
(2005) 09 AHC CK 0043
In the Allahabad High Court
Case No : Special Appeal No. 532 of 2005

Smt. Ram Devi

APPELLANT

Vs

Director Bal Vikas Sewa Avam Pushtahar, Bal Vikas Pariyojna
Adhikari and State of U.P.

RESPONDENT

Date of Decision : 01-09-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 226
Uttar Pradesh Intermediate Education Act, 1921 — Section 16F, 16F(1), 16G(3)

Citation : (2006) 1 AWC 168

Hon'ble Judges : Ajoy Nath Ray, C.J.; Ashok Bhushan, J

Bench : Division Bench

Advocate : Manoj Kumar Mishra and L.N. Shukla, for the Appellant;

Final Decision : Allowed

Judgement

1. Heard counsel for the appellant and learned standing counsel appearing for the respondents.
2. This appeal has been filed against the judgement and order dated 1.7.2005 passed by the learned Single Judge dismissing the writ petition filed by the appellant challenging the order dated 1.5.1999 passed by the Director, Bal Vikas Sewa Avam Pustahar holding the petitioner not entitled for promotion on the post of Mukhya Sewika.
3. Brief facts necessary to be noted for. deciding this appeal are;
4. The petitioner was engaged as Angan Bari Karyakatri on 2.6.1980. The petitioner since her engagement as Angan Bari Karyakatri continued to work and discharged her duties. The appellant applied for being considered for promotion on the post of Mukhya Sewika. The appellant was called to appear before the Selection Committee vide letter dated 7.8.1998, The appellant appeared before the selection committee and was considered. The result of promotion was declared in which list the name of the appellant was not included. The appellant

had earlier filed Writ Petition No. 6354 of 1999 along with three others Angan Bari Karyakatri claiming that the petitioners were entitled for promotion. This Court dismissed the writ petition as premature since no adverse orders were passed against the appellant at that time. This Court while dismissing the Writ Petition vide its order dated 9.3.1999 however, observed that the petitioners may raise their grievance before the respondents who may consider the case of the petitioners and pass appropriate order. After the judgement of this Court dated 9.3.1999 the representation was submitted by the appellant along with two other persons which were considered and rejected by the order dated 1.5.1999 of the Director, Bal Vikas Sewa Avam Pustahar. The Director in the order rejecting the representation observed that although according to the recommendation of the Selection Committee the appellant has secured more marks than the last selected candidate but since at the time of initial engagement of the appellant as Angan Bari Karyakatri her age was less than 18 years, she is not entitled to be considered for promotion. The Director also noted that vide Government Order dated 3.12.1997 the minimum age of Angan Bari Karyakatri has been raised from 18 years to 21 years. The Writ Petition was filed by the appellant along with two others challenging the order dated 1.5.1999. The Writ Petition has been dismissed by the learned Single Judge vide its judgement dated 1.7.2005 against which judgement this Special Appeal has been filed. The learned Single Judge relying on two judgements of this Court namely 2003 (4) Education Service Cases 2039 Smt. Sunaina Singh v. District Magistrate. Muz and Anr. 1971 A.L.J. 983 Arya Kanya Pathshala and Anr. v. Smt. Manorama Devi Agnihotri and Ors. dismissed the Writ Petition, It was observed by the learned Single Judge that the petitioners did not have any right for appointment therefore the order refusing to promote them cannot be challenged.

5. Learned counsel for the appellant in support of the appeal raised following submissions:-

(I) The appellant was entitled for promotion as Mukhya Sewika since she was found to have secured more marks than the candidates selected. The fact that at the time of initial engagement as Angan Bari Karyakatri in the year 1980 the appellant was less than 18 years of age, was not a relevant fact for denying the promotion.

(II) Two Division Bench judgements relied by the learned Single Judge namely Smt. Sunaina Singh (supra) and Arya Kanya Pathshala and Anr. (supra) are not attracted in the present case.

6. The learned standing counsel refuting the submissions of counsel for the appellant submitted that the appellant was engaged as Angan Bari Karyakatri which is not a service and is not governed by any statutory service rules hence the Writ Petition filed by the appellant was not maintainable. He further contended that the engagement as Angan Bari Karyakatri is only ad hoc and temporary and does not give any right to the appellant. Further, the engagement

of the appellant was under the World Bank Scheme.

7. Before proceeding to consider the submissions raised by the counsel for the appellant the submission of the learned standing counsel that no statutory service rules have been framed for Angan Bari Karyakatri hence the Writ Petition is not maintainable, needs to be considered first. In the present case, the appointment and functioning of the appellant as Angan Bari Karyakatri is not in question. The question before the Court was the denial of promotion to the appellant on the post of Mukhya Sewika in which selection the appellant was allowed to participate. From the order dated 1.5.1999 passed by the Director it is clear that the service conditions of Angan Bari Karyakatri are governed by the Government Orders issued from time to time. In the event no statutory rules have been framed for governing the service conditions of any employee it is open for the State to regulate the services conditions by Government Orders issued in exercise of executive power of the State under Article 162 of the Constitution of India. The apex Court in Sant Ram Sharma Vs. State of Rajasthan and Another, laid down the above proposition. Paragraph 7 of the judgement which is relevant for the present case is extracted below :-

(7) We proceed to consider the next contention of Mr. N. C. Chatterjee that in the absence of any statutory rules governing promotions of selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restriction not found in the rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provisions in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotion of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules and administrative instructions, but if the rules are silent on any particular point Government can fill up the gap;s and supplement the rules and issue instructions not consistent with the rules already framed."

8. In view of above the submission of the learned standing counsel that since no statutory rules have been framed governing the promotion on the post of Mukhya Sewika the Writ Petition is not maintainable, cannot be accepted.

9. Now the submission raised by the counsel of the appellant needs to be considered. There is no dispute that the appellant was engaged in the year 1980 as Angan Bari Karyakatri and has been working since then. The appellant was called for selection for promotion on the post of Mukhya Sewika and was considered by the Selection Committee. From the order dated 1.5.1999 passed by the Director it is clear that the appellant was awarded more marks by the Selection Committee than the candidates who were selected. The only reason given by the Selection Committee for non suiting appellant was that she was less than 18 years of age at the time of initial engagement as Angan Bari Karyakatri.

After the initial engagement of the appellant in the year 1980 she has been continuously working and discharging her duties as Angan Bari Karyakatri for about eighteen years when she was called by the Selection Committee. For promotion to a post a candidate has to fulfil the criteria as applicable on the date when he is being considered for promotion or on any other relevant date as required by Rules. It is not the case of the respondent that the appellant lacks any qualification for promotion. The appellant has gained experience on the post of Angan Bari Karyakatri of more than eighteen years. At the time when the appellant is being considered for promotion she cannot be non suited on the ground that at the time of her initial engagement as Angan Bari Karyakatri she was less than eighteen years of age when no action was taken against her for the last eighteen years and she was working on the post without any objection. It is not the case of the respondents that due to her being less than eighteen years of age at the time of engagement her services were terminated or any other action was taken. We are of the view that at time of consideration of promotion in the year 1998 i.e. More than 18 years after her initial engagement it is not open for the respondents to non suit her on the ground that she was less than eighteen years of age at the time of her initial engagement in the year 1980. The view which we are taking finds support from the observations of the apex Court while considering the question of confirmation in *Bhagwati Prasad Vs. Delhi State Mineral Development Corporation*, of the above judgement is extracted below :-

"6. The main controversy centres found the question whether some petitioners are possessed of the requisite qualifications to hold the posts so as to entitle them to be confirmed in the respective posts held by them. The indisputable facts are that the petitioners were appointed between the period 1983 and 1986 and ever since, they have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always aid the person to effectively discharge the duties and is a sure guide to assess the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard had harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications. "

10. The appellant was not liable to be unsuited on the ground that she was less than eighteen years of age at the time of her initial engagement in the year 1980. The Director in his order dated 1.5.1999 has clearly held that the marks allocated to the appellant by the Selection Committee were more than the candidate selected and we hold that the appellant was fully entitled to be promoted and her non promotion was illegal.

11. Two judgements relied by the learned Single Judge for dismissing the Writ Petition of the appellant also require to be considered. The first decision relied by

the learned Single Judge is of the case of Smt. Sunaina Singh (supra) which was a case of termination of ad hoc and temporary engagement of Angan Bari Karyakatri. The Division Bench held that Angan Bari Karyakatri was engaged on honorarium under the World Bank Scheme and had no right to the post. The Writ Petition filed by Smt. Sunaina Singh challenging her termination was dismissed on the ground that she had no right to the post and she was appointed on ad hoc temporary post on honorarium. The Division Bench upheld the judgement of the learned Single Judge. The Division Bench upheld the termination of service of Angan Bari Karyakatri on the ground that the appointment was temporary purely on ad hoc basis on the World Bank Scheme and cannot be termed as service. The present case is not a case of termination of engagement of Angan Bari Karyakatri. The present case is a case of promotion to the post of Mukhya Sewika on the basis of working as Angan Bari Karyakatri. The promotion on the post of Mukhya Sewika is governed by the Government Orders issued from time to time. The appellant has been denied promotion not on the ground that she has no right on the post of Angan Bari Karyakatri or she is not entitled to be considered but promotion was denied on the ground that she was less than eighteen years of age at the time of initial engagement. The ground on which the appellant was non suited for promotion is clearly erroneous ground as held by us in earlier part of this judgement. The promotion has been denied to the appellant by a decision taken by the Director, Bal Vikas Sewa Avam Pustahar who is an officer of the State Government. An order has been passed by the Director, Bal Vikas Sewa Avam Pustahar rejecting the claim of the appellant for promotion. In the Writ Petition the appellant had challenged the order of an Officer of the Government that is the Director, Bal Vikas Sewa Avam Pustahar. In above view the proposition laid down in the case of Smt. Sunaina Singh (supra) were not attracted in the present case and the Writ Petition of the appellant challenging her non promotion cannot be dismissed on the proposition as laid down in the case of Smt. Sunaina Singh (supra).

12. Further the Writ Petition filed by the appellant challenging the order of the Director, Bal Vikas Sewa Avam Pustahar was fully maintainable. The Director passed the impugned order as a public functionary exercising the powers given to Director under the Government Orders regulating the promotion on the post of Mukhya Sewika. As the Director has refused the promotion on arbitrary and unreasonable ground there is violation of the constitutional provisions of Articles 14 and 16 of the Constitution of India. The decision of a Government Officer i.e. the public functionary which is arbitrary can be challenged by the appellant by means of a Writ Petition under Article 226 of the Constitution of India. The apex Court in *Tikaram Vs. Mundikota Shikshan Prasarak Mandal and Others*, had considered the maintainability of the Writ Petition filed against an order of Director of Education regarding service of a teacher of a private school. The apex Court held that the Writ Petition is fully maintainable, the action of an officer of Government is always amenable to the decision of the High Court under Article 226 of the Constitution. Following was laid down in paragraph 3 :-

"3. In the instant case the appellant is seeking a relief not against a private body but against an officer of Government who is always amenable to the jurisdiction of the Court. The appellant has merely sought the quashing of the impugned order dated November 26y, 1976 passed by the Director on review setting aside the order of the Deputy Director. What consequences follow from the quashing of the above said order in so far as the Management is concerned is an entirely different issue. In the circumstances, the High Court was wrong in holding that a petition under Article 226 of the Constitution did not lie against the impugned order passed by the Director. We are aware of some of the decisions in which it is observed that no teacher could enforce a right under the School Code which is non statutory in character against the management. But since this petition is principally directed against the order passed in a quasi judicial proceedings by the Director, though in a case arising under the School Code and since the Director had assumed a jurisdiction to review his own orders not conferred on him, we hold that the appellant was entitled to maintain the petition under Article 226 of the Constitution. "

13. The proposition laid down by the apex Court in above case fully applies in the facts of the present case. The Writ Petition filed by the appellant is clearly maintainable.

14. Another judgement relied by the learned Single Judge in dismissing the Writ Petition of the appellant was the case of Arya Kanya Pathshala and Anr. (supra). The learned Single Judge while referring the said judgement observed that in the above case the Division Bench held that once the initial appointment was found to be illegal and contrary to the provisions of law the incumbent cannot claim the benefit of provisions of law. In the case of Arya Kanya Pathshala and Anr. (supra) Smt. Manorama Devi was appointed as Head Mistress by the Committee of Management. By the subsequent order of the Committee of Management her services were terminated. She challenged the termination order before this Court which was allowed by the learned Single Judge. Special Appeal was filed by the College. The learned Single Judge held that the order terminating her services was made without obtaining permission of the Inspectress of Schools hence the termination was invalid. The Division Bench noted the provisions of "Section 16F of the Intermediate Education Act, 1921 which provided that a teacher can be appointed with the approval of the Inspectress of Schools/ The Regional Deputy Director of Education. The Division Bench held that the provisions of Section 16F (1) of the Act providing for approval before appointment is mandatory provision. The Writ Petitioner was not appointed with the approval of the education authority, hence there was no necessity for obtaining approval before termination. The Division Bench held that the provisions of Section 16G (3) of the UP. Intermediate Education Act, 1921 is not applicable in the facts of that case. The appointment itself was not made with the approval. There cannot be any quarrel with the proposition laid down by the Division Bench in the case of Arya Kanya Pathshala and Anr. (supra). The said proposition however is not attracted in the present case. In the present case the engagement of the

appellant was made in the year 1980 and her services were never terminated on the ground that she was less than eighteen years of age at the time of her initial engagement rather the appellant was allowed to continue as Angan Bari Karyakatri and was also allowed to participate in the selection for promotion. When no objections were taken with regard to appointment of the appellant as Angan Bari Karyakatri for last eighteen years the same could not be taken at the time of consideration for promotion on the post of Mukhya Sewika for which post all eligibilities are fulfilled by the appellant.

15. We are of the view that the propositions laid down in both the above judgements relied by the learned Single Judge are not attracted in the present case and the learned Single Judge erred in dismissing the Writ Petition following the aforesaid two cases.

16. The appellant has made out case for grant of relief to her. We have held that the appellant is entitled to be promoted on the post in question and her non promotion on the ground as given in the order dated 1.5.1999 was wholly erroneous. The order dated 1.5.1999 as well as the judgement of the learned Single Judge are set aside. The appellant is held fully entitled to be promoted as Mukhya Sewika. We direct the respondents to pass appropriate order for promotion of the appellant in the event a vacancy still exist and if no vacancy exist in any future vacancy on the post of Mukhya Sewika.

17. The appeal is allowed to the extent indicated above. Parties shall bear their own costs.