

(2010) 11 AHC CK 0280
In the Allahabad High Court
Case No : Special Appeal No. 1501 of 2007

Shreyaskar Tripathi

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 26-11-2010

Acts Referred:

Acharya Niyamawali, 1998 — Rule 10, 10(1), 10(2), 10(3)
Allahabad High Court Rules, 1952 — Rule 5
Constitution of India, 1950 — Article 12, 21, 21(A), 226
Uttar Pradesh General Clauses Act, 1904 — Section 19(A)
Uttar Pradesh Higher Education Services Commission Act, 1980 — Section 11, 12, 13, 14
Uttar Pradesh Intermediate Education Act, 1921 — Section 12(2), 16, 16(2), 16(6(2), 16(A)
Uttar Pradesh Intermediate Education Regulations, 1921 — Regulation 1, 101, 102, 103, 104
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 — Section 33

Citation : (2010) 11 AHC CK 0280

Hon'ble Judges : Sunil Ambwani, J;Kashi Nath Pandey, J

Bench : Division Bench

Judgement

1. "Saraswati Vidya Mandir Inter College Kakari Pariyojna Sonebhadra" is a recognised, unaided educational institution governed by the provisions of the U.P. Intermediate Education Act, 1921 (in short the Act of 1921). It was recognised as Higher Secondary School on 29.3.2001, and as Intermediate College for classes upto Class XII, on 25.9.2004. The Committee of Management of the institution was recognised by Regional Committee chaired by the Joint Director of Education, Vindhyachal Region, Mirzapur dated 2.1.2007. Shri Shyam Sunder Singh is the President and Shri Uma Shanker Singh is the Manager of the institution.

2. Bhartiya Shiksha Samiti, Uttar Pradesh Purva Allahabad is a society, which is not stated to be registered and has any concern with the Saraswati Vidya Mandir Inter College Kakari Pariyojna, Sonebhadra. The Secretary of the Society

transferred the petitioner vide impugned order dated 13.7.2007 from Saraswati Vidya Mandir Inter College Kakari Pariyojna Sonebhadra, to Barati Lal Ganga Ram Sarswati Vidya Mandir Inter College Lalganj, District Raibareilly.

3. The District Inspector of Schools, Sonebhadra, by his order dated 16.7.2007, directed the Manager of the institution, clarifying that the order of transfer is impermissible and is illegal, and that since the provisions of U.P. Intermediate Education Act, 1921, the regulations framed therein are fully applicable to the institution, the petitioner can be transferred only after following the procedure prescribed for transfer under Regulations 55 to 61 in Chapter III of the Regulations made under the UP Intermediate Education Act, 1921 providing for making application to the competent authority for transfer with no objections from both the institutions. The regulations provide for transfer by a competent authority under the Act of 1921.

4. Learned Single Judge, by the judgment dated 8.10.2007 under challenge in this Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, held that since the educational institution in question is an unaided institution, it is not State or instrumentality of the State. The institution is a private body and is not performing any public duty. In view of the Full Bench judgment of this Court in M.K. Gandhi v. Director of Education (Secondary) UP Lucknow and Ors. 2005 (3) UPLBEC 2187, the writ petition was not maintainable.

5. We have heard Shri Ashok Khare, Senior Advocate appearing for Shri S.K. Tripathi-the petitioner-appellant. Learned Standing Counsel appears for the State respondents. Shri Anil Bhushan appears for the Committee of Management, Sarswati Vidya Mandir Inter College Kakari Pariyojana Sonebhadra and the Bhartiya Shiksha Samiti Uttar Pradesh Purva, Allahabad-respondent Nos. 4 and 5 respectively.

6. Shri Ashok Khare appearing for the petitioner submits that learned Single Judge has erroneously dismissed the writ petition as not maintainable. The institution is recognised by the Board of High School and Intermediate Education to which all the provisions of the UP Intermediate Education Act, 1921 and the regulations made therein are applicable. The transfers of the teachers amongst the recognised educational institutions are governed by the provisions of the UP Intermediate Education Act, 1921 and the regulations framed thereunder.

7. In Aley Ahmad Abdi v. District Inspector of Schools, Allahabad and Ors. (1976) SWC 731 a Full Bench of this Court held that the provisions of the U.P. Intermediate Education Act, 1921 and regulations are applicable to every recognised institution whether receiving grant-in-aid or not. The institutions, which are recognised, are governed by the provisions of the Act, even if they are not receiving any grant-in-aid from the State Government. He has relied upon judgments in Shiksha Prasar Samiti, Babhanan, District Gonda v. State of UP and Ors. 1986 UP LBEC 477 ; Smt. Shashi Kala Singh Vs. District Inspector of Schools, Mahrajganj and others, Dharmendra Pal Dwivedi v. the District

Inspector of Schools, Bulandshahr and Anr. 2000 (4) E.S.C. 2263 (All.); Brahma Dayal Mehta v. Senior Personnel Executive, India Drugs and Pharmaceuticals Ltd (1990) 3 UPLBEC 1570; Km. Shamim Fatima v. The Manager, Bal Vidyalaya Montessori School and Ors. 1994 HVD (All.) IV 143 ; Smt. Satyawati Verma Vs. U.P. State of Electricity Board and another, and Chandrika Prasad Gupta and others Vs. State of U. P. and others, in support of his submission.

8. Shri Ashok Khare submits that even if the institution is unaided (Vitt Vihin), a permanent headmaster of the recognised institution, which was earlier a Junior High School and thereafter upgraded as a High School, his services stand absorbed as a permanent assistant teacher by virtue of Regulation 4 of Chapter II of the Regulations framed under the Act. His services were not terminated consequent on the upgradation of the institution, and thus does not get converted from permanent teacher into a part time teacher. Even assuming that the petitioner-appellant is a part time teacher, the regulations framed under the Act are fully applicable to such teachers by virtue of Section 16G (i) of the Act. Every person employed in a recognised institution shall be governed by such conditions of service as are prescribed by regulations, notwithstanding any agreement to the contrary between the management and the employee. Section 16-G (i) gives overriding power to such regulations and the conditions contrary to which are void.

9. Shri Khare submits that with regard to institutions granted Vitt Vihin recognition subsequent to 14.10.1987 by virtue of Section 7AB of the Act, the provisions of Payment of Salaries Act, 1971 and U.P. Secondary Education Services Selection Board Act, 1982 are not applicable. If the legislature intended to exclude the applicability of the Regulations made under the Act of 1921, a similar exclusion should have been provided u/s 7AB of the Act. He submits that in the cases cited by him, the service conditions under the Act were made applicable even to the teachers serving in the unaided institutions provided they are recognised and that Regulations 55 to 62 of Chapter III of the Regulations framed under the Act prescribed a procedure for transfer from one recognised institution to another recognised institution. The teacher has to apply for transfer. The Regulations clearly visualize that the only method of transfer contemplated is voluntary transfer. In the present case, the petitioner is not desirous and has not applied for transfer.

10. It is submitted by Shri Khare that after an application is made voluntarily by any teacher for transfer, the Regulations provide the recommendations of a Three-Member Committee headed by the Additional Director of Education (Secondary), as its Chairman with Additional Director of Education (Basic), and Joint Director of Education (Mahila) as its members. In the present case, the Committee has not considered the transfer of the petitioner nor there is any order of the Additional Director of Education (Secondary) permitting the transfer. The claim of the respondents, that the Regulations for transfer are applicable only to a teacher of aided institution, is clearly erroneous as the Note-II to

Regulation 61 specifies that transfer is to be made from an aided institution to another aided institution and from an unaided institution to another unaided institution only. Regulation 110 is limited for transfer of employees other than teachers namely clerks, librarian, and class IV employees. Shri Khare submits that wherever the Regulations are made applicable only to recognised and aided institutions, the Regulations have clearly specified it. For example Regulations 101, 102, 103, 104, 107 deal with compassionate appointment and Regulation 110 clearly specifies that the said provisions are applicable only to recognised and aided institution.

11. Shri Khare submits that even if the petitioner for arguments sake is treated to be a part time teacher serving in an unaided institution and assuming that the Regulations are not applicable, even then the service conditions of such teachers are governed by the provisions of Government order dated 10.8.2001, which does not provide for transfer. The Government order dated 10.8.2001 does not permit transfer. Each recognised educational institution is a separate institution with a Committee of Management of such individual institution being the employer of the teachers of such institution. Where a society registered under the Societies Registration Act has established several educational institutions, the society does not become the employer. The Committee of Management is the employer of the teachers. The teachers have the relationship of master and servant with the Committee of Management of such individual institution and that each institution has its own administration, which is clear from the provisions of Section 16A to 16CCC of the Act. There can be no transfer from one employer to another. For this proposition he has relied upon the judgments in *Raghuveer Prasad Bhatnagar v. Administrator, Committee of Management, Gandhi Vidyalaya Intermediate College, Khekra, District Meerut* 1985 UP LBEC 346 ; *Om Prakash Rana Vs. Swarup Singh Tomar and Others*, and *Ajay Kumar v. Director of Higher Education, UP Allahabad and Ors.* (1997) 1 UPLBEC 337.

12. Shri Anil Bhushan appearing for the Committee of Management, Saraswati Vidya Mandir Inter College, Sonbhadra-respondent No. 4, and Mantri, Bhartiya Shiksha Samiti, Uttar Pradesh Purva, Allahabad-respondent No. 5 submits that the Sarswati Vidya Mandir Inter College, Sonbhadra is being run by a private society namely Bhartiya Shiksha Samiti, U.P. East, Allahabad. The institution is not receiving grant in aid from the State Government. Bhartiya Shiksha Samiti is a society registered under the provisions of the Society Registration Act, 1860. It runs several institutions in State of Uttar Pradesh. For better maintenance of the institution the society has been divided into two units, out of which one is known as Bhartiya Shiksha Samiti U.P. East Allahabad registered vide Registration Certificate No. 480/07-08 with Registrar of Societies with its address at Jwala Devi Parishar, Civil Lines, Prayag, Allahabad. The certificate dated 4th August, 2007 is valid upto 3.8.2012. The society has framed service regulations for its employees known as "Acharya Niyamawali April, 1998". Rule 10 of these Rules provides for transfer. Sub-rule (1) provides that if it is necessary the Acharya, Pradhanacharya, Karyalaya Pramukh and clerks can be transferred from one

Vidya Mandir to another. They will report within 7 days of receiving the order of transfer to the specified place and will be paid 7 days pay by the Vidya Mandir, where he has been transferred, after the receipt of the joining is given by post to the new Vidya Mandir. This joining period of 7 days will not be allowed in summer vacations. Sub-rule (2) provides that the Acharya will not be entitled to any leave after the transfer orders have been received. Sub-rule (3) provides that it will be necessary to comply with the transfer order before making any request. The non-joining shall be treated as an act of indiscipline for which the services may be terminated, and thereafter no application or recommendations will be made in respect of transfer order.

13. Shri Anil Bhushan submits that the petitioner appellant had signed a contract to abide by the "Acharya Niyamawali". It is a private contract between the petitioner-appellant and the management with which he is bound in law.

14. Shri Anil Bhushan further submits that the institution in question is recognized under the provisions of the U.P. Intermediate Education Act, 1921 only for the purposes connected with the Board examinations. The recognition is defined u/s 2(d) of the Act as follows:

(d) "recognition" means recognition for the purpose of preparing candidates for admission to the Boards examinations

15. In Chapter VII of Regulations provisions are made for method and procedure for grant of recognition. Regulation 5(12) provides that the institution will adopt Section 7AA of the Act in totality, meaning thereby that they appoint the teachers on part time basis. It is provided in Clause 11 (kha) that such teachers ought to possess the qualification given in Chapter II. Where the statutes prescribes application of certain provisions, the other provision cannot automatically apply to the institutions vide Vemareddy Kumaraswamy Reddy and Another Vs. State of A.P., Where words in the statutes are clear and there is no obscurity, there is no ambiguity and the intention of statute is clear. Shri Anil Bhushan submits, the courts have no scope to innovate or set upon a task to amending or altering statutory provisions.

16. Shri Anil Bhushan submits that the appointment of teacher is to be made u/s 16E of the Act, against a post. The post means a post sanctioned by the Director of Education or a competent authority. In the present case, the Director has not sanctioned any post in the institution. Regulation 55 to 61 of Chapter III only provides for a procedure of transfer of permanent teachers from one institution to another institution. A permanent teacher means a regular teacher selected and appointed by the UP Secondary Education Service Selection Board, or by regularisation u/s 33 of the U.P. Secondary Education Service Commission Act, 1982. Regulation 61 provides for travelling allowance in case of transfer. The Regulations relating to transfer from Regulations 55 to 61 are not available to the appellant as they are applicable only to aided institution vide Dr. Krishna Kant Srivastava v. State of UP and Ors. Writ Petition No. 34202 of 2010.

17. Shri Anil Bhushan submits that Regulation 110 in Chapter III of the Regulations made under the Act provides that the provisions of transfer are applicable to aided institutions and thus no benefit can be given to the appellant. The Regulations 102, 103 are also applicable only to aided institutions. He lastly submits that in the present case the transfer has been made under the bye-laws of the society, which have no statutory force and hence the society, not a State within the meaning of Article 12 is not amenable to writ jurisdiction, as held by Full Bench judgment in M.K. Gandhi's case. The appointments in the institution in question are made by the management u/s 7-AA of the Act. The service regulations have been framed by the society for the institutions run by it which are all unaided institutions. He adds that the services of the appellant are governed by the bye laws of the society, and since the society is a private body, not a State within the meaning under Article 12 of the Constitution of India, no writ can be issued. The Special appeal is thus liable to be dismissed.

18. It is admitted to both the parties that Sarswati Vidya Mandir Inter College, Sonebhadra and Barati Lal Ganga Ram Sarswati Vidya Mandir Inter College Lalganj, District Raibareli are recognised but unaided institutions under the U.P. Intermediate Education Act, 1921. The provisions of Payment of Salaries Act, 1971, and the U.P. Secondary Education Service Commission Act, 1982 are not applicable to the teachers of these institutions. The management pays the salary from its own sources, and the fees realised from the students. The post of teachers in these institutions have not been sanctioned by the Director of Education and that since the institutions were recognised after 1987, the service conditions of the teachers in these institutions are to be regulated in accordance with the orders issued u/s 7-AA of the Act. The Government Order dated 10.8.2001 has been issued to regulate service conditions of such teachers.

19. Learned Single Judge relied upon the judgments in *Army School, Gorakhpur v. Smt. Shilpi Paul* 2005 (1) ESC (Allahabad) 342 in which relying upon *General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrugan Nishad and Others*, in a case in which a sugar mill run by a cooperative society registered under the U.P. Cooperative Societies Act, 1965 was not held in the facts of that case to be governed by the State as it has no control at all in the functioning of the mill much less deep and pervasive one. Learned Single Judge has further relied upon a Full Bench judgment of Madras High Court in *A. Joseph Louis v. District Welfare Fund Committee, Trichy-1 and Ors.* 2005 (4) ESC (Madras) 2669; *Smt. Satyawati Verma v. U.P. State Electricity Board and Anr.* 1993 (1) A.W.C. 681; *Km. Shamim Fatima v. Manager, B.V.M. School* 1994 HVD (All) IV 143 and the judgment in *M.K. Gandhi's case* (supra) in holding that the school in question or *Bhartiya Shiksha Samiti Uttar Pradesh Purva Allahabad* are not State within the meaning of Article 12 of the Constitution of India. These institutions are also not under obligation or duty imposed by the Act upon their Committee of Management. The appointment of the teachers in these institutions is not made on the post sanctioned by the Director of Education nor any approval is required under the Rules for their appointment. Learned Judge was further of the opinion

that in view of the decisions cited before him, the institutions are also neither statutory bodies nor are performing any public duty for issuance of a writ of mandamus.

20. In *Gopal Dubey v. District Inspector of Schools, Maharajganj and Anr.* (1999) 1 UP LBEC 1 a Full Bench of this Court was required to consider the liability of the State Government for payment of the salary to the teachers of the institution where such teachers are appointed for subjects, without obtaining sanction for that subjects from the educational authorities. The Full Bench considered the scheme of the Act for unaided institutions and held:

14. Section 7 of the said Act, enumerates power of the Board. In Sub-section (4) thereof one of the powers vested in the Board is to recognise institutions for the purposes of its examinations.

15. In Section 7-A, which was substituted in the statute by amendment with effect from 14.10.1986 by U.P. Act No. 18 of 1987, it is laid down that notwithstanding anything contained in Clause (4) of Section 7 (a) the Board may, with the prior approval of the State government, recognise an institution in any new subject or group of subjects or for a higher class; (b) the Inspector may permit an Institution to open a new section in an existing class.

16. Section 7-AA, which was inserted by U.P. Act 18 of 1987 makes provisions for employment of part time teachers or part time instructor. It provides, inter alia, that notwithstanding anything contained in this Act the Management of an institution may from its own resources employ- (i) as an interim measure part time teachers for imparting instructions in any subject or group of subjects or for a higher class for which permission is granted u/s 7-A; (ii) part time instructors to impart instructions in moral education or any trade or craft under socially or useful productive work of vocational course. Sub-sections (2) to (5) lay down pre-conditions for appointment of a part time teacher. In Sub-section (6) of Section 7-AA is provided that nothing in the Act shall preclude a person already serving as a teacher in an institution from being employed as part time teacher or a part time instructor u/s 7-AA. In this connection a provision in the Regulations framed under the Intermediate Education Act is relevant. In Regulation 19 under Chapter II of the Regulations it is laid down that where any person is appointed as, or any promotion is made on any post of head of institution or teacher in contravention of the provisions of this Chapter or against any post other than a sanctioned post, the Inspector shall decline to pay salary and other allowances, if any, to such person where the institution is covered by the provisions of the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 and in other case shall decline to give grant for the salary and allowance in respect of such person. At this stage it is relevant to note that as the statement of the object of the Act States the statute was enacted to establish a Board to take the place of the Allahabad University in regulating and supervising the system of High School and Intermediate Education in the United Provinces, and to prescribe courses therefore.

17. From the provisions of the two Acts and the Regulations noted above, the scheme of things that emerges is that the Board constituted under the U.P. Intermediate Education Act is the competent authority to accord recognition to an institution of the purposes of its examinations in subjects specified in the sanction order as provided in Section 7. The Board is also empowered u/s 7-A to accord recognition to an institution in any new subject or group of subjects or of a higher class with prior approval of the State Government.

18. The Payment of Salaries Act, on the other hand, is an Act to regulate the payment of salaries of teachers and other employees of High Schools and Intermediate Colleges receiving aid out of the State funds and to provide for matters connected therewith. An institution under the said Act means a recognised institution for the time being receiving maintenance grant/grant-in-aid from the State Government. In respect of such an institution the State Government takes the liability to pay salary to the teachers and the other employees of the institution. A teacher or employee, in order to claim the benefit of payment of salary under the said Act has to fulfill certain conditions prescribed under the statute. The Management of the institution, in order to claim reimbursement of salary of its teachers and employees, is also to fulfill the conditions prescribed under the Act. In Section 9 of the Act it is mandated that no institution shall create a new post of teacher or other employee except with the prior approval of the Director or such other officer as may be empowered in that behalf by the Director. In the present case the distinction on between a new post and an existing post is not relevant because it is not disputed that the post of lecturer to which the petitioner claim to be promoted/appointed is a new post created in the year 1990. No dispute was raised before us regarding applicability of Section 9 of the case.

21. The Full Bench answered the questions formulated by it, that on recognition granted by the Board in respect of a subject in an institution under Section-7A of the Act, it will not be presumed that the post of lecturer in such subject stands sanctioned by the Director of Education u/s 9 of the Payment of Salaries Act, 1971. Since no prior approval of the Director was obtained before appointment of the petitioner in that case, as a Lecturer in the subject, the claim for payment of salary from the State Government was unsustainable. The management was also not entitled to reimbursement of the salary in absence of approval of the post. It was, however, open to the management to send the proposal to the Director for grant of approval, and if such proposal is received by the Director, he will consider the same in accordance with the provisions of the Regulations and the law and pass appropriate orders.

22. In *Alley Ahmad Abidi v. District Inspector of Schools 1976 AWC 721*, a Full Bench of this Court in 1976, was required to consider whether the Committee of Management of an Intermediate College is a statutory body, and if so whether a writ petition filed against it will be maintainable. Learned Judges considered the scheme of the U.P. Intermediate Education Act, 1921 and its various provisions

and were of the opinion that though the Committee of Management of an Intermediate College is not a statutory body, such committee is still amenable to the writ jurisdiction of the High Court, where such committee is entrusted with performances of statutory powers and duties.

23. A large number of cases were thereafter decided by the Court, referred by Shri Ashok Khare, which have followed the same principle of law. In *Raghunandan Prasad Bhatnagar v. Administrator, Committee of Management, Gandhi Vidyalaya Intermediate College, Khekhra, District Meerut* and Ors. 1985 UP LBEC 346 a Full Bench of this Court was once again required to consider whether after the commencement of the U.P. Secondary Education Services Commission and Selection Board Act, 1982, providing for manner of appointment of teachers, it is permissible for management to fill up the post by transferring a teacher from one institution to another. Hon''ble Mr. Justice M.N. Shukla, Acting Chief Justice and Hon''ble J.N. Dubey, JJ in their majority opinion held that under the new Act of 1982, the central object is to ban appointment of teachers, otherwise than through the instrumentality of the Commission. In case vacancies are allowed to be filled up by resorting to transfer, that would be plainly repugnant to the provisions of the new Act. Hence, so long as it is just a transfer simpliciter" i.e. by mutual exchange, it remains, conditions of service, but if it is treated as a mode of appointment, it would become inconsistent with Section 16 of the Act. The decisions in *Ratan Pal Singh v. Deputy Director of Education* 1983 UP LBEC 34 and *Committee of Management, National Inter College v. the Inspector of Schools Azamgarh* 1983 UP LBEC 198, were held not to lay down correct law and the decision in *Har Swarup Misra v. State of UP* 1978 ALR 215 was upheld. A transfer according to majority view cannot be made as a device to make appointment, with respect to which the power vests with the Commission. When the legislature has used two different terms in the same statutes, namely "transfer", and "appointment", they cannot be placed at par. The minority view of Justice B.D. Aggarwal holding that even after enforcement of the U.P. Secondary Education Service Commission and Selection Boards Act 1982 (UP Act No. 2 of 1982) and the rules framed thereunder, the provisions of Section 16-6(2) (c) of the Act and Regulations 55 to 62 of Chapter III, of transfer will continue to be operative and effective, did not prevail.

24. In *Om Prakash Rana Vs. Swarup Singh Tomar and Others*, the Supreme Court held that on the constitution of the Secondary Education Service Commission, it is no longer possible for a vacancy in the post of Principal, Headmaster or teacher of the categories mentioned in the Schedule to be filled by the process of transfer u/s 16-6 (2) (c) of the Act and the regulations. The majority view of the Full Bench in *Raghunandan Prasad Bhatnagar* was approved, except that the mutual transfer of service between teachers serving in different institutions was held to be permissible. The Supreme Court held that the transfer is not a condition of service of the employee under the Regulations. With the appointment of the Principal in a College, a new appointment comes into existence. The scheme of the Act envisages appointment of a Principal in relation

to a specific college alone. Different Colleges may be owned by different bodies and organizations. On filling the office of the Principal, a new contract of employment with the particular college comes into existence. There is no State level service to which Principals of the colleges are appointed. The machinery may be different, but the considerations of transfer, namely that of appointment is the same. The object of the establishment of Commission will be defeated, if appointment by transfer is permitted. The amendments to Section 16-6 (2) (c) for transfer, cannot after the true construction and scope of enactment.

25. A Full Bench of this Court in *Ajay Kumar Vs. Director of Higher Education and Others*, while examining the provisions of Section 11 to 14 of the U.P. Higher Education Service Commission Act, 1980 in respect of powers of Commission or Director, Higher Education (in respect of teachers of the degree colleges) examined the question whether the U.P. Higher Education Service Commission has jurisdiction/ power to transfer a teacher from one degree college to another. Relying upon *Om Prakash Rana v. Swarup Singh Tomar* (Supra) the Full Bench observed in para 14 that the Secondary Education Service Commission Act contemplates the appointment of teacher on the recommendations of the Commission in relation to a specified college and after the teacher joins the college, he becomes the employee of that college. If he is transferred, it amounts to cessation of his employment in the former college, and not new appointment in the new college. It was held that teacher of Intermediate College cannot be transferred from one college to another inspite of specific provisions contained in the Intermediate Education Act and the Regulations made thereunder conferring such power of transfer. The Full Bench, thereafter, observed in para 15 that the decision in *Om Prakash Rana* was followed in *General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another*, wherein the Supreme Court held that the employee of one Cantonment Board cannot be transferred to another Cantonment Board in as much as the services in the Cantonment Board is not centralised service or the service at the state level. The Full Bench held that the powers u/s 19-A of the U.P. General Clauses Act, 1904 includes only such power, which is necessary to effectuate a power. Expressly granted ancillary powers could be implied or inferred for exercising such power of selection. The power to transfer is neither necessary nor relevant. The question of transferring a teacher from one Degree College to another arises only after he had joined the college on the recommendations of the Commission. After making the recommendation the Commission becomes *functus officio*. The Commission does not have either expressed or implied powers to transfer a teacher from one Degree College to another.

26. The U.P. Secondary Education Services Commission and Selection Board Act, 1992 is not applicable to unaided institution and thus the principles settled by the Supreme Court in *Om Prakash Rana* (Supra) and Full Bench of this Court in *Ajay Kumar* (Supra) are not applicable to the present case.

27. We are required to consider, whether the opinion expressed by learned Single

Judge that the writ petition by teacher of the recognised but unaided educational institution for issuing writ of certiorari to quash the transfer order, and a writ of mandamus to issue necessary consequential directions is maintainable against private society, and if it is held to be maintainable, whether the provisions of Section 16 (c)(2) of the U.P. Intermediate Education Act, 1921 and Regulations 55 to 61 made in Chapter III of the Act are applicable to the Principal/ Head Master and teacher from one recognised but unaided institution to another recognised but unaided education institution under the management of private society. Further we are also required to decide on the submissions made by the parties, whether the service conditions under the Rules (Acharya Niyamawali) are binding to such teachers.

28. The recognition u/s 2 (d) of the Act means recognition for the purposes of preparing candidates for admission to the board examination. Section 5(12) provides that the institution receiving recognition without grant in aid will adopt Section 7AA of the Act in totality. Such teachers, however, are required to possess the qualifications given in Chapter II. The teachers can be appointed only against a post for which approval has been given by the Director of Education. Even in respect of teachers appointed u/s 7AA, purportedly on part time basis the State Government u/s 7AA-3 can and has prescribed service conditions under Government Order No. 1443/15-7-01-1(191)/2000 dated 10.8.2001. These provide that teachers in such educational institutions will be called part time teachers. The minimum age of such teachers will be 21 years on the 1st July of the calendar year in which they are appointed. Clause-3 provides that for appointment, the teachers must possess the qualification mentioned in Regulation-1 of Chapter-II of the Act. The Government Order, thereafter, prescribes the selection procedure by advertisement in atleast two newspapers having wide circulation in the locality giving 15 days' time for making application by a Committee consisting of Chairman of the Managing Committee; Manager or member nominated by Manager; Principal of the school and a subject specialist nominated by the Managing Committee as members. The disqualifications are given in Clause-5. Clause-6 provides that minimum wages will be paid in accordance with the Minimum Wages Act to such part time teacher by the management from its own source. Para 7 provides for the provident fund and life insurance scheme in which part of the contribution will be given by the management. Clause 8 and 9 provide for disciplinary proceedings and termination of the services and Clause 10 provides for resignation of which Clause 10 (b) provides that where the Secondary Education Board ceases the recognition of any subject or any section or for any other reason ceases the post of part time teacher, the management can terminate the services of such part time teacher by giving him one month's notice or one month's pay.

29. By a letter issued by the Director of Education, Madhyamik U.P. Lucknow dated 22.11.2006 to all the Regional Joint Directors of Education and District Inspector of Schools of the State in respect of unaided but recognised colleges it is provided with reference to Government Order dated 10th August, 2001

(Supra) that the elections of the Committee of Management of these secondary schools should be made in accordance with the Scheme of Administration. The part time teachers in these schools should be appointed after selection in accordance with the procedure prescribed in Government Order dated 10.8.2001 and that they should be paid their prescribed monetary benefits by the management from its own sources. The disciplinary proceeding and conditions of service should also be regulated in accordance with the Government Order dated 10.8.2001, and that wherever any teacher is aggrieved by termination of his services or any decision taken by the management, an appeal may be preferred to the District Inspector of Schools, who shall decide the same on merits. The decision of the District Inspector of Schools will be enforced on the institutions in accordance with the provisions of the U.P. Intermediate Education Act, 1921. The Director of Education has further provided in para 5 and 6 of his letter dated 22.11.2006 that all such institutions should be regularly inspected and that department shall ensure that the institution is following the prescribed curriculum and the course books. The District Inspector of Schools is also required to keep the details of such part time teachers in the unaided secondary schools, in his office.

30. The conditions of the recognition of the unaided educational institutions, not only provides for recognition for the purpose of preparing candidates for admission to the Board Examination but also various other provisions including the service conditions of the part time teachers appointed in such colleges u/s 7AA. The prescription of minimum age, qualification, method of appointment, constitution of selection committee, disqualification, emoluments, prescription of provident fund and life insurance schemes, disciplinary action, termination of services and provisions of an appeal to DIOS, and the enforcement of the orders of DIOS, resignation and termination of services with one month's notice or one month's pay, if the Board ceases recognition of any subject or any section, clearly indicate that the recognition by the Board is not only for preparing the candidates for Board Examination but also to provide for other regulatory measures including the service conditions of the teachers. The Government Order dated 10th August, 2001, as explained by the circular of the Director of Education Madhyamik dated 22.11.2006 issued u/s 7AA (3) of the Act, regulate the service conditions of part time teachers.

31. The recognised educational institutions are serving public purpose of providing education to the children. In *Miss. Mohini Jain Vs. State of Karnataka and others*, and *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, the Supreme Court recognised the right to education to be included in the right to life under Article 21 of the Constitution. The states have been held to be under a duty to impart education and particularly primary education having regard to the fact that the same is fundamental right within the meaning of Article 12 of the Constitution of India. In *Modern School Vs. Union of India (UOI) and Others*, *State of Bihar and Others Vs. Project Uchcha Vidya, Sikshak Sangh and Others*, and *Superstar Education Society Vs. Stats of*

Maharashtra and Others, the right to primary education is treated to be included in the right to life. Article 21A was inserted by 86th Amendment Act, 2002 w.e.f. 12.12.2002 providing that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such a manner as the State may by law determine. After eight years of the insertion of Article 21-A in the Chapter of Fundamental Rights, the Parliament has enacted the Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009) w.e.f. 26th August, 2009 recognising the right of child to free and compulsory education in Chapter-II; the duty of appropriate government, local authority in Chapter-III and responsibility of schools and teachers in Chapter-IV. The Act provides for reimbursement of the expenditure incurred to the extent of per child expenditure of the State or the actual amount charged of the child, whichever is less by the schools specified in Sub-clause (iv) of Clause (n) of Section 2, provided such reimbursement shall not exceed per child expenditure incurred by school specified in Sub-clause (i) of Clause (n) of Section 2. This right is in addition to obligation of such unaided school to provide for free education to a specified number of children on account of it having received any land, building, equipment and other facilities either free or cost or at such concessional rates. Section 2 (a) (n) (iv) and Section 12(2) of the Act of 2009 are quoted as below:

(n) "school" means any recognised school imparting elementary education and includes-

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority.

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

12. (2) The school specified in Sub-clause (iv) of Clause (n) of Section 2 providing free and compulsory elementary education as specified in Clause (c) of Sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of perchild-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed perchild-expenditure incurred by a school specified in Sub-clause (i) of Clause (n) of Section 2:

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of if having receiving any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

32. A writ petition under Article 226 of the Constitution is maintainable against the State, and authorities exercising powers of the State, statutory body, and instrumentality or agency of the state, a company financed and owned by the State, private body run substantially on State funding, a private body discharging public duty or public obligations of public nature and person or a body under liability to discharge any function under any statute, to compel it to perform statutory functions. A writ of mandamus may also be issued to any person or authority performing public duty owing positive obligation to the affected party. The Supreme Court as long back as in 1976 in *Executive Committee of Vaish Degree College, Shamli and Ors. v. Laxmi Narain and Ors.* (1976) 2 SCC 58, held that writ petition is maintainable against the Committee of Management of a society running an educational institution discharging statutory duties. Unlike a cooperative society or a society, which is not regulated or required to perform any statutory functions, an educational institution even if it is run by private society, admitted to the privileges of the U.P. Intermediate Education Act, 1921 by virtue of its recognition is required to perform statutory duties, and is thus amenable to a writ jurisdiction of the High Court under Article 226 of the Constitution of India. The benefits and privileges of the recognition u/s 7 of the Act are not confined only to prepare the students for admission to the Board Examination. These include as discussed above the requirement to follow the curriculum, course books, appointment of teachers in proportion to the number of subjects for which recognition has been granted, in the ratio of the number of students as well as service conditions of the teachers under the Government Order dated 10th August, 2001. These service conditions include essential qualifications, method of appointment, constitution of selection committee, benefits of service, disciplinary action which includes termination of services, resignation and appeal to DIOS. The Board can also give directions to the private institutions to terminate services of teachers, if any subject or any section is to be closed under its directions. Apart from these statutory functions, the recognised unaided educational institutions are also required to provide for free and compulsory education, if it has received any benefits from the State, and even otherwise on the reimbursement per child of the expenditure fixed in accordance with the provisions of the Act. The recognised but unaided schools were always under obligations to provide education, which is fundamental right of every child, now recognised specifically under Article 21A, and enforced by the Right to Free and Compulsory Education under the Act of 2009. In the circumstances, the judgment relied upon by learned Single Judge are distinguishable and are not applicable to the present case. The judgment in *M. K. Gandhi (Supra)* was rendered in respect of Delhi Public School recognised by the Central Board of Secondary Education, which was a society having its own bye-laws. Further in *General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrughan Nishad and Others*, the mill was held to be cooperative society registered under the U.P. Cooperative Societies act, 1965 with no control of the State in its functioning much less a deep and pervasive one. In *Army School, Gorakhpur v. Smt. Shilpi Paul* 2005 (1) ESC (All.) 342 the army school was not

held to be State under Article 12 of the Constitution, as it was run by welfare society.

33. We find substance in the submission of Shri Ashok Khare that the learned Single Judge did not appreciate that the educational institutions recognised under the U.P. Intermediate Education Act, even if it is unaided, has to carry out several statutory functions. The teachers of such institutions have statutory conditions of service prescribed under Government Order dated 10th August, 2001 issued in exercise of power u/s 7AA (3) of the Act. Now by the enforcement of Article 21A of the Constitution of India by the Right of Children to Free and Compulsory Education Act, 2009, all the schools including unaided schools are under statutory obligation to provide education to children. It is thus difficult to accept the submission that writs under Article 226 of the Constitution of India cannot be issued to such institutions. The opinion expressed by learned Single Judge, is contrary to law and is unacceptable.

34. The petitioner may have subscribe to the Acharya Niyamawali of April 1998, he is protected by the provisions of the Act, and regulations as well as service conditions made by the State Government under Government Order dated 10th August, 2001 in exercise of the statutory powers u/s 7AA (3) of the Act. The service conditions in Acharya Niyamawali, April, 1998 to the extent that they are inconsistent with the statutory service conditions made in exercise of powers under the Act of 1921 or the regulations made thereunder are not enforceable against the petitioner. The Bhartiya Shiksha Samiti, U.P. East Allahabad is private society registered under the Societies Registration Act, 1860. It is running several educational institutions in the assigned areas of Uttar Pradesh. Each school, however, managed by the society has separate recognition for the purposes preparing students for Board examinations, and also number of subjects. The teachers of these institutions have rights and protection of the service conditions, prescribed by the State Government. The Bhartiya Shiksha Samiti can have only that much control over its institutions, which is not inconsistent with the provisions of the Act and Regulations. The provisions of the Payment of Salary Act and the U.P. Secondary Education Service Commission Selection Board Act, 1982 are not applicable to the part time teachers appointed to the recognised but unaided institutions. The other provisions of the Act in so far as they have been made applicable to such institutions will continue to apply to them. The legal position in this regard was settled by Full Bench in Aley Ahmad Abdi v. District Inspector of Schools, Allahabad and Ors. 1976 AWC 721. There has been no departure from the legal position either in the Act or in the subsequent decision of the Supreme court.

35. So far as the transfer from one recognised unaided institution to another recognised unaided institution managed by another private society is concerned, we do not find any provisions under the Act of 1921 or Regulations made thereunder to restrict such transfers. The power to transfer a teacher from one institution to another is included u/s 16 G (2) (c) of the Act. The Regulations

prescribe the manner and mode of such transfer. The Regulations clearly prescribe, where they are made applicable to aided or unaided institutions. The Regulation 55 to 61 are quoted as below:

55. A permanent employee of an institution, other than minority institution, desiring his transfer to another institution may make an application for the purpose through the Head and Manager of the Institution to the Inspector of Schools or the Regional Inspectress, as the case may be. The Application besides other particulars of the applicant, shall contain the names of institutions, places or districts to which the transfer is desired. If the application is forwarded by a Manager, copies of the service book and character roll should be sent along with it.

After an application has been forwarded on intimation should be sent by the employee through the Head Master/ Principal and the Manager to the Inspector/ Regional Inspectress before April 1, each year intimating whether the request for transfer continues to hold good. Failing such intimation it would be presumed that the request has lapsed.

56. Application received by the Inspector or Regional Inspectress under Regulation 55 shall be forwarded by him/ her to the Inspector/ Regional Inspectress in whose jurisdiction the desired place of transfer lies or to the Manager of the institution if it lies within his/ her own jurisdiction.

57. The Inspector and Regional Inspectress shall maintain a register of applications for transfer received by them under Regulations 55 and 56.

58. Omitted.

59. No person employed in a recognised institution shall be transferred from that institution to any other institution unless-

(a) the Committee of Management for each such institution, by means of a resolution, duly passed in that behalf, concur in such transfer;

(b) the permission in writing of the Inspector is obtained before giving effect to such transfer.

59-A. Upon the transfer of any person under Regulation 59 the following consequences shall ensure, namely,-

(a) such person shall become an employee of the institution to which he is transferred and shall hold office by the same tenure, at the same remuneration and upon the same other conditions of service as he would have held if the transfer had not taken effect, and shall continue to do so, unless and until such tenure remuneration and other terms and conditions are duly altered:

(b) the seniority of such person in relation to other employees in the same cadre and grade serving in the said institution shall be subject to refixation in accordance with law;

(c) any services rendered by such person before the date of transfer in the institutions from which he is transferred shall, for the purpose of this regulation, be deemed to be services rendered under the institution to which he is transferred.

60. The order of appointment in the new institution of an employee transferred from another institution shall mention along with other particulars prescribed, the fact of his transfer and the name of the institution from which he has been transferred.

61. Within a month of the transfer of an employee from one institution to another the Manager of the former shall, under intimation to the Inspector of Regional Inspectress concerned, sent to the Manager of the latter institution the employee's Service Book, Character Roll, Leave Account, Provident Fund Account and other relevant papers, all duly posted up-to-date.

62. An employee shall not be entitled to travelling allowance on transfer. He will, however, be permitted journey time at the rate of one day for every 100 miles or part thereof subject to a maximum of three days. The salary for journey time will in the absence of agreement to the contrary, be paid by the institution which he joins on transfer.

36. Regulation 58 was omitted by notification dated 2.12.1975 and Regulation 59/59A were substituted under the said notification. Regulation 55 provides for an application of transfer by a permanent employee of the institution. The procedure prescribed for making application is that the request has to be forwarded through Head Master/ Principal to the Inspector/ Regional Inspectress before April 1st each year to be forwarded under Regulation 56 to the Inspector/ Regional Inspectress in whose jurisdiction desired place of transfer lies or to the Manager of the institutions, if it lies within his/ her jurisdiction. Regulation 57 provides for maintenance of register. Regulation 59A provides that the seniority will be refixed in accordance with law and the service rendered before the date of transfer in the institutions from where he is transferred to be deemed to be services rendered under the institution to which he is transferred. Employee's service book, character roll, leave account, provident fund and other papers are required to be duly posted upto date within a month of the transfer and forwarded with intimation to the Inspector or Regional Inspectress concerned to the later institution.

37. All these regulations clearly demonstrate that they are applicable to teachers serving in the aided institutions. The reference to permanent employee of the institution, permission of the Inspector of Schools, resolutions to be passed by the Committee of Management, fixation of seniority, transfer of the services, maintenance of records and traveling allowance are all in reference to the teachers receiving salary from the account of the State Government and their services are regulated by the statutory service conditions and the orders of the educational authorities.

38. In the present case, the service conditions of the part time teachers of the institution in question are regulated by the Government Order dated 10th August, 2001 to the extent the service conditions have been framed. They do not include transfer of teachers.

39. There is no restrictions on a educational society to run any number of educational institution. If it is not receiving any grant from the State Government, it can transfer its teachers from one institution to another without violating the conditions of such teachers prescribed by Government Order dated 10th August, 2001 made in reference to Section 7AA (3) of the Act of 1921. The Committee of Management is the employer of such teacher. It may under its bye laws bind itself with the condition of society, which govern and regulate the educational institutions and may be having many more educational institutions within its fold. The Act of 1921, regulations framed thereunder, the Government Order dated 10th August, 2001 do not restrict the transfer of teachers from one institution to another and such teachers have to abide by the terms and conditions of their employment to which they had agreed at the time of their appointment. The provisions of Acharya Niyamawali in such case to that extent so far as it is not inconsistent with the provisions of the U.P. Act of 1921, Regulations framed thereunder and the Government Order dated 10th August, 2001, will be applicable to such Principal/ Head Master or teachers.

40. We, thus, hold that the writ petition was maintainable, but that the petitioner was not entitled to writ of certiorari to quash the transfer order and to direct him to continue at Sonbhadra.

41. The special appeal is partly allowed to the extent of the maintainability of the writ petition. On merits of the transfer order the special appeal as well as the writ petition are dismissed.