
(2004) 09 AHC CK 0169

In the Allahabad High Court

Case No : Writ Petition Nos. 43219 of 1998 with 49586 of 1999

Vimal Kumar Pandey

APPELLANT

Vs

Basic Shiksha Adhikari, Auraiya & Ors.

RESPONDENT

Date of Decision : 13-09-2004

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 16

Citation : (2004) 09 AHC CK 0169

Hon'ble Judges : Tarun Agarwala, J

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—Sri Ram Kishore Pandey was a permanent employee in the Pandit Nehru Madhyamik Vidyalay Baharpura, Auraiya and died in harness on 15/9/1997. Sri Vimal Kumar Pandey (hereinafter called the petitioner) was the only son of the deceased and applied for an employment on compassionate ground under the Dying in Harness Rules. Since the petitioner was duly qualified and eligible to be appointed as an Assistant Teacher, hence his application was forwarded to the Mandaleeya Sahayak Shiksha Nideshak (Basic) Kanpur Region, Kanpur vide a letter dated 27/10/1997. A Selection Committee was constituted on 18/12/1997 and the petitioner's name was recommended for an appointment as an Assistant Teacher. Based on the recommendation of the Selection Committee, the District Basic Shiksha Adhikari by his letter dated 18/12/1997 directed the Committee of Management to appoint the petitioner as an untrained teacher on a fixed pay of Rs.850/per month. On the basis of the aforesaid direction of the District Basic Shiksha Adhikari, the Committee of Management issued an appointment letter dated 22/2/1997 appointing the petitioner as an untrained teacher. Accordingly, the petitioner joined as an untrained teacher and was paid the salary till 30/5/1998.

2. On account of the change of the Manager, the new Manager, respondent No.3, passed an exparte order dated 30.5.1998 cancelling the appointment of the petitioner as an untrained teacher on the ground that the petitioner could not be

appointed as a teacher under the Dying in Harness Rules as per the judgment of the Allahabad High Court.

3. Aggrieved by this decision of the respondent No.3, the petitioner made a representation before the Basic Shiksha Adhikari, who by his order dated 9111998 cancelled the order dated 3051998 passed by the Manager of the Committee of Management and directed the Committee of Management to reinstate the petitioner immediately. The Basic Shiksha Adhikari in his order held that the judgment of the High Court was not applicable to an appointment on compassionate ground and that, in any case, previous approval for removing a teacher was not taken from the authority and therefore, the order dated 3051998 was not sustainable.

4. In spite of the order of the Basic Shiksha Adhikari dated 9111998, the petitioner was not allowed to join and accordingly the petitioner filed a writ petition No. 43219 of 1998 praying for a writ of mandamus directing the respondents to pay the salary alongwith the arrears and further prayed that he should be permitted to work as a teacher in the institution. The aforesaid writ petition was entertained and an interim order dated 1511999 was passed directing the respondents to pay the salary provided the order of the Basic Shiksha Adhikari dated 9111998 had not been recalled by any appropriate authority or by a court. In spite of this interim order, the Committee of Management did not permit the petitioner to join the institution nor was paid his salary. Instead, the Committee of Management after ten months filed a writ petition No. 49586 of 1999 for quashing the order dated 18121997 by which the Basic Shiksha Adhikari had directed the Committee of Management to issue an appointment letter in favour of the petitioner as well as the order dated 9111998, whereby the Basic Shiksha Adhikari directed the Committee of Management to reinstate the petitioner. The Committee of Management further prayed that a writ of mandamus be issued declaring that the appointment of the petitioner as an untrained teacher in Dying in Harness Rules was void and without jurisdiction.

5. The Committee of Management had challenged the appointment of Vimal Kumar Pandey in Writ Petition No. 49586 of 1999 on the ground that there was no evidence on the record to show that any Selection Committee was constituted or that the Selection Committee had recommended the name of the petitioner. It was also contended that the selection of the petitioner for appointment to the post of Assistant Teacher on a supernumerary post was against the Government Order dated 811998 as well as against the decision of the Supreme Court in Director of Education and another v. Pushpendra Kumar and others, 1998 (2) LBESR 391 (SC), in which it was held that in the event there are no vacancy in class III posts, in that event supernumerary posts cannot be granted in class III posts and that the supernumerary post in class IV should be created for an appointment under the Dying in Harness Rules.

6. The learned counsel for the Committee of Management further submitted that

the post of Assistant Teacher is a selection post, which could not be filled up by appointing the petitioner under the Dying in Harness Rules and such appointment made was wholly illegal and void and was rightly cancelled.

7. Heard Sri Krishnaji Khare, the learned counsel appearing for the Committee of Management and Sri Y.K. Saxena, the learned counsel appearing for Vimal Kumar Pandey.

8. Before dealing with the submissions made by the learned counsel for the parties, it is necessary to quote a few provisions of the Act. Section 16 of the U.P. Secondary Education Services and Selection Board Act, 1982 states :

16. Appointment to be made only on the recommendation of the Board.(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made there under but subject to the provisions of Sections 18, 21B, 21C, 21D, 33, 33A and 33B, every appointment of a teacher, shall, on or after the date of commencement of the U.P. Secondary Education Services Selection Boards (Amendment) Act, 1995 be made by the management only on the recommendation of commission:

Provided that in respect of retrenched employees, the provisions of Section 26EE of the Intermediate Education Act, 1921, shall mutatis mutandis apply:

Provided further that the appointment of a teacher by transfer from one institution to another, may be made in accordance with the regulations made under clause (c) of subsection (2) of Section 16G of the Intermediate Education Act, 1921:

Provided also that the dependent, of a teacher or other employee of an Institution dying in harness, who possess, the qualifications prescribed under the Intermediate Education Act, 1921 may, be appointed as teacher in Trained Graduate's Grade in accordance with the Regulations made under subsection (4) of Section 9 of the said Act.

(2) Any appointment made in contravention of the provisions of subsection (1) shall be void.

9. The third proviso to subsection (1) of Section 16 was inserted by U.P. Act No. 15 of 1995 w.e.f. 28.12.1994, which stipulates that every appointment of a teacher will be made by the management only on the recommendations of the Section Board constituted under the Act. The third proviso to subsection (1) carved out an exception to the method of recruitment in respect of the dependents of the teachers or other employees of an institution dying in harness and envisaged that such dependents may be appointed as a teacher in the trained grade in accordance with the Regulations made under subsection (4) of Section 9 of U.P. Intermediate Education Act, 1921.

10. In Sanjiv Kumar Dubey v. District Inspector of Schools, Etawah and others, 1998(2) LBESR 647 (All) : 1998(2) U.P.L.B.E.C. 1393, a learned Single Judge of

this Court held that the Government Order dated 22/1995 as well as the third proviso to Section 16(2) of U.P. Secondary Service Commission Act, 1992 was arbitrary and ultra vires and that no person could be appointed as a teacher under the Dying in Harness Rules. Based on this judgment, the Manager of the Committee of Management passed the order dated 30/5/1998 cancelling the appointment of the petitioner.

11. It is relevant to mention here that the judgment of the learned Single Judge in Sanjeev Kumar Dubey's case (supra) was reversed in Special Appeal No. 426 of 1998 decided on 12/2/2000 in Sanjiv Kumar Dubey v. District Inspector of Schools, Etawah and others, 2000(2) LBESR 534 (All) : 2000(1) UPLBEC 634, in which the division bench held

“(7) The appointment as a teacher in the trained graduate grade in an Institution recognized under the U.P. Intermediate Education Act, 1921 is an appointment in the lowest grade of teaching staff of secondary Institutions after the abolition of C.T. grade. It cannot be gainsaid that appointment under the proviso may be made only if the candidate is equipped with the qualifications prescribed under the Intermediate Education Act, 1921. The essential qualifications have not been dispensed with. The procedure for such appointment is laid down in Regulations 105 and 106 of Chapter III of the Regulations as they stand substituted by impugned notification dated Feb. 2, 1995 issued in exercise of power under Section 9(4) of the U.P. Intermediate Education Act. It forms a class in itself and the classification so made has a reasonable and rational nexus with the object sought to be achieved viz. relief against destitution as held in Umesh Kumar Nagpal (supra). The procedure as laid down in Regulation 105 of Chapter III of the Regulations made under the U.P. Intermediate Education Act visualises selection by a duly constituted Selection Committee consisting of the District Inspector of Schools, the Lekhadhikari, officer of District Inspector of Schools and Zila Basic Shiksha Adhikari. Since a teacher serves as a melting pot in shaping the career, character, and weaving moral fibre and aptitude for educational excellence in impressionable young children and being principal instrument to awakening the child to the cultural ethos, intellectual excellence and discipline, the enabling provision contained in the third proviso to subsection (1) of Section 16 of the Act and those contained in Regulations 105 and 106 of Chapter III of the Regulations made in exercise of power under Section 9(4) of the U.P. Intermediate Education Act must be so construed as to enable the selection committee to select the dependant only if he is found suitable. The third proviso to subsection (1) of Section 16 of the Act is only an enabling provision and the word ‘may’ used in the proviso imparts discretion in the Selection Committee referred to in Regulation 105 to select the dependant of a teacher or other employees dying in harness for appointment in trained graduate grade only if the candidate is found by the Selection Committee suitable, qualified for and deserving of such appointment. In our opinion, therefore, the third proviso to subsection (1) of Section 16 and the Notification dated 5/2/1998 by which Regulations 103 to 107 of Chapter III of the Regulations made under the U.P.

Intermediate Education Act were substituted are not ultra vires the Article 14 of the Constitution. Broader perspective of social justice sought to be achieved by these provisions must be borne in mind while examining the reasonableness of the classification made by the Legislature.?

12. Thus, the basis of the cancellation of the petitioner's appointment by the Manager of the Committee of Management vide his letter dated 3051998 does not survive any longer. The appointment of the petitioner cannot be cancelled on the ground that a teacher could not be appointed under the Dying in Harness Rules.

13. The contention that there was no evidence to show that the matter was placed before the Selection Committee and that the Selection Committee recommended the name of the petitioner under the dying in harness rules is devoid of any merit. The District Basic Shiksha Adhikari, Auraiya vide his letter dated 18121997 had clearly indicated that a Selection Committee met on 18121997 recommending the name of Vimal Kumar Pandey for an appointment as an Assistant Teacher. Therefore, it does not lie in the mouth of the Committee of Management to allege that no Selection Committee was constituted.

14. The submission of the learned Counsel for the Committee of Management, that in view of the Government Order dated 8.1.1998 and in view of the judgment of the Supreme Court in Director of Education v. Pushpendra Kumar and others, 1998 (2) LBESR 391 (SC), no appointment as an untrained teacher could be made on a class III post is devoid of any merit. The Government Order dated 811998 is not applicable inasmuch as the petitioner was appointed prior to the issuance of the said Government Order dated 22121997. The Government Order dated 811998 can only be prospective and cannot be retrospective. The decision of the Supreme Court in Pushpendra Kumar (supra) is distinguishable. In that case it was held that a direction to appoint a person by creating a supernumerary post in a class III post could not be made and that a direction should have been given to appoint a person in a Class IV post. In the present case, there is no allegation that no vacancy existed in a class III post. In the absence of this allegation, the decision of the Supreme Court is not applicable.

15. There is another aspect of the matter. There is a delay of more than 10 months in the filing of the writ petition by the Committee of Management. No explanation whatsoever has been given as to why the Committee of Management could not file the writ petition earlier. It is clear that the writ petition was filed in order to defeat the interim order dated 1511995 passed in Civil Misc. Writ Petition No. 43219 of 1998. The writ petition suffers from laches and is also liable to be dismissed on this ground also.

16. In view of the aforesaid, I find no merit in the Writ Petition No. 49586 of 1999 filed by the Committee of Management and is dismissed with cost.

17. In so far as Writ Petition No. 43219 of 1998 is concerned which has been filed by Vimal Kumar Pandey, it is clear, that the order of the Committee of

Management dated 30.5.1998 was passed on the basis of the judgment, which has been overruled by a division bench. Further previous approval of the action of the Committee of Management was required from the authority concerned before removing Vimal Kumar Pandey. In the present case, this was not done and, therefore, the Basic Shiksha Adhikari rightly disapproved the order dated 30.5.1998

18. Consequently, the writ petition of Vimal Kumar Pandey being Civil Misc. Writ Petition No.43219 of 1998 is allowed and a writ of mandamus is issued directing the Basic Shiksha Adhikari to ensure that the Committee of Management reinstates Vimal Kumar Pandey as a teacher in the institution with continuity of service and with full back wages. The Committee of Management is directed to pay the arrears of salary within three months from the date of the production of the certified copy of this judgment.

Decided accordingly.