to costs.