

(2003) 01 RAJ CK 0065

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 3972, 4178, 4360 and 4902 of 2002 and 76 of 2003

Smt. Vimlesh Chouhan

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 17-01-2003

Acts Referred:

Rajasthan Civil Services (Service Matters Appellate Tribunal) Act, 1976 — Section 2
Rajasthan Panchayati Raj Act, 1994 — Section 97A
Rajasthan Panchayati Raj Rules, 1996 — Rule 289

Citation : (2003) 4 RLW 2111 : (2003) 2 WLC 492 : (2003) 1 WLN 167

Hon'ble Judges : P.C. Tatia, J

Bench : Single Bench

Advocate : S.K.M. Vyas and G.K. Vyas, for the Appellant; M.R. Singhvi, Kusum Rao and R.S. Saluja, for the Respondent

Final Decision : Dismissed

Judgement

TATIA, J.—Heard learned counsel for the parties.

2. These writ petitions are decided by this common judgment as there are common questions of facts and laws are involved in these petitions.

3. S.B. Civil Writ Petition No. 4178/2002 has been filed by the Rajasthan Shikshak Sangh (Sanadhya) through its National Secretary Shri Kishan Gopal Joshi; whereas other writ petitions have been filed by private individual persons challenging the order of transfer, passed by the District Education Officer (Primary Education), transferring the petitioners engaged in primary education in various schools situated at different places but within the State of Rajasthan.

4. According to learned counsel for the petitioners, the orders of transfer are without jurisdiction on the ground that though earlier subject of primary education was with the Education Department of the Government of Rajasthan but, the State Government decided to transfer the subject of Primary Education

in the State of Rajasthan to the Panchayati Raj Institutions of the Rajasthan, to give effect to the 73rd Constitutional Amendment by which item No. 234 (B.) has been amended. For this the State Government issued order on 29.4.2000. Copy of this order is Annexure A/1. Therefore, entire administration of primary education now vests with the Panchayati Raj Institutions and the Dist. Education Officer though appointing authority of the petitioners left with no jurisdiction to pass the orders of transfers of the teachers engaged in primary education. The State government thereafter, further issued number of orders which also shows that the State government had intention to transfer the entire subject of Primary Education to the Panchayati Raj Institutions and one of those order is the order dated 19.7.01 (Annex. A/2). This order dated 19 July 2001 was issued by the State government, when the State Government came to know that, in the matter of transfer of teachers engaged in Primary Education, the orders are being issued in violation to the guidelines issued by the State Government, therefore, the State Government directed various authorities to see that the guidelines issued by the State government be followed strictly and in case any order in violation of the guidelines is issued, than action be taken against the guilty officer under the provisions of C.CA Rules and in the case against the public representatives such action may be taken u/s 38 of the Rajasthan Panchayati Raj Act. It is relevant to mention here that the above order dated 19 July 2001 was issued by the Director, Panchayati Raj . Department, Government of Rajasthan.

5. According to learned counsel for the petitioners, not only this but, despite clear direction of the State government, the education Department officers did not stop issuing transfer orders, therefore, the State Government took a serious view and the State government issued another circular dated 28.8.2001 informing all concerned authorities that, to give effect to the decision of handing over work of primary education to the Panchayati Raj Institution, necessary amendments have been made in the Rajasthan Panchayati Raj Act, therefore, all work relating to the primary Education which was being done by the Chief Executive Officer/The local Officer now will be done by the District Primary Education Officer/Sub-Primary Education Officer but it does not mean that work of primary education has been separated from the panchayat Samiti. In fact, Primary Education Officer has also been included with Chief Executive Officer and both will work under the control and supervision of Zila Pramukh. By this circular new guidelines are issued, making it clear that at district level, the Chief Executive Officer and at Panchayat Level, the Development Officer shall be Chief Administrative Officer and they will have powers, including the power to give directions to the District Primary Education Officer and to take proposals in the matter of transfers, disciplinary and other administrative matters from District Primary Education Officer/Sub Primary Education Officer so that agenda for educational work may be prepared for taking decision by the District Establishment Committee and thereafter, the implementation of the decisions Committee and thereafter, for implementation of the decisions they may be sent to Primary Education Officer/Sub Primary Education Officer upon which,

necessary orders may be issued by the District Primary Education Officer/Sub Primary Education Officer. Copy of this circular is Annexure 1. Petitioners have placed on record yet another order dated 4th October 2002 issued by the Panchayati Raj (Primary Education) Department, prescribing the procedure to be adopted in the matter of transfers and postings of the teachers working in the primary education, therefore according to the learned counsel for the petitioner, the respondent No. 1 State as well as the Panchayati Raj Department of the State cannot take contrary stand to their own orders and circular. It is further submitted that, the intention to transfer the entire primary education to the Panchayati Raj Institutions can be achieved only by giving full power to the Panchayati Raj Institutions including the power of posting and transfers of the teachers in the schools without which object of transfer of primary education to the Panchayati Raj institution cannot be fulfilled, therefore, the transfer orders issued by the District Education Officer, in whom no power remains, to transfer teachers working in the primary School, are without jurisdiction and without authority of law.

6. Next it was contended by the learned counsel for the petitioners, that the teachers engaged in primary education, can be transferred only in accordance with the provisions of the Rule 289 of the Rajasthan Panchayati Raj Rules 1996. As per Rule 289 of the rules of 1996, transfer orders of the teachers can be issued by the Panchayat Samiti or Zila Parishad only after getting approval from the District Establishment Committee. The Rule 289 has not been amended by the State government to give power of passing order of transfer of teachers by the District Education Officer. Learned counsel for the petitioners relies upon the judgment of this court delivered in case of Rajasthan Shikshak Sang v. State and Ors. (1), decided on 2.4.02. In the above writ petition also, the petitioners challenged the orders of transfer made by the Director, Primary Education dated 12.10.2001 on the same ground of death lack of competence of the Director Primary Education, placing reliance upon the provisions of Rule 289 of the Rajasthan Panchayati Raj Rules, 1996. In the above case order dated 20 January 2001 conferring the power of transfer within the District upon the Director, Primary Education was considered. It was held in the above case that Government Order cannot be enforced unless the provisions of Rule 289 of the rules of, 1996 have also been amended to that effect. It appears that sufficient material was not placed before the learned single judge therefore, the learned single judge disposed of the writ petition as under :-

"Let the matter be considered afresh by the District Establishment Committee, Jodhpur and in case the District Establishment Committee is of the view that the provisions of Rule 289 has also been amended, the matter may be referred to Director. Primary Education and the said authority will pass the appropriate order of transfer. In case the District Establishment Committee comes to the conclusion that there is no amendment to the provisions of Rule 289, the Committee shall pass the appropriate order and sent it to the Vikas Adhikari or the competent authority for enforcement."

7. Learned counsel for Rajasthan Shikshak Sangh, Mr. M.R. Singhvi, Ms. Kusam Rao for the State, Shri R.S. Saluja for other respondents raised preliminary objections with respect to the maintainability of the writ petitions filed by all the petitioners on the ground of availability of effective alternative statutory remedy to petitioners under the provisions of Rajasthan Civil Services (Service matters appellate Tribunal) Act, 1976, According to the learned counsel's for the respondents, the petitioners have challenged the orders of their transfers. Admittedly the petitioners are the Government servants and could have preferred the appeals against the above orders before the Rajasthan Civil Services Tribunal but Instead of availing the statutory remedy available to the petitioners, the petitioners straightway preferred the writ petition under Article 226 of the Constitution of India, without assigning any reason for not filing appeals against the above orders and there exists no ground for not filing the appeals by the petitioners against the above orders, if the petitioners are aggrieved against the above orders of transfers. Mr. M.R. Singhvi relies upon the Judgment of the Hon'ble Supreme Court delivered in the case of Secretary, Minor Irrigation and Engineering Services v. Sahngoo Ram Arya and Anr. (2), when, the Hon'ble Supreme Court held that even where the Tribunal has no authority to grant the interim orders, even then it cannot be ground to bypass the State Tribunals. It is also submitted by the learned counsel for the respondent that the Primary Teacher is the post available in the Rajasthan Panchayati Raj Act 1994 as well as shown in the rules framed thereunder which are the rules of 1996. The petitioners in the present writ petitions are not the employees appointed under the above act of 1994 or rules of 1996 but they are the employees of the State and are appointed by following procedure which is provided under the Rajasthan Educational Subordinate Service Rules, 1971. Their appointing authority is the District Education Officer and who is competent to pass the order of transfer of the petitioners from one School to another school. The teachers appointed under the Panchayati Raj act and rules can become the employees of the State services only by their appointment as teacher under rules of 1971 as there is quota provided for giving appointment to the Panchayati Raj Primary Teacher on the post of Teacher under entry 9(A) of Section F of Schedule appended to the Rajasthan Education Subordinate Service Rules, 1971. Therefore, according to the learned counsel for the Respondents, there exists two sets of the teachers engaged in primary education, one is appointee under the provisions of the Panchayati Raj Act, 1994 and another is appointee under the Rules of 1971. Appointing authority of both the teachers are different and therefore, the Rule 289 of the rules of 1996 applies to the teachers appointed under the provisions of the Act of 1994 and the rules of 1996 and these Rules have no application over the petitioners teachers. It is also submitted that the judgment relied upon by the counsel for the petitioners delivered in S.B. Civil Writ Petition No. 4363/01 also goes against the petitioners, as the petitioners are relying upon the various circulars issued by the Panchayati Raj Department or the orders passed by the State Government which cannot override the statutory provisions of the rules of 1971.

8. Another preliminary objection with respect to the maintainability of the writ petition No. 4178/02, filed by the Rajasthan Shikshak Sangh (Sanadhya) is that the petitioner union is not registered union and therefore cannot maintain the writ petition in view of the Full Bench decision of this court delivered in the case of RSEB Accountants Association v. RSEB, where in the Full Bench of this court held that the writ petition filed by the unregistered association is not maintainable.

9. Learned counsel for the petitioners in rejoinder submitted that the petitioner union is registered union and he can place on record the copy of the registration certificate of the petitioner union. So far as appointment of the members of the petitioners union as well as other petitioners are concerned, the learned counsel for the petitioners frankly admitted that the petitioners are the Government Servant as defined in Sub-clause (c) of Section 2 of the Rajasthan Civil Service (service matter appellate Tribunal), Act 1976 and their services are being governed by the Rules of 1971, they are not the appointees under the Rajasthan Panchayati Raj Act 1994 or rules framed thereunder of 1996. Still, according to the learned counsel for the petitioners, since the State government has transferred the subject of Primary Education to the Panchayati Raj Institutions, therefore, only for the purpose of transfers, the petitioners are governed by the Rule 289 of the rules of 1996 otherwise there will be no meaning of transfer of primary education to the Panchayati Raj Institutions.

10. I perused the entire record of the writ petitions and considered the submissions of the learned counsel for the parties. First of all it is to be seen whether writ petitions of the petitioners are maintainable or not in view of the objections raised by the learned counsel for the respondents? So far as objection with respect to the maintainability of the writ petition filed by the Rajasthan Shikshak Sangh (Sanadhya Group) is concerned, it cannot be rejected because of the non-production of the certificate of registration of the petitioner union because it is stated by learned counsel for the petitioners that the petitioners union is registered union and there appears no reason to disbelieve the statement of the learned counsel for the petitioners. In the facts and circumstances of this case and because of the reason that this court is hearing the other writ petitions involving the same point where in, this court do not deem it proper to refuse right of audience to the petitioner of the S.B. Civil writ petition No. 4178/02.

11. The second objection raised by the learned counsels for the respondents is that, the writ petitions filed by the all the petitioners are not maintainable in view of the availability of the effective alternate statutory remedy of appeals against the impugned orders. For this according to the learned counsel for the petitioners, the availability of the alternate remedy is no absolute bar against the maintainability of the writ petitions. According to the learned counsel for the petitioners when the order is without jurisdiction, writ petition can be entertained by the High Court even when alternate remedy is available. Learned counsel for

the petitioners relies upon the judgment of the Hon"ble Supreme Court delivered in the case of Dr. (Smt.) Kuntesh Gupta v. MGT. of Hindu Kanya Mahavidhyalaya and (3). Whereas learned counsel for the respondents submitted that the respondents have raised the objection immediately and the writ petitions have not been admitted by this court. Even in cases where the writ petitions have been admitted without notice to the respondents and the respondents without any delay on their part raises objection of the non maintainability of the writ petition on the ground of availability of effective alternate remedy, the order of exparte admission cannot take away right of respondents to raise objection about maintainability of the writ petition. Here in these cases, according to the learned counsel for the respondents neither the orders passed by the District Primary Education Officer are without jurisdiction nor any reasons has been shown by the petitioners for not availing the statutory remedy of the appeal.

12. I considered the submissions of the counsel for the parties. It is clear from the rules of 1971 that the post of teacher is provided in Section F at S.No. 9 (a) of the Schedule appended to the Rajasthan Education Subordinate Service Rules, 1971. Learned counsel for the petitioner admitted that the petitioners were appointed under the rules of 1971 and they are Government servants as defined in Sub-section (c) of Section 2 of Rajasthan Civil Service (Service Matters Appellate Tribunal) Act, 1976. The Tribunal established under the rules of 1976 is competent to decide the service matters given in Sub-section (f) of Section 2 of the Act of 1976. The state Government issued a notification dated 25.2.1995 and included the transfer orders in the definition of service matters under Clause (viii) of Sub-section (f) of Section 2 of the Act of 1976, therefore, it is clear that all the orders of transfer challenged by petitioners are appealable under the Act of 1976. However, another post of primary teacher is available in the Panchayati Raj Act, 1994 and in the Rule 258 of the Rajasthan Panchayati Raj Rules, 1996. The primary teacher appointed under the Rajasthan Panchayati Raj Act 1994 and Rules 1996 are admittedly governed by the Act of 1994 and Rules of 1996 having their separate appointing authority. The teacher appointed under the Act of 1994 and the rules of 1996 is eligible to be appointed on the post of teacher under S.No. 9 (a) of Section F of the Schedule appended to the rules of 1971. For appointment to the post of teacher in the Rules of 1971, there is 75% quota reserved for the teachers of the Panchayati Samities. By getting appointment in this quota of 75% under the rules of 1971, the primary teachers of the Panchayati Raj Institution get the status of teacher under the rules of 1971, therefore, the teachers directly appointed under the rules of 1971 are the entirely different set of employees than the employees who are working on the basis of the appointment obtained under the Rajasthan Panchayati Raj Act, 1994 and Rules of 1996. It is not disputed by the learned counsel for the petitioners that the remedy of appeal is available to the petitioners against the orders of transfers which are under challenged in these writ petitions.

13. Still question survives, whether it can be held at the outset that the transfer orders passed by the concerned District Primary Education Officer are the

absolutely without jurisdiction because this is the only basis, on which the learned counsel for the petitioners submitted that even when remedy of appeal under the statutory rules is available to the petitioners, still in, view of the law laid down by Hon"ble Supreme Court referred above, the petition cannot be dismissed on the ground of availability of alternative remedy. So far as controlling and vesting of administrative power in the authorities under the rules of 1971 prior to Government order dated 29.4.2000 (Annex. A/1) is concerned, there is no dispute. It appears from the Judgment of this Court relief upon by learned counsel for the petitioner delivered in Rajasthan Shikshak Sangh's case SBCW Pet. No. 4363/01, order dated 29.4.2k (supra) was not under consideration on the basis of which it is alleged that the work of the Primary Education has been handed over to the Panchayati Raj Institution, therefore, nothing has been said in the above Judgment dated 2.4.2002, about the effect of this order dated 29.4.2000. In answer to the question, whether by this order dated 29.4.2000, the services of the petitioners appointed under the rules of 1971 stand transferred to the Panchayati Raj Institution, and whether the petitioners shall be governed by the Rajasthan Panchayati Raj Act, 1994 and Rules of 1996, learned counsel for the petitioners submits that the petitioners are still governed by the rules of 1971 for all purposes except for the purpose of transfer and posting in the schools situated within the jurisdiction of the Panchayati Raj Institutions. Therefore, very foundation of contention of learned counsel that the authority who passed the impugned transfer orders inherently lack jurisdiction becomes doubtful. Learned counsel for the petitioner relies upon the circulars dated 29.4.2000 (referred to above), dated 19.4.2001 (Annex. A/2), dated 4.10.2002 (Annex. A/3) and the circular dated 28.8.2001 (Annex. 1) and submits that on the basis of above circulars, the power of the transfer of the teachers working in the primary schools stand transferred to the Panchayati Raj Institutions, whereas, the Judgment of this court delivered in the case of Rajasthan Shikshak Sangh (supra), itself says that Government orders cannot be enforced against the statutory rules. Apart from it, from a bare reading of the circular dated 28.8.01 (Annex. 1) which was heavily relied upon by learned counsel for the petitioners and the amendments which were made in Sections 2, 23, 35, 79, 81-A, 82, 84, 90 and 91 in the Rajasthan Panchayati Raj Act, 1994 and insertion of Section 97-A, it is clear from the amendment made in the Act of 1994 that "Block Elementary Education Officer" is also included in the Section 33 of the Act of 1994. In circular dated 28.8.01 in the guide line No. 1 it is mentioned that the Chief Executive Officer at the level of State and development Officer at the level of Panchayat Samiti will be Secretary and Administrative Officer who will have power to give instructions and may prepare the agenda for consideration the matters of transfer, disciplinary and other administrative matters by the Committees (Establishment Committee), and after getting the decision from the committee, for implementation will be sent to the District Primary Education Officer/Sub-Primary Education Officer. These Education Officers will pass the order of implementation, therefore, by this circular also, it appears that as per the guide lines, District Primary Education officer can pass

the necessary order of transfer of the teachers but in view of the Judgment of this court delivered in Rajasthan Shikshak Sangh (supra), this circular dated 28.8.01 is also Government order and not a statutory rule. The petitioners have not placed on record any of the government decision wherein it is said that the District Primary Education Officer, who is appointing authority of the petitioner teachers in view of the order dated 2.11.2000, copy of which is placed on record as Annex. R/4, shall have no power to pass orders of transfers for the teachers appointed under the rules of 1971.

14. None of the circular placed on record by the petitioners specifically provide that teachers, though appointed under the rules of 1971, can be transferred by following the procedure provided under the Act of 1994 and Rules of 1996 despite the fact that they are not appointed by the rules of 1996. All questions; like what is the effect of order dated 29.4.2000 (Annex.A/1) and other orders issued by the Govt. time to time qua the rules of 1971?, which admittedly covers the service conditions of the petitioners, and whether there can be two set of teachers in one primary school, one covered by the rules of 1971 and another set of teachers governed by the rules of 1996? Whether the appointing authority is deprived of his authority of administration including his right to transfer his subordinate by any of circular issued by the State Govt.? Whether only right to transfer alone can be given to any other authority, keeping the rest of power with appointing authority under the rules of 1971. Without recording findings on above questions it cannot be straight way held that the District Primary Education Officer lacks inherently in jurisdiction in passing the orders of transfers.

15. In the Judgment of Rajasthan Shikshak Sangh (supra), the writ petition appears to have been decided by the learned single Judge on the basis of the facts and law which were placed and argued before the learned single judge and the facts referred above even circulars which are placed on record in these petitions were not placed and argued by both the parties of that petition. Therefore, learned Single Judge of this court rightly observed that the Government orders cannot override the statutory provisions of law. Therefore, the above Judgment appears to have application to the teachers appointed under the Act of 1994 and Rules of 1996 and their transfers, which are not subject matter in these writ petitions, certainly can be done by following the procedure as provided under the Rules of 1996 particularly Rule 289 leaving open the issue whether the teachers appointed under the rule of 1971 will also be governed by the rules of 1996?

16. Conclusion of above discussion is that at the very outset, without complete enquiry with respect to the effect of provisions of Rules of 1971 and comparing with it the provisions of Act of 1994 and Rules of 1996 and finding out the effect of the order dated 29.4.2000 by which the subject of primary education has been transferred to the Panchayati Raj Institutions, it cannot be said that the orders passed by the District Primary Education Officer are patently and inherently without jurisdiction. Therefore, the writ petitions filed by the petitioners in the

light of Judgment of Supreme Court delivered in the case of Secretary, Minor Irrigation and Rural Engineering Services v. Sahmgoon Ram and Ors., wherein Hon"ble Apex Court held that the statutory remedy of appeal provided before the Tribunal cannot be by passed even in the cases where the Tribunal has no power to grant interim relief, the writ petitions are not maintainable on the ground of availability of effective alternative remedy.

17. Therefore, the Writ petitions of the petitioners are dismissed. No order as to the costs.