

(2005) 08 AHC CK 0069

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No's. 34234, 37242 and 38265 of 2005

Urmila Chaurasia

APPELLANT

Vs

The State of U.P. and Others

RESPONDENT

Date of Decision : 12-08-2005

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 162, 21A, 226
Uttar Pradesh Basic Education Act, 1972 — Section 11, 11(2)

Citation : (2005) 6 AWC 5214 : (2005) 4 ESC 2548

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Advocate : Ram Belas Yadav, for the Appellant; A.P. Tiwari and S.S. Tripathi and S.C., for the Respondent

Judgement

A.P. Sahi, J.—These writ petitions relate to the selection, appointment and continuance or refusal to do so in respect of the petitioners as "Shiksha Mitra" who are Teachers in primary schools under a scheme known as "Shiksha Mitra Yojna".

2. Learned Standing Counsel on behalf of the State look a preliminary objection to the maintainability of these writ petitions on the strength of 2 decisions of this Court one by a learned single Judge in Writ Petition No. 15908 of 2003 decided on 15.4.2003 and the other in Special Appeal No. 547 of 2004 (Smt. Mala Devi v. State of U.P. and Ors.) decided on 17.5.2004. The judgment of the learned Single Judge and that in Special Appeal referred to herein above are quoted herein below:

Civil Misc. Writ Petition No. 15908 of 2003 Pradeep Kumar v. Adhyaksh, Gram Shiksha Samiti and Ors.

"Heard Sri Rajendra Yadav, Advocate holding brief of Sri K.K. Tripathi learned counsel for the petitioner, Sri V.K. Singh learned counsel appearing for respondent no. 1, Sri K. Sahai learned counsel appearing for respondent No. 2 an

4 learned Standing Counsel appearing for respondent no. 6.

The petitioner claims appointment on the post of Shiksha Mitra.

The appointment of Shiksha Mitra is made under a scheme of the Government and only honorarium is paid Shiksha Mitra is not a Civil post. No material has been placed to show that Shiksha Mitra holds a civil post

The writ petition is not maintainable under Article 226 of the Constitution.

The writ petition is, accordingly, dismissed.

Sd/- Honi V.M. Sahai, J"

Special Appeal No. 547 of 2004 Smt. Mala Devi v. State of U.P. and Ors.

"This Special Appeal has been filed against the judgment of the learned Single dated 8.4.2004.

We have heard learned counsel for the parties.

In our opinion it is not necessary to go into the correctness or otherwise on merits of the judgment of the learned Single Judge because we are of the opinion that the post of Shiksha Mitra is not a civil post at all. The appointment of Shiksha Mitra is made under a Scheme of the Government on which only honorarium is paid and hence no writ lies. This view was taken by a learned Single Judge in Writ Petition No. 15908 of 2003 Pradeep Kumar v. Adhyaksh, Gram Shiksha Samiti and Ors., on 15.4.2003. We are in agreement with the view taken by the learned Single Judge in the aforesaid case. Hence we are of the opinion that the writ was not maintainable as we hold that the Shiksha Mitra is not a civil post at all. In Dr. Alok Kumar Singh v. State of U.P. 2002 ESC 427, it was held that an ad hoc appointee receiving only honorarium has no right.

For the reasons given above, we dismiss this writ petition and sustain the judgment of the learned Single Judge, but for a reason from the one he has given.

Sd/- Hon. M. Katju, J. Sd/-Hon. R.S. Tripathi, J."

3. On the other hand, learned counsel for the petitioners informed the Court that there was no occasion for the Division Bench in Special Appeal No. 547 of 2004 to have approved the learned single Judge decision in Writ Petition No. 15908 of 2003 (supra) inasmuch the said decision in the case of Pradeep Kumar decided on 15.4.2003 had already been set aside in Special Appeal No. 338 of 2003 decided on 5.5.2003 quoted herein below:

Special Appeal No. 338 of 2003 Pradeep Kumar v. Adhyaksha Gram Shiksha Samiti and Ors.

By consent of parties his appeal is treated as on day's list and take up for hearing.

A writ application was moved by the writ petitioner asking for setting aside and order dated 25.2.2003 passed by Block Development Officer, Sadar Auraiya, District Auraiya and also directing the State - respondent not to release the fixed pay in favour of respondent No. 4 and other incidental reliefs.

From a perusal of the impugned against which the present appeal has been preferred we find that the learned Judge proceeded on the basis that the writ petitioner himself claimed appointment on the post of Shiksha-Mitra although the relief claimed in the writ application was totally different.

That being the position, we have no other alternative but to set aside the impugned order and send the case back to the learned Judge for a decision afresh in accordance with law after giving hearing to the parties and after passing a reasoned order. In the event the non-appearing respondents are aggrieved by this order, it will be open for them to apply for recall of this order in the presence of other parties.

With the above observations this Special Appeal is disposed of.

In view of the order passed in the Special Appeal, the application for stay becomes infructuous and is disposed of.

Sd/- Hon. Tanui Chatterjee, CJ Sd/- Vineet Saran, J

4. It has been further submitted that even otherwise the Division Bench judgment of Smt. Mala Devi while placing reliance on the case of Dr. Alok Kumar Singh v. State of U.P. and Ors. 2002 (2) ESC 427, has erroneously proceeded to adopt the reasoning thereof inasmuch as the said case had got nothing to do with the maintainability of a writ petition in a fact situation as involved in the present set of cases pertaining to Shiksha Mitra.

5. Learned counsels for the petitioners have vehemently urged that Shiksha Mitra Scheme is a scheme which has been sponsored by the State Government and is entirely funded by the State. The scheme has been framed by the State Government under its executive powers under Government Orders dated 26.5.1999 and 1.7.2001 defining the terms and conditions of the engagement as a Shiksha Mitra. The mode of selection of such Teachers is entrusted to the Gaon Shiksha Samiti (Village "Education Committee") which is a statutory authority under the provisions of Section 11 of the Uttar Pradesh Basic Education Act 1972 and which Committee is chaired by the Pradhan (headman) of the Village. It is upon the recommendation of the Shiksha Samiti that the appointment has to be made by the District Basic Education Officer. The finances have to be released by the District Basic Education Officer under the direct supervision of the District Magistrate of the district concerned. The appointment has to be made necessarily for carrying out teaching work in primary schools established, run, managed and founded by the State Government.

6. While attempting to distinguish the judgments relied upon by the learned Standing Counsel, learned counsel for the petitioners have urged that the

decisions have proceeded on the basis that the posts in question are not civil posts and secondly the payment made to Shiksha Mitra Teachers is only an honorarium which distinction was not sufficient to hold the writ petitions as not maintainable. They submit that the Court ought to have further probed into the matter and ought to have considered the nature of functions and duties performed by the Teachers under the Shiksha Mitra Scheme as also the control by the State over the performance of their functions before holding the petitions to be not maintainable. They contend that the decisions relied upon by the learned Standing Counsel do not reflect any such exercise and, therefore, the decisions do not lay down the law correctly. To further buttress their submission, learned counsel for the petitioners urged that the matter requires to be examined in the light of certain more decisions which have been rendered by the Apex Court particularly the case of *Zee Tele Films Ltd. and Anr. v. Union of India and Ors.* AIR 2005 SCW 2985, *K.C. Sharma v. Delhi Stock Exchange* JT 2005 (4) 18 , *Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others*, as explained in *G. Basi Reddy Vs. International Crops Research Instt. and Another*, . On the basis of the aforesaid decisions, it has been urged that a writ would be maintainable under Article 226 of the Constitution and the function of the State with regard to selection of a Teacher under the Shiksha Mitra Scheme is neither of a private character nor does it denude the State in any manner of its control over such functions. Learned counsel for the petitioners, have extensively placed the Government Order dated 1.7.2001 issued by the Secretary, Government of Uttar Pradesh, which according to them is saved under Article 162 of the Constitution and has the force of law. It has been stated that any violation of the said Government Order or non compliance thereof would render a writ petition maintainable in this regard.

7. Before embarking upon the other aspects it is necessary to refer to the Constitutional Scheme and also the statutory provisions that directly concern this issue. The Apex Court in the case of *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, pioneered the idea of recognizing the right to education as a fundamental right. Article 45 of the Constitution which was contained in Part IV of the Constitution when *Unni Krishnan* came to be decided by the Supreme Court was only a directive principle of State policy. Article 45 is quoted herein below:--

"45. Provision for early childhood care and education to children below the age of six years.-- The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

8. The aforesaid provision was transposed by our law makers in the shape of Article 21A (yet to be enforced) as inserted by 86th Amendment Act 2002 is quoted herein below:

"21-A. Right to education.- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine"

9. Article 45 as now re-framed and substituted by the 86th Amendment Act 2002 (yet to be enforced) is quoted herein below:-

"45. Provision for free and compulsory education for children.--The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

10. It is, thus, clear from the aforesaid Constitutional provisions as also the decisions of the Apex Court that the right to provide free education at the primary stage has been recognized as a sovereign function and is a right guaranteed under the Constitution. The State is obliged to fulfil the Constitutional aspirations and, as such, it has to perform its duty in this respect. It is, thus, a public duty and a public function to be undertaken by the State for extending such benefit. The Parliament and the State Legislature both are empowered to frame laws the source whereof can be traced to entry 25 of List III of the list appended to 7th Schedule of the Constitution. The State Government realizing its responsibility in this field took over this responsibility of primary education and in order to strengthen the primary and junior High Schools and to increase their useful needs the State Government assumed full responsibility for controlling and managing such institutions by enacting the Uttar Pradesh Basic Education Act 1972 as amended from time to time. Coming to the case at hand and in reference to the issue involved, the duty and responsibility for managing such institutions at the village level was entrusted to a "Gaon Shiksha Samiti". The provisions of Section 11 of the 1972 Act are quoted herein below:

"11. Gaon Shiksha Samiti and its function.--(1) For each village or group of villages for which a Gram Panchayat is established under the United Provinces Panchayat Raj Act, 1947, there shall be established a committee to be known as Gaon Shiksha Samiti which shall consist of the following members, namely--

- (a) the Pradhan of the Gram Panchayat who shall be the Chairman;
- (b) three guardians of students of basic schools (of whom one guardian must be a woman) to be nominated by the Assistant Basic Education Officer;
- (c) the head master of the basic school situated in the Gram Panchayat and if there are more than one such schools, the senior most of the head masters thereof, who shall be the Member-Secretary;

(2) Except as otherwise provided in any other provisions of this Act and subject to the supervision and control of the Gram Panchpyat, the Gaon Shiksha Samiti shall perform the following functions, namely-

- (a) to establish, administer, control and manage basic schools in the panchayat area;
- (b) to prepare schemes for the development, expansion and improvement of such basic schools;

- (c) to promote and develop basic education, non-formal education and adult education in the panchayat area;
- (d) to make suggestions to the Zila Panchayat for the improvement of basic schools, buildings and the equipment thereof;
- (e) to take all such necessary steps as may be considered necessary to ensure punctuality and attendance of teachers and others employees of basic schools;
- (f) to make recommendation for minor punishment in such manner as may be prescribed on a teacher or other employee of a basic school situate within limits of the panchayat area.
- (g) such other functions pertaining to basic education as may be entrusted to it by the State Government".

11. The State Government, therefore, has the power to issue necessary directions for the fulfillment of the aforesaid Constitutional obligations and Statutory duties which the Gaon Shiksha Samiti is obliged to carry out, in terms of Section 11(2)(g) for the fulfillment of the objectives, and in the exercise of its executive power under Article 162 of the Constitution. Three Government Orders have been issued which have been brought to the notice of this Court; they are the Government Orders dated 26.5.1999, which is supplemented by another Government order of the same year and which both find mention in the third Government Order dated 1.7.2001 issued by the Secretary, Government of Uttar Pradesh. The State Government, therefore, has exercised its power both under the Constitution by issuing Government Orders in respect of a subject matter with regard to which it is empowered to legislate and which Government Orders can be issued in view of the Statutory provisions of the Basic Education Act pointed out herein above.

12. A perusal of the Government order would demonstrate that the Director of the State (Planning) and the Director of Education (Basic) shall assess and identify the number of such Teachers who are to be engaged in the ratio provided in Clause 1 of the said government order, The Institutions have to be identified by the Director of Education (Basic) and the other Officers which require the engagement of such Teachers. The identification of institutions have to be carried out in the manner prescribed in the Government order dated 26.5.1999 by a district level Committee. Thereafter, the Gaon Shiksha Samiti shall pass a resolution after inviting the applications from the eligible candidates from within the Village Panchayat concerned. In case of non-availability of a candidate the territorial area would be further extendable to the Nyaya Panchayat level. The Gaon Shiksha Samiti shall prepare the order of preference in accordance with the qualifications of such Teachers and 50 % of such Teachers shall be of the female category. Disqualifications for selecting relatives of the Chairman of Shiksha Samiti and its Members have also been prescribed. The tenure of such a Teacher would ordinarily continue till the end of Session but in the case of a Teacher having rendered satisfactory service, the services shall be

extendable by a resolution of Shiksha Samiti. The power to remove a Teacher during continuance has also been delegated on the Shiksha Samiti and the payment to such Teachers @ Rs. 2250/- has to be disbursed through the Shiksha Samiti upon an approval by the District Level Committee. A training in the District Education and Training Institute has also to be undertaken by such a candidate and during such period of training a Teacher shall be entitled to free residence and food under the scheme. According to the directives issued by the "Secretary under the said Government Order, the control over the Teacher shall be exercised by the Gaon Shiksha Samiti and supervised by the Headmaster of the institution. What is more important and revealing is that the Officers of Basic Education Department have been made accountable for the functioning of such Teachers which has to be reported when inspections are carried out by them. The academic assistance to such Teachers has to be provided by a coordinator at the block level.

13. It is, thus, clear from what has been narrated herein above, that the scheme is to provide assistance at the primary education level under a scheme which has been enforced through a Government Order for the fulfillment of the objectives Of providing education to children at the primary level. There is a manifest control by the statutory body created under the U.P. Basic Education Act 1972 namely the Gaon Shiksha Samiti. The Gaon Shiksha Samiti has been defined u/s 11 of the aforesaid Act which has full control over basic schools in the Panchayat area and special reference may be had to clause (g) of sub-section 2 of Section 11 which enjoins the Gaon Shiksha Samiti to perform such other functions pertaining to basic education as may be entrusted to it by the State Government. Thus, the State Government has delegated this function to the Gaon Shiksha Samiti under the aforesaid Rule in the shape of Government Orders referred to herein above.

14. The latest decision of the Apex Court in the case of Zee Tele Films Ltd. v. Union of India and Ors., after discussing the various shades of State control held that an aggrieved party can always move a writ petition under Article 226 of the Constitution of India against a person or body performing public duty. The relevant extract of the aforesaid decision as contained in paras 31 to 33 is quoted herein below:

"31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian Cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary

course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

32. This Court in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, has held:

"Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law, Under Article 226, writs can be issued to "any person or authority". The term "authority" used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty, The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

33. Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in *Pradeep Kumar Biswas* case (*supra*), hence there is force in the contention of Mr. Venugopal that this petition under Article 32 of the Constitution is not maintainable.

15. Coming to the view expressed by the Division Bench in Special Appeal No. 547 of 2004 referred to herein above, it is obvious that the Division Bench endorses the view of the learned Single Judge which judgment had already been set aside by this Court. Moreover, whether the post of Shiksha Mitra is a civil post or not has to be adjudged in the light of the parameters laid down by the Apex Court in its decision right from the leading case of *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, and followed in *The Superintendent of Post Offices and Others Vs. P.K. Rajamma*, and carried over by this Court in the latest decision in Special Appeal No. 263 of 1997 dated 26.8.2004, *State of U.P. and Ors. v. Dashrath Singh and Anr.* This Court in the aforesaid Division Bench Judgment came to the conclusion that Home guards hold a civil post The Government Order by which the engagement of a Shiksha Mitra has been made possible spells out clear norms the fulfillment whereof will only entitle a person to be engaged as a Shiksha Mitra. In the opinion of this Court, merely because

such Teachers do not hold a civil post cannot dis-entitle them from questioning the correctness or otherwise of the action of the authorities on whom a duty is cast to act fairly under the Government Order. The authorities in view of the nature of control over the scheme by the State Government, have to perform functions in conformity with the Rule of law. The function performed by them is a public function and the nature of duties performed by a Shiksha Mitra is a public duty for educating children at the primary level.

16. In view of the aforesaid discussions, this Court is of the opinion that a challenge to the action of the Gaon Shiksha Samiti or the authorities referred to under the Government Orders is amenable to writ jurisdiction, in the event it is demonstrated that the action of the authorities is either unfair or arbitrary so as to violate Article 14 of the Constitution of India or is not in conformity with the Government Orders.

17. In the aforesaid facts and circumstances and in view of the fact that the very basis of the decision of the Division Bench in Smt. Mala Devi's case has been taken away, this Court has no hesitation in holding that a writ petition under Article 226 of the Constitution of India by a candidate under the Shiksha Mitra Scheme is maintainable provided a case is made out in the light of what has been stated herein above. The preliminary objection, therefore, raised by the learned Standing Counsel is hereby over ruled.

18. Learned Standing Counsel is directed to file counter-affidavit within 3 weeks on behalf of the Respondent - State and its authorities as directed by this Court earlier and the matter shall be listed immediately upon the expiry of 3 weeks before the appropriate Bench for admission.