
(2002) 04 AHC CK 0063

In the Allahabad High Court

Case No : C.M.W.P. No. 12879 of 2001 with 31 other writ petitions

Uma Shanker Singh and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 05-04-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2002) 3 AWC 1871 : (2002) 2 UPLBEC 1356

Hon'ble Judges : S.R. Singh, J;D.R. Chaudhary, J

Bench : Division Bench

Advocate : Aditya Kumar Singh, P.K. Singh and Ashok Khare, for the Appellant;

Final Decision : Partly Allowed

Judgement

S.R. Singh, J.—This bunch of 32 petitions was heard together for convenient disposal by a common judgment in view of the fact that these writ petitions raise common questions of law and are based on a common cause of action.

2. A Non-Formal Education Scheme was initially introduced by the Central Government in the year 1979-80 for imparting education to children in the age group of 6 to 14 years, who either did not attend any school or who after joining left the school before completing primary education. Initially the expenses incurred in the scheme were shared by the State Government and the Central Government in the ratio of 50 : 50 but later on, it was revised to 40% : 60% and subsequently 10% : 90% in the case of girl students. The scheme was implemented in the State of U, P. under the Director of Education (Basic) U. P. It is not disputed that in order to successfully run the scheme, certain posts including the posts of supervisors were created at various levels vide Government Order No. 6764/15 (5-81-562/70) dated 11.8.1981, to supervise the work at various centres. Appointments to posts of supervisors were made vide Government Order dated 11.2.1982 (Annexure-1 to the Writ Petition No. 12879 of 2001). The scheme itself being temporary, appointments were made purely on temporary and on ad hoc basis liable to be terminated at any time

without notice. Later on in the year 1987-88, the aforesaid scheme was modified and it was given the share of a project and in order to meet the requirements of the project known as Non-Formal Education Project, various posts were created by Government Order No. 1625/ 1515/ 88-351-07 dated 30.3.1988, copy of which has been annexed as Annexure-CA-1 to the counter-affidavit filed in Writ Petition No. 12879 of 2001. The posts so created included the post of Project Officer at project level and since the project itself was temporary in nature, the Government order aforesaid clearly visualised that all the posts would be temporary liable to be abolished at any time without any prior information.

3. It is not disputed that posts other than the posts of Project Officer (Pariyojana Adhikari) had their equivalent posts in the education department under the Directorate of Education, U. P. and accordingly, all the posts other than posts of Pariyojana Adhikari were filled on deputation by transfer of officers/officials holding equivalent posts in the regular education department and since the post of Project Officers did not have any equivalent posts in the regular department, the Government vide Order No. 2930/1515/88-15/88 dated 15.7.1988 appointed a selection committee empowered to select Project Officers. The essential qualification for the posts were prescribed in the Government order aforesaid with a stipulation that persons appointed as Project Officers would be bound to work for at least three years and further that on cessation of the project, their services would automatically come to an end. Supervisors already working under the old scheme of non-formal education were made eligible for being considered for appointment to the post of Project Officers with a stipulation that on the project coming to an end, the services of the Project Officers would automatically be terminated without any prior notice. All the persons, who applied and were selected for appointment gave an undertaking to the effect that on being selected for appointment to the post of Project Officers, they would continue on the post at least for a period of three years and that in the event of the project coming to an end, their service would automatically stand terminated. Indisputably, there was no mention in the Government order by which the posts of Project Officers were created that the posts of Project Officers were ex-cadre posts but in the appointment letters dated 13.8.1999 and 27.2.1991, the appointees were described as if on deputation. It is also borne out from the material on record that most of the petitioners were initially appointed for the First time as supervisors under Non Formal Education Scheme or Adult Education Scheme excepting some who were although selected as "Sub Deputy Inspectors of Schools (petitioners of Writ Petition No. 12851 of 2001 and petitioners of Writ Petition No. 17100 of 2001) ; Assistant Teacher in L.T. grade (petitioners of Writ Petition No. 21308 of 2001) ; Agriculture Extension Teacher (petitioners of Writ Petition No. 13906 of 2001) ; and Lecturer (petitioner Nos. 1 to 9 of Writ Petition No. 17100 of 2001) in the regular education, department but granted appointment as supervisors in the Non-Formal Education Scheme and later on as Project Officers. The writ petitioners were working as Project Officers (Non-Formal Education) in the pay scale of Rs. 6,500-10,500 as on 31.3.2001.

4. Posts of Project Officers were admittedly created at the project level vide order dated 30.3.1988 while posts of Additional Director of Education (non-formal). Deputy Director of Education (non-formal) were enacted at the Directorate level, and at the level of State Institute of Education, post of Senior Advisers while at the regional level post of officer on special duty and at the district level post of district Non-Formal Education Officer were enacted. Besides the above posts, class III and class IV posts were created at every level of the Project. The Non-Formal Education Project so started continued till 31.3.2001 whereafter the Central Government stopped funding the project and disbanded the same. The State Government, however, came out with a revised project under the name of "Education Guarantee Scheme and Alternative and Innovative Education" w.e.f. 1.4.2001 but the Non-Formal Education Project had to be abandoned resulting in repatriation of such officers/employees, who were drawn from the regular line on deputation and who were holding lien on permanent posts and termination of those who were not holding any lien on any permanent post. The petitioners did not hold any lien on any posts as they were initially appointed as supervisors under Non-Formal Education Scheme which posts came to be abolished but they were selected and appointed on the post of Project Officers under the Non-Formal Education Project itself. Most of the petitioners were issued appointment letters dated 13.8.1989 or 27.2.1991. They were shown in the appointment letters as if appointed on deputation. A writ petition being Civil Misc. Writ Petition No. 42806 of 2000 came to be filed by Pradeshiya Pariyojana Adhikari Anopcharik Shiksha Sangh, U. P., through its General Secretary and Ors. v. State of U. P. and Ors., inter alia for the following reliefs :

"(a) A writ, order or direction of a suitable nature commanding the respondents to treat the posts of Project Officer, Non-Formal Education as cadre post in the subordinate education (Gazetted) service with all consequential benefits thereof to the petitioners and the members of the petitioner No. 1 Association ;;

(b) A writ, order or direction of a suitable nature commanding the respondents to treat the petitioners as regularly and substantively appointed on the post of Project Officer, Non-Formal Education and as members of Subordinate Education (Gazetted) Service with all consequential benefits thereof;

(c) A writ, order or direction of a suitable nature commanding the respondent No. 1 to take a Director, Non-Formal Education, U. P., Lucknow, as contained in his communication dated 4.2.1999 and 19.1.2000 (Annexures-20 and 17 to the writ petition) ; within a period to be specified by this Hon"ble Court and to maintain the existing status of the petitions till such decisions ;"

5. The writ petition aforesaid was finally disposed of by order dated 9.10.2000 with a direction upon the State Government to take final decision on the representations filed by the petitioners therein after taking into reckoning the recommendation made by the Director, Non-Formal Education, U. P., Lucknow vide letters dated 4.2.1999 and 19.1.2000, The decision was required to be taken by means of a reasoned order, if possible, within two months from the date

of production of certified copy of that order. Consequent upon the said direction, the State Government took up the matter but ultimately rejected, the representations vide impugned order dated 23.3.2001, a copy of which has been annexed as Annexure-21 to the Writ Petition No. 12879 of 2001, Uma Shankar Singh v. State of U, P. and Ors.. However, on 24.3.2001 the Government issued another order visualising thereby that after the cessation/revision of Non-Formal Education Project w.e.f. 31.3.2001 due to non-sanction of funds by the Central Government, services of the Project Officers/ Assistant Project Officers working at project level on ex-cadre posts although "came to an end but it was decided by the Government on humanitarian grounds that such Project Officers/Assistant Project Officers, who were working on ex-cadre posts would be absorbed in the available posts of Assistant Teacher L.T. Grade in the pay scale of Rs. 4,500-7,000 with a clear stipulation that they would not get any pay protection on account of such absorption. The order dated 23.3.2001 (Annexure-21) and order dated 24.3.2001 (Annexure -2) are the subject-matter of impugnement in this petition.

6. On behalf of the petitioners main argument was advanced by Sri Ashok Khare, Senior Advocate while on behalf of the State, Sri Vinod Swarup, Additional Advocate General appeared in these petitions. The nub of the submissions of Sri Ashok Khare is two fold : first, that the petitioners have been illegally denied the status and pay they were enjoying as Project Officers on erroneous view that the posts of Project Officers were ex-cadre posts ; and second, that the petitioners have been illegally discriminated from the incumbents of other posts in the project whose status and pay have not been disturbed after the cessation of the project, Sri Vinod Swarup on the other hand submitted that the petitioners could not legally claim any parity with those incumbents of the posts of Project Officers, who had permanent lien in the education department and who have been repatriated to their substantive posts after abolition of the posts of Project Officers. As regards pay protection it has been submitted by the learned Additional Advocate General that any protection of status and pay if given to the petitioners would result in denial of equality of treatment to those, who have been repatriated to their parent department.

7. As regards the plea that the petitioners were not appointed on deputation, we are of the view that the use of the word "deputation" in the appointment orders in relation to the petitioners was a misnomer. In State of Punjab and Others Vs. Inder Singh and Others, the Supreme Court explained the concept of "deputation" in the following words :

"The concept of "deputation" is well understood in service law and has a recognised meaning. "Deputation" has a different connotation in service law and the dictionary meaning of the word "deputation" is of no help. In simple words "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry of

period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be."

8. Since the petitioners did not have any lien on any of the posts and rather they were appointed directly on the posts of Project Officers and not on transfer from any other department, they cannot be said to be deputationists. The earlier report of the Director Basic Education (Non-Formal Education) submitted in this regard on 19.1.2000, was correct and the subsequent report justifying the use of the word "deputation" in the appointment orders of the petitioners is unsustainable. However, since the posts of Project Officers were abolished and incumbents could not claim absorption or regularisation as of right on equivalent posts, in the absence of the statutory rules, what is now to be examined is whether Government having decided to absorb the petitioners could legally protect their status and pay. In this connection, Sri Vinod Swarup has submitted that if the status and pay of the petitioners are protected, that would be violative of fundamental rights of other Project Officers, who have been repatriated to their substantive posts of Sub-Deputy Inspector, Inspector of Schools, Assistant Teacher L.T. Grade, Lecturer and Extension Teacher after abolition of the project. The Government have not adverted to this aspect of the matter while deciding the petitioners' representation and since for the reasons disclosed hereinafter, we are persuaded to remit the matter to the State Government for reconsideration. We do not consider it necessary to express any opinion on the submission of the Additional Advocate General that if status and pay of the petitioners are protected, that would result in violation of fundamental rights guaranteed by Articles 14 and 16 of the Constitution of other Project Officers, who have been repatriated to their parent department. It is for the Government to see whether protection of status and pay to the petitioners would lead to violation of Articles 14 and 16 of the Constitution.

9. There is no denying fact that creation and abolition of posts are the attributes of the exercise of sovereign power of the State, *State of U. P. and Anr., v. Dr. P. B. L. Saxena* AIR 1969 All 449 (FB) , for "every sovereign Government has within its own jurisdiction the right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration and to abolish such offices as it may deem superfluous, 42 Am Jur 902 para 31 quoted in para 36 of the judgment by R.S. Pathak, J. (as he then was) in *State of V. P. and Anr., v. Dr. P. B. L. Saxena* (supra)." The Supreme Court in *M.*

Ramanatha Pillai Vs. The State of Kerala and Another, too has very clearly laid down that the power to create, continue and abolish any civil post is Inherent in every sovereign Government and the decision in this regard is taken as a matter of Government policy depending on exigencies of circumstances and administrative necessities. In fact, the petitioners have not questioned the abolition of posts of Project Officers and other posts created under the Non-Formal Education Project. What is essentially under challenge in these petitions is the denial of status and pay protection while absorbing the petitioners after abolition of posts of Project Officers. We are of the considered view that although the petitioners could not claim, on abolition of posts of Project Officer created under Non-Formal Education in which they were appointed as of right, their absorption but once it was decided by the Government to absorb the retrenched Project Officers, it was obligatory for the Government to follow such norms and conditions as may have been laid down from time to time for absorption of surplus or retrenched employees.

10. Attention of the Court was invited to G.O, No. 88 (I)/66 O&M dated Lucknow March 2, 1967, laying down the terms and conditions of absorption of surplus employees. Surplus employees according to the said Government order could broadly be placed in the following categories :

"(a) those rendered surplus as a result of raising of norms of work or other economy measures approved by Government.

(b) those rendered surplus as a result of reorganisation of a department/ organisation/ office with a view to improve efficiency or to effect economy.

(c) all other viz., who have been recruited for specified jobs expected to last for a specified period or whose services are terminated in the normal course in accordance with the terms and conditions of their service such as additional copyists, seasonal peons attached to collection Amins, etc."

11. So far employees under category (c) above are concerned, the Government order aforesaid visualised that since they were recruited for a particular work and they clearly knew that their term of employment would expire after a specified period, therefore, their services should stand terminated on completion of the work or on the expiry of the fixed period for which they were employed in accordance with the terms and conditions of their appointments. As regards the employees under categories (a) and (b) above, they may be either permanent or temporary. These persons are to be absorbed on posts which may fall vacant on account of retirements, discharge, death, etc. or on new posts which may be created in future to meet the requirements of public work, and for that purpose, the terms and conditions of their absorption as laid down in the Government order are as under :

"A. Permanent employees will be absorbed in posts in identical or higher scale of pay, their pay being fixed in accordance with the existing rules except that in case of absorption on a higher posts, their pay will not be fixed at a stage next

above the existing pay because such a case cannot be treated as a case of promotion and of assumption of duties and responsibilities of higher order in the normal course. They will also be allowed to draw their next increment on the same date on which they would have drawn it on their old post. On absorption in other departments, they will retain their lien on their permanent posts until they are confirmed on their new posts. They will also be eligible for promotion in their old department in clear and regular vacancies till they are confirmed on their new posts ; but their cases will not be considered for promotion to vacancies of shorter duration as that will mean unnecessary dislocation. The procedure of absorption will be the same as adopted in normal course in releasing permanent Government servants for taking up new appointments in other departments and they will be entitled to all such facilities as are admissible under normal rules except as provided above.

B. (i) Temporary employees, as far as possible, will be absorbed in identical scale of pay. If such posts are not available they may be absorbed in posts in lower or higher scales of pay. Pay in such cases will be fixed in accordance with the following orders and they will be allowed to draw their next increment on the same date on which they would have drawn it on their old post :

(a) In case of absorption in lower posts, pay will be fixed at the same stage at which he was drawing pay in his old post by taking recourse to the provisions of Fundamental Rule 27, Financial Hand Book, Vol. II, Part II subject to the condition that the pay so fixed does not exceed the maximum of the pay scale of the new post. If there is no corresponding stage, the pay will be fixed at the next lower stage, difference being allowed under Fundamental Rule 19 read with Fundamental Rule 9 (23) (b), Financial Hand Book, Vol. II, Part II as personal pay to be absorbed in future increments. If an employee is drawing more than the maximum of scale of pay of his new post, the difference will be allowed as personal pay to be absorbed in future increases of pay on account of promotion, if any, or for any other reasons

(b) In case of absorption in a highest post, the benefit of fixation of pay at the stage next above the present pay will not be allowed and the pay will be fixed at the same stage, or if there is no such stage then at the" next below stage-difference being allowed under Fundamental Rule 19 read with Fundamental Rule 9 (23) (b). Financial Hand Book, Vol. II, Part II as personal pay to be absorbed in future increments.

(ii) To facilitate fixation of pay of these employees, the Governor has been pleased to delegate to Heads of Departments, the power of fixation of pay of such employees under Fundamental Rule 27, Financial Hand Book Vols. II to IV in accordance with the above principles. The cases -not covered by these orders should be referred to Government in the administrative department concerned.

(iii) The procedure for absorption will be that as soon as an alternative appointment is available, the surplus employee shall be served with the formal

orders, to be passed by the competent authority, for termination of the services of the employee concerned. in accordance with his terms and conditions of appointment and simultaneously informed about the alternative appointment. If he agrees to join the new post within the period allowed, he will be appointed on the new post by the appropriate authority for the new post, but if he fails to do so, his services shall stand terminated in accordance with the formal orders already served on him. If he Joins the new post, he will be allowed a compensatory allowance which will be equal in amount to what would have been admissible to him under Rule 42, Financial Hand Book, Vol. III in the event of his transfer in the Interest of Government work from his old to the new post. The amount so paid will be debited to the primary unit "Allowances and Honoraria" of the departmental budget from which the pay of the new post is to be met. On absorption, the temporary employee will be deemed to have severed all connections with his previous post, but he will carry forward his leave account and his post service will count for pension if he is later confirmed in his new post without interruption in service. Any break occurring between the relinquishment of the charge on the old post and the assumption of the charge on the new post which does not exceed the rules on the subject as standing on the date of such relinquishment in a case of transfer from the old to the new post will not be deemed to be an interruption within the meaning of Article 420, C.S.R., but the period of such break itself will not count as qualifying service. Inter se seniority of such an employee in the new department or in respect of new post will be fixed in accordance with principles which will be communicated separately by the Appointment Department."

12. In *Dr. Chittaranjan Sharma and Ors. v. State of Himachal Pradesh and Anr.* 1996 (3) ESC 622 (SC), the appellants therein were not regularly appointed in H. I.M. Ayurvedic Degree College, Paprola, Kangra, which was taken over by the Government and handed over to Himachal Pradesh Health and Family Welfare Department and under relevant clause of the agreement, existing staff, Principal, Teaching and another employees were eligible to be absorbed in the college on a recommendation made by the screening committee after taking into consideration as to whether they fulfilled requisite conditions. The appellants therein were absorbed in suitable administrative posts to which they were eligible. They challenged their absorption before the Administrative Tribunal. The Tribunal directed to maintain the scale of pay which they were drawing on the date of the takeover and directed their absorption in the posts of Ayurvedic Chikitsa Adhikaries, etc. The Supreme Court held :

"It is seen that since the appellant had not fulfilled the requisite qualifications either when they were initially appointed by the committee before takeover nor when statutory rules were made by the Governor so as to enable for absorption. Instead of retrenching them from service, due to non-fulfilment of the requisite qualifications, the Government came to absorb them in the Ayurvedic Chikitsa, Adhikaries post, etc. to which they are eligible. The Tribunal has given the direction to maintain the pay scales and to make adjustment and absorption. In

our view, directions are correct and based on equity and do not call for any interference. They may also be considered for further promotion from the absorbed posts in accordance with the rules."

13. Since the Government have not addressed itself to factors relevant to the question as to protection of pay and status, we are of the view that the matter should be remitted to the State Government for reconsideration.

14. Accordingly, the petitions succeed and are allowed in part. The impugned order dated 23.3.2001 is quashed. The matter is remitted to the State Government to reconsider the feasibility of protection of pay and status of the petitioners after taking into reckoning all the relevant factors stated in this judgment and if necessary to modify its order dated 24.3.2001, accordingly.