**(2017) 02 AHC CK 0218**

**In the Allahabad High Court**

**Case No :** 59 of 2017

State Of U.P. Thru Secy. And 2 Others — APPELLANT

Vs

Keshav Pandey And Another — RESPONDENT

**Date of Decision :** 03-02-2017

**Acts Referred:**

**Citation :** (2017) 02 AHC CK 0218

**Hon'ble Judges :** V.K. Shukla, Sangeeta Chandra

**Bench :** Division Bench

**Advocate :** Bhola Nath Yadav, Indra Raj Singh

# Judgement

1. This appeal has been filed by the Stateappellants challenging the judgment and order dated 04.04.2016 passed by the Hon''ble Single Judge, wherein the Hon''ble Single Judge has directed that the petitioner shall be entitled to pension under the provisions of UP State Aided Educational Institutions Employees Contributory Provident Fund, Insurance and Pension Rules, 1964 (herein after referred to as Pension Rules of 1964) and in case, the management contribution has not been deposited, the same shall be deposited within one month from the date of passing of the order. It has been further directed that the Authorities shall proceed to compute the pension of the petitioner taking into account the total length of service rendered by them as qualifying service in the light of judgment rendered in Writ A No. 28679 of 2009 (Krishna Prasad Yadav vs State of U.P.) and in Civil Appeal No. 3989 of 2006 (State of U.P. and

others vs Pawan Kumar Dwivedi and others) decided by the Supreme Court. A further direction has been made that pension should be computed and paid to the petitioner from the date of superannuation within a period of two months from the date of production of certified copy of the judgement and order dated 04.04.2016. The orders passed by the Deputy Director of Education and District Inspector of Schools, Mau rejecting the claim of petitioner for salary of Trained Grade Assistant Teacher have also been salaried.

2. The facts of the case as pleaded by the learned Standing Counsel on behalf of the State appellants are that the respondent-petitioner was initially engaged as untrained teachers in attached primary section of Bhadaon Inter College, Thalaipur, District Mau on 10.09.1978 and since the petitioner was not being paid salary of trained grade in terms of the Government Order dated 21.10.1994, the respondent-petitioner made repeated representations, which representations were not being decided and therefore, petitioner filed Writ Petition No. 25292 of 2014 (Keshav Pandey vs Joint Director of Education, Azamgarh region Azamgarh and three others), which was finally disposed of by this Court on 02.05.2014 directing the District

Inspector of Schools, Mau to take an appropriate decision in the matter. Thereafter, the Joint Director of Education, Azamgarh, Region Azamgarh passed an order dated 07.02.2014 rejecting the representation of the respondentpetitioner for salary in trained grade and in consequence thereof the District Inspector of Schools, Mau also passed an order dated 21.04.2014 declining the fixing of salary of the petitioner in Trained Grade. The respondentpetitioner thereafter filed Writ Petition No. 29332 of 2014 (Keshav Pandey vs Joint Director of Education and three others), which has been decided by the Hon''ble Single Judge by means of impugned judgment and order dated 04.04.2016.

3. It has been argued by the State-appellants that a counter affidavit has been filed in the aforesaid writ petition and also a supplementary counter affidavit disputing the claim of the respondentpetitioner for trained graduate grade on the ground that when the respondent-petitioner was appointed as Assistant Teacher, the primary section of Bhadaon Inter College, Thalaipur, District Mau, was unaided, although recognized. Due to refusal of the State to take the Institution under grant in aid, the said Institution filed Writ Petition No. 24344 of 2006 (Committee of

Management, Bhadaon Higher Secondary School, Mau vs State of U.P. and others) wherein this Court passed an order dated 04.05.2006, in compliance of which the Government vide order dated 15.05.2007 directed for payment of salary to the teachers working in attached primary section. In pursuance of the aforesaid Government Order dated 15th May, 2007, the District Inspector of Schools, Mau issued an order/letter No. 3859-64/2008 dated 24.04.2008 granting approval for payment of salary of untrained grade to the respondentpetitioner and others.

4. In the counter affidavit, it was clearly stated that the case of the petitioner was not covered under the Government Order dated 21.10.1994, which extended the exemption of training and provided benefit of trained grade salary to those teachers of attached primary section of Intermediate College, who had completed ten years of service on or before 01.09.1994 or only two years of their service had been left before retirement of such teachers. Instead the respondent-petitioner was governed by the provisions of Government Order dated

 

09.12.2003, which provided that untrained Assistant Teachers working in attached but unaided primary sections of recognized and aided Secondary Institution, who had completed five years of service on before 31.12.2003 or only two years of service remained before retirement could be considered for exemption from training with certain conditions. As the petitioner'' case did not fall within the parameters fixed by the Government Order dated 09.12.2003, his case was rejected by Joint Director of Education, Azamgarh on 07.02.2014 and by the District Inspector of Schools on 21.01.2014.

5. It has been contended on behalf of the Stateappellants that without looking into the contents of the counter affidavit and supplementary counter affidavit, the aforesaid writ petition was allowed by the Hon''ble Single Judge. It has also been stated that the Hon''ble Single Judge has relied upon the judgment and order dated 26.08.2015 rendered by this Court in Writ Petition No. 30742 of 2013 (Shesh Ram vs State of U.P. and others), which judgment was allowed in terms of judgment rendered in Writ A No. 28679 of 2009 (Krishna Prasad Yadav and others vs State of U.P.). The aforesaid judgment in the case of Shesh Ram had been considered by Division Bench of this Court in the case of U.P. Senior Basic Shiksha Sangh vs State of U.P. and others reported in 2016 (1)

ADJ 667 (also filed as annexure No. 8 to the paper book), in which after considering the relevant law on the subject, this Court had come to the conclusion that teachers appointed prior to 1st April, 2005 in unaided Institutions would not be entitled to avail the benefit of Pension Rules, 1964. The Uttar Pradesh State Aided Educational Institution Employees Contributory Provident Fund, Insurance, Pension Rules, 1964 being not applicable to the school in which the respondentpetitioner was working, the primary section of which was not under grant in aid, he could not have been extended the benefit of depositing the managerial contribution by the Hon''ble Single Judge in the impugned judgment and order.

6. It has also been argued on behalf of the State-appellants that another Division Bench of this Court in Special Appeal (Defective) No. 560 of 2016 and connected matters in State of U.P. vs Mahavir Singh Yadav and others and has come to the conclusion that striking down cut off date prescribed by the State Government for depositing the management contribution under the provisions of 1964 Rules could not have been done by the Hon''ble Single Judge relying upon the judgement rendered in the case of Shanti Solanki vs State of U.P. in Writ Petition No. 75746 of 2005 decided

on 06.09.2016. The view taken by Hon''ble Single Judged in the case of Budhi Ram vs State of U.P. and another, 2013 (1) ADJ 254 has been affirmed as a correct position in law.

7. The learned counsel for the respondentpetitioner has controverted the arguments made on behalf of State appellants by pointing out the supplementary affidavit filed by him in the writ petition before the Hon''ble Single Judge,

 

wherein a hand written certificate given by the Principal of the school has been filed, wherein it was stated that the primary section of the Bhadaon High School was recognized on 28.01.1964 and the High School section was recognized on 04.07.1964. The Intermediate section was recognized on 02.07.1970. The High School section was taken under grant in aid on 15.04.1965 and the Intermediate section was taken under grant in aid on 16.08.1971 and name of the school was included list of 393 Secondary Schools for boys whose attached primary sections had been taken under grant in aid for payment of salary of teachers and others employees vide Government Order issued on 05.09.1989.

8. It has been argued by the learned counsel for the respondent-petitioner that when the supplementary affidavit was filed by the petitioner,

the Writ Court had granted time to the State Authorities to file an affidavit of rebuttal, but the supplementary counter affidavit filed on behalf of the District Inspect of Schools, district Mau was silent on this fact, but only stated that the contents of paragraph Nos. 3 and 4 of the supplementary counter affidavit are matters of records and did not require any comment.

9. The question before this Court for consideration in this appeal is whether or not the primary section of Bhadaon Inter College, Thalaipur, Mau had been taken under grant in aid list on 05.09.1989 i.e. before 1st April, 2005, thus entitling the respondent-petitioner to be given the benefit of Pension Rules of 1964 ?

10. Another question for consideration before this Court is whether in the writ petition, which was filed challenging the orders dated 7.2.2014 and 21.4.2014 passed by the respondent Nos.1 and 2 rejecting the petitioner''s representation for grant of exemption from training and for a mandamus to fix his salary in the training grade of Assistant Teacher from the due date and to pay the difference of arrears of salary, the Hon''ble Single Judge could have ignored the pleadings of record and instead of deciding the issue, whether the Government order dated 21.10.1994 was

applicable in the case of the petitioner or the Government order dated 9.12.2003 was applicable for fixing his salary and could have issued a mandamus to the authorities to not only fix the salary in the trained grade with retrospective effect, but also hold that the petitioner is entitled to pension under the provisions of the Pension Rules, 1964 and direct that in case, the management contribution is not deposited, then, the same shall be deposited and also direct that the pension be computed taking into account the total length of service rendered by him as an untrained teacher in an unaided primary section of a school for the purpose of qualifying service for pension and further direct that the said pension so computed be paid to the petitioner from the date of superannuation within the prescribed time as fixed by the Court.

11. We shall consider the Government Order dated 21.10.1994, first, on which the respondentpetitioner had based his claim and which has been filed by the petitioner as an Annexure-4 to his writ petition. The said Government Order

 

dated 21.10.1994 has been addressed to the Director Secondary Education and Director Basic Education and the subject as mentioned at the beginning of the order relates to grant of exemption from B.T.C training or giving facility of in service training to

such teachers, who were working either in Basic or Upper Basic Schools run by Basic Shiksha Parishad or in schools, which were private yet recognized and aided. The Government had decided that all those teachers, who had rendered continuous service of 10 years on or before 1.9.1994 or who had only 2 years of service left before their superannuation, may be granted exemption from training and such exemption from training should be granted by the concerned Regional Assistant Director Basic Education or Regional Deputy Director Education.

12. From a bare perusal of the said Government Order filed at Page 100 of the Paper Book, it is evident that the said Government Order was issued for the benefit of those teachers, who were working either in Basic Shiksha Parishad run schools or in private schools, which were recognized and aided and attached to secondary schools.

13. The Government Order dated 9.12.2003, which has been relied upon by the respondent Nos.1 and 2 to the writ petition to defeat the claim of the respondent-petitioner has also been filed by the petitioner as Annexure No.11 to his writ petition. A bare perusal of Annexure No.11 would show that it relates to teachers, who were working in schools, whose primary section was unaided,

but attached to secondary schools, which received aid. For these teachers the Government had decided that all those, who were untrained but had rendered 5 years continuous service as on 31.12.2003 or whose superannuation was due within 2 years would be granted exemption from training.

14. The petitioner''s case as setup in the supplementary affidavit filed before the Hon''ble Single Judge was based on hand written letter sent by the Principal of the Institutions, which said that the primary section of Bhadaon Inter College, Mau had been recognized on 28.1.1964 and was brought under the purview of grant in aid list w.e.f. 5.9.1989. The authorities case as set up in the counter affidavit as well as supplementary counter affidavit is that because the primary section was unaided, and because it was not being paid salary reimbursement, the Committee of Management of Bhadaon Inter College, Thalaipur, Mau had filed Writ Petition No.24344 of 2006, which was disposed of with the direction to give such benefit by this Court on 4.5.2006. The State Government in compliance of the judgment and order dated 4.5.2006 had issued an order on 15. 5.2007 for payment of salary to teachers working in the attached primary school and in pursuance thereof the District Inspector of Schools

had issued the order dated 24.2.2008 by means of which some teachers of the institution were given salary. In the said order issued by the District Inspector of Schools specific mention has been made that Sri Keshav Pandey along with 7 other teachers, who were untrained and who were working in the attached primary section would only be given a salary of untrained teacher. This order issued on 24.2.2008 by the Deputy Inspector of Schools was not challenged by the respondent-petitioner in his writ petition. Instead, the petitioner made representations on the basis of Government Order dated 21.10.1994 alleging that he had rendered 10 years of service much before the cut off date i.e. 1.9.1994, as he was initially engaged by the school in question on 10.9.1978. The representations were forwarded to the Competent Authority and the Competent Authority, in this case the Joint Director of Education, Azamgarh Region, Azamgarh rejected the claim of the petitioner on the ground that his case was not covered by the said Government Order dated 21.10.1994 but was covered under the Government Order dated 31.12.2003. Consequential orders were passed by the District Inspector of Schools. Both these orders were challenged in the writ petition filed in 2014.

15. The petitioner had retired on 30 June 2014 and this fact was taken into account by the Hon''ble Single Judge when the case was taken up for final hearing on 4.4.2016. The Hon''ble Single Judge in his judgment and order dated 4.4.2016 has mentioned that the respondent-petitioner was appointed in the attached primary section of the Institution in question and he had completed 10 years of regular service in untrained grade on 11.9.1988 prior to the cut off date i.e. 1.9.1994 mentioned in the Government Order dated 21.10.1994. Thereafter, he was held to be entitled to exemption from training and grant of salary in the trained grade.

16. The Hon''ble Single Judge also considered the judgment rendered in the case of Shesh Ram (Supra) and Krishna Prasad Yadav (Supra) and also the judgment rendered by the Hon''ble Supreme Court in the case of State of U.P and others Vs. Pawan Kumar Dwivedi and others. After quoting Paragraphs 44 and 46 of the aforesaid judgment of the Hon''ble Supreme Court, wherein the Hon''ble Supreme Court has quoted with approval the argument made on behalf of the respondents therein that Junior Basic Schools i.e. Class I to V and Senior Basic Schools i.e. Class VI to VIII, either separately or together, are under the same Board that is the Board of Basic Education as per the 1972 Act. As such the

Payment of Salaries Act 1978 meant for Junior High Schools only as per the State-appellants contention therein, cannot be said to be a correct interpretation of the law.

17. It is not clear as to how the Hon''ble Single Judge came to the conclusion that the petitioner working in an unaided primary section (Junior Basic School) attached to an aided Secondary School could be said to have been covered by the Government Order dated 21.10.1994, on the basis of the judgment rendered in the case of Pawan Kumar Dwivedi alone.

18. Infact, there is no finding recorded by the Hon''ble Single Judge at all regarding the applicability of Government Order dated 9.12.2003 to which the respondent Nos. 1 and 2 to the writ petition, had adverted to in their orders

 

impugned dated 7.2.2014 and 21.4.2014. In the operative part of the judgment impugned, the direction for the petitioner to be paid salary of trained grade and for payment of pension to him taking into account his whole services have been issued, without any discussion.

19. Perhaps the Hon''ble Single Judge was swayed by the observations made in the case of Pawan Kumar Dwivedi (supra), wherein the Hon''ble Supreme Court has held that primary section attached to the Junior High School and High

Schools already under grant in aid shall be treated to be part and parcel of such schools and therefore, covered under the Payment of Salary Act, 1978 or Payment of Salary Act, 1971.

20. After the declaration of the law in the case of Pawan Kumar Dwivedi with regard to the attached primary section of Junior High Schools, the Hon''ble Single Judge may have come to the conclusion that the petitioner being untrained teachers in primary section of Bhadaon Higher Secondary School, Thalaipur, Mau of which High School and Intermediate sections had already been extended grant in aid on 15.04.1965 and 16.08.1971 respectively, would also be entitled to the benefit of the Government Order dated 21.10.1994, but such a finding has not been recorded by the Hon''ble Single Judge in specific terms.

21. If the Hon''ble Single Judge was swayed by this fact that the primary section of Bhadaon Higher Secondary School should be treated to be under grant in aid list w.e.f. 05.09.1989 as mentioned in the supplementary affidavit of the petitioner, then it is inexplicable and beyond comprehension as to why the Committee of Management was impelled to file a Writ Petition No. 24344 of 2006 praying for grant of salary to its teachers of the primary section under the

Payment of Salary Act, 1971, which writ petition was decided on 04.05.2006 and in compliance of the judgment and order dated 04.05.2006, the Government had issued the order dated 15.05.2007 bringing the primary section of the school in question under grant in aid list.

22. The question also needs to be considered as to whether declaration of law as given in the case of Pawan Kumar Dwivedi (supra) by the Constitution Bench judgement dated 2nd September, 2014 would apply retrospectively to all such primary sections attached to Junior High Schools and Higher Secondary Schools to make such primary sections entitled for being considered under grant in aid list with effect from 1989 without adjudication of their individual cases by the authorities concerned.

23. All these issues with regard to whether primary section of Bhadaon Inter College, Mau (earlier Bhadaon Higher Secondary School, Mau) was under grant in aid list w.e.f. 1989 itself and thereafter its teachers were covered by the Government Order dated 21.10.1994 entitling untrained teachers such as the petitioner salary in the trained grade after completing 10 years of service before the cut off date mentioned in the said Government Order, have not been

 

specifically considered by the Hon''ble Single Judge at all.

24. Moreso, with regard to law settled by the Division Bench of this Court in the case of U.P. Senior Basic Shikshak Sangh vs State of U.P. and others, 2016 (1) ADJ 667 which affirms the observations of the Hon''ble Single Judge in the case of Budhi Ram vs State of U.P. 2013 (1) ADJ 254, there are no observations in the judgment impugned, and perhaps it escaped the notice of the Hon''ble Single Judge that it has already been held by this Court that all teachers of un-aided Institutions being not covered by the provisions of Pension Rules, 1964 earlier, could not be granted the benefit of pension after such schools were taken under grant in aid. Since after 01.04.2005, the New Pension Scheme became applicable, and the earlier Pension Rules, 1964 were not applicable whether it could be permitted to teachers working in unaided private Institutions to deposit managerial contribution under the earlier Pension Rules, 1964 by the Hon''ble Single Judge as has been done in the judgment under appeal dated 04.04.2016; is an issue which needs also to be considered whether the judgment in the case of Smt. Shanti Solanki striking down the cut off date for deposit of managerial contribution under the provisions of 1964 Rules could also be followed for the benefit of teachers of unaided primary section of aided Junior Basic or Higher

Secondary School is also a question that needs to be considered.

25. Since the petitioner had come praying for limited relief for grant of trained grade salary and exemption from training and no pleadings in regard to these issues/questions as have cropped up for consideration before us can be found in writ petition were before the Hon''ble Single Judge, the matter needs reconsideration afresh by the Hon''ble Single Judge.

26. Consequently, the judgment and order dated 04.04.2016 is set aside and the writ petition is restored to its original number with liberty to the petitioner to move appropriate amendment application before the Hon''ble Single Judge for finding on such issues as have been discussed aforesaid. The special appeal is disposed of.