

Narendra Kumar Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Jul-06-2001

Reported in : (2002)1UPLBEC683

Judge : Sushil Harkauli, J.

Acts : Uttar Pradesh Intermediate Education Act, 1921; Uttar Pradesh Intermediate Education Regulations - Regulation 61(2); [Constitution of India](#) - Article 16

Appeal No. : Civil Misc. Writ Petition Nos. 656, 1101, 22214 and 22928 of 2001

Appellant : Narendra Kumar

Respondent : State of U.P. and ors.

Disposition : Petition dismissed

Judgement :

S. Harkauli, J.

1. These four connected writ petitions are being decided by this common judgment.

All the petitioners are aggrieved by an order transferring Sri Nitya Nand Sharma from the post of Principal, Jawahar Inter College, Balmanauli, district Baghpat to

the post of Principal of S.S.D. Boys Inter College, Meerut.

2. S.S.D. Boys Inter College (hereinafter referred as the College for short) is being presently managed by a Prabandh Sanchalak (Authorised Controller) appointed by the Joint Director of Meerut and the committee of management of the said college for the time being stands superseded. The college is on the grant in aid list of the Government and is covered by U.P. High School and Intermediate Colleges (Payment of Salaries to Teachers and other Employees) Act, 1971.'

3. Sri Nityanand Sharma after being selected by Secondary Education Services Selection Board (hereinafter referred to as the Board) is working as the Principal of Jawahar Inter College, Balmanauli. By the impugned order dated 27-4-2001 the Director of Education has transferred Sri Nityanand Sharma to the post of the Principal, S.S.D. Boys Inter College. The post of Principal of S.S.D. Boys Inter College stood occupied by one Manmohan Sharma, who was due to retire from service on 30-6-2001. Thus, Sri Nityanand Sharma would normally have joined as Principal of the College immediately after 30-6-2001. However, by an interim order dated 15-6-2001 passed in Writ Petition No. 22214 of 2001, the impugned order dated 27-4-2001 was stayed. Following the order dated 15-6-2001 referred to above on 21-6-2001 another similar interim order was passed in writ petition No. 22928 of 2001, Both the stay orders were to continue upto 2-7-2001. The arguments in these four writ petitions started on 4.7.2001 and the interim order was, therefore, directed to continue by another order dated 4-7-2001 passed in Writ Petition No. 22214 of 2001. The argument continued on 5th and 6th July, 2001.

4. Before dealing with the issues, it may be pointed out here that although, reliefs claimed in each of the aforesaid writ petitions are framed in different terms but in substance all the four writ petitions are seeking to keep Sri Nitya Nand Sharma out of office of Principal of the College and want that office to be filled up by a local teacher.

5. Writ Petition No. 656 of 2001 is by Sri Narendra Kumar who has been selected for the post of Principal by the Board. He was given placement as Principal at Udai Pratap Intermediate College, Sapanwat, district Ghaziabad. But he was not

permitted by the Management of that college to join there and he, therefore, applied for being placed at the S.S.D. Boys Intermediate College, as a Principal. He obtained 'no objection certificate' from the Prabandh Sanchalak of S.S.D. Boys Intermediate College on 30.9.2000. On the strength of that no objection certificate he claims that his placement at Ghaziabad college should be changed and he should be placed as Principal in S.S.D, Boys Intermediate College, pursuant to his selection by the Board.

6. The selection by the Board of Sri Narendra Kumar was not made for S.S.D. Boys Intermediate College, as the advisement did not include the post of Principal of that college. The selection was admittedly for college other than S.S.D. Boys Intermediate College. In the case of selection of Principal the names of the colleges for which selection is being made are mentioned in the initial advertisement and the candidates who apply for such post are required to give their preference in respect of the colleges mentioned in the advertisement.

7. In Chapter III of the Regulations framed under U.P. Intermediate Education Act, 1921, it is provided that the post of Principal in an Institution can also be filled by transfer from another college, where the person sought to be transferred was appointed after selection by the Board. This transfer is permissible only with the consent of the management at both the institutions. It may be mentioned here that according to the note at the end of Regulation 61(2) of Chapter III of the aforesaid Regulations 'management' has been defined to include 'the managing committee' or the officer or authority in whom the management is vested which means that management for the purpose of giving consent for transfer would include the 'Prabandh Sanchalak'.

8. Since Sri Narendra Kumar has not yet joined Udai Pratap Inter College, Sapnawat, district Ghaziabad, therefore, there would be no occasion for the management of that college to give consent for transfer and in fact also no such consent has been pleaded. Thus, the case of Sri Narendra Kumar is not one of transfer from the Ghaziabad college to the S.S.D. College, as it does not fall within the parameters of the provisions of law dealing with transfer rather it is a case of fresh first placement as a Principal. Therefore, the consent of Prabandh Sanhatak

alleged by him does not clothe him with any additional or preferential right for the post of Principal of the S.S.D. College as compared to Sri Nitya Nand Sharma, as it is not the case of transfer. On the contrary, the case of Sri Nitya Nand Sharma stands on a much stronger footing as his case is one of transfer and is supported by consent of both the Managements.

9. In the circumstances I find myself unable to accept the prayer of the Sri Narendra Kumar that, in preference to Sri Nitya Nand Sharma, he should be placed on the post of Principal, S.S.D. Boys Intermediate College, merely based on the grounds that (1) he is not being permitted to join at Ghaziabad and (2) the Prabandh Sanchalak has given consent in his favour.

10. It may have been in the discretion of the Board and the Director of Education to give him the placement sought by him, but the authorities have not done so and I do not find any legal ground in this writ petition on the basis of which the respondents can be compelled by a mandamus to place Sri Narendra Kumar on the post of Principal of S.S.D Boys Intermediate College, for which he was never selected. Besides the Educational authorities have chosen to fill up the post of Principal of S.S.D. Boys Inter College by transfer of Sri Nitya Nand Sharma with the consent of the management of both the colleges. He was selected by the Board. All the requirement of law are fulfilled and thus this decision for filling up of that post of Principal of S.S.D. Boys Inter College by transfer also cannot be faulted.

11. The other contentions against order of transfer and permissibility of transfer are dealt with later in this judgment.

12. Under the circumstances no relief can be granted to Sri Narendra Kumar in Writ Petition No. 656 of 2001, which is accordingly dismissed.

13. Writ Petition No. 11101 of 2001 is again by Sri Narendra Kumar wherein he has challenged the vires of the proviso to Section 16 of U.P. Secondary (Services Selection Board) Act, 1982, which reads as follows :

'.....Provided further that appointment of a teacher by transfer from one institution to another may be made in accordance with Regulations made under Clause (c) of Sub-section (2) of Section 16-G of Intermediate Education Act, 1921.'

14. For ready reference Section 16-G (2)(c) of the Act are reproduced below :

'16-G.....

(1).....

(2) without prejudice to the generality of the power conferred by Sub-section

(1) the Regulations may provide for:

(a)

(b)

(c) transfer of service from one recognised institution to another.

15. The relevant regulations are Regulations 55 to 61 in Chapter-III.

16. In substance the above regulations provide that the Educational authorities can transfer a teacher or Head of the institution from one college to another with the consent of the Management of both the institutions.

17. The argument advanced from the side of Sri Narendra Kumar in support of the challenge to the vires is in two-fold.

18. The first argument is that the post of Principal, if it is to be filled up by the direct recruitment by the Board, is advertised giving the name of the college or colleges for which selection is proposed to be held. Thus the candidates interested in the post of a particular college have a right to apply for the post in the college in which they are interested. By filling up the post through transfer, the right of the other candidates, who may be interested in that post to be considered for the appointment is defeated as no selection is held. The argument from the side of Sri Narendra Kumar contends that this is violative of the right of such candidates guaranteed under Article 16 of the [Constitution of India](#).

19. Article 16 of the Constitution guarantees fundamental right of equality of opportunity in the matter relating to employment or appointment to any 'office under the State'.

20. Having considered the submission of the learned Counsel for the parties I am of the opinion that the office of Principal of the private college is not an office under the 'State' and, therefore, Article 16 of the Constitution has no application.

21. Learned Counsel for Sri Narendra Kumar has submitted on the strength of the decisions of Apex Court in the case of Manmohan Singh v. Union Territory, reported in AIR 1985 Supreme Court 364, as interpreted in the case of Air India Authority, reported in (1997) 9 SCC 377 (Paragraph 20), that under the certain circumstances the recognised and aided Educational institutions may be 'Instrumentality of State' for the purpose of Article 12 of the [Constitution of India](#). As against this, learned Counsel for Sri Nitya Nand Sharma relies upon the case of Andimukta Sadguru Shri Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smrak Trust and Ors. v. V.R. Rudani and Ors., reported in (1989) 2 SCC 691, in paragraph 20 of which it has been explained that the term 'authority' used in Article 226 must receive liberal meaning, unlike the term in Article 12 of the Constitution. Article 311 talks of 'civil post' under the State. In AIR 1985 SC 1046, K.C. Joshi v. U.O.I, a corporation (O.N.G.C.) wholly owned by the State was held to be (instrumentality of the) State for Articles 12 and 16 but not for Article 311.

22. 'Instrumentality of State.'

Upon examining the case-law cited and having considered that long drawn arguments advanced on this aspect of the matter I am of the opinion that the phrase 'instrumentality of State' has been used, in the context, to denote a situation where the facts indicate that under the artificial front face of the corporation it is actually the State which is carrying out the activity. Thus, for an institution to qualify as an instrumentality of the State apart from financial aid which it receives from the State there must also exist element of actual control of its management by the State.

Meaning of 'control'

Regulation of managerial activities by legislative provisions or conferment of supervisory powers on the State over the activities of a private management is not 'control'. The element of control would mean the power to take or influence taking of decisions. For example by the State having 100% ownership (AIR 1985 SC 1046 supra), or having the officers of the State on the Board of Management etc. But mere provisions in statutes or subordinate legislation empowering the State Officers to exercise supervisory functions to ensure that private management acts fairly and in accordance with law is not control of the management. To repeat, the 'control' must be of a nature to lead to the conclusion that the institution or establishment is a mere front, behind which the actual operations are being carried out by the State.

23. On the facts of the present case:

I am unable to find any pleadings in any of these petitions which would enable me to hold that S.S.D. Boys Inter College, which is normally to, be managed by a private elected management and is run by a private society, to be an instrumentality of the State. Even if there is an Authorised Controller over the college for the time being, the term of the Authorised Controller is only for a limited period and for a limited purpose till the private management takes over again, and this short term arrangement to my mind will not temporarily convert this private college into an instrumentality of the State for the purpose of Article 12 of the [Constitution of India](#).

24. Due to the reasons given above I am unable to accept the submissions from the side of the Sri Narendra Kumar and I hold that Article 16 of the Constitution does not cover the post of Principal of a privately managed educational institution even though the institution may be receiving aid and grant from the Government and even though in respect of some of the functions of the private management there may be supervisory jurisdiction given to the State for the purpose of ensuring that the private management keeps within the frame work of law and fairness.

25. The second submission in support of the attack on the vires is that the procedure for selection for the post of Principal of a institution by Board, as prescribed by U.P. Secondary Education Services Selection Board Rules, 1998,

indicates that the Board while considering the suitability of a candidate takes into consideration the particular college, for which selection is being made and accordingly considers the suitability of the candidate with reference to the particular post in the particular college. Such a candidate may not be suitable for the post of Principal of another college and, therefore, provisions for transfer by educational authorities merely with the consent of the management of two colleges, without consulting the Services Selection Board, is, liable to be struck down.

26. Upon perusal of Rules 12 (5) & 12 (7) of the said Rules, I find that the Board in respect to selection for the post of Headmaster and Principal is required to allot the marks in the following manner:

'(1) 60% marks are to be awarded on the basis of the quality points specified in Appendix-D of the Rules.

Appendix-D prescribes that quality point marks will be given on the basis of the percentage of marks obtained by a candidate in High School, Intermediate, Graduation and Post-graduation and division awarded to the candidate in theory and practical of the training. Thus, these marks are independent of the consideration of any particular post in any particular institution.

(2) 20% marks are awarded for having experience more than the required experience one mark for each research paper to be given with the maximum of four marks and two marks for each year of such experience with maximum of sixteen marks.

(3) 10% marks for having Doctorate Degree.

27. The remaining 10% marks are allotted for Interview out of which 4% marks are to be given on the basis of the subject general knowledge 3% marks on the basis of the personality and 3% marks are on the basis of the ability of expression.

28. Thus, all the hundred percent marks in respect of the selection are accounted for as above, and there is no scope or margin left for the Board to consider the suitability of a candidate for the particular post in the particular college.

29. In view of this position it cannot be said that while selecting a candidate for the post of the Principal the Board takes into consideration the suitability of that candidate for the particular post in the particular college.

30. For these reasons the second submission on behalf of Sri Narendra Kumar also cannot be accepted.

31. In the result Writ Petition No. 1101 of 2001 is also dismissed.

Writ Petition No. 22214 of 2001, has been filed by Sri Rakesh Kumar Sharma who claims to be a life member of the general body of S.S.D. Inter College i.e. the life, member of the society which elects the Managing Committee for managing the college. A preliminary objection has been raised by the learned Counsel representing Sri Nityanand Sharma about the locus standi of the petitioner in his capacity as life member to challenge the appointment by transfer on the post of Principal. In support of the preliminary objection following two decisions have been cited:

(1) Smt. Vimla Devi v. Dy. Director of Education, 1997 (3) Education and Services Cases 1807

(2) Committee of Management v. Director of Education, 2001 (1) AWC 122.

32. Both the aforesaid decisions hold that where Committee of Management does not choose to challenge the issue a member of the parent society does not have locus standi for making the challenge. However, having examined these two decisions and the facts of the present case I am of the opinion that where committee of management elected by the parent body is under supersession and the institution is being managed by the authorised controller who is not obviously not answerable to the parent society, the parent society would have a right to file writ petition, especially in respect of the decisions which would have a long-term impact upon the college, which impact is likely to continue even after the authorised controller quits and is replaced by a duly elected committee of management. However, giving the locus standi to the parent society is different than giving the locus standi to each and every member of the society. Thus, I am

of the opinion that public policy demands that, in the circumstances mentioned above the parent society as a body may file a writ petition through its office bearers or members duly authorised by the society either by its bye-laws or by a resolution so as to bind the society by the decision of the Court. But independent of such authorisation every single member of the society cannot be conferred with a such right or locus standi as otherwise it would lead to multiplicity of litigation by individual members separately without binding the other members or the society by the decisions of the Court.

33. In the present case there is no such authorisation pleaded and therefore, I am of the opinion that the petitioner R.K. Sharma, merely because of his claiming to be a life member has no right to maintain this writ petition challenging the appointment of Principal of the college by transfer. It may be pointed out here that from the side of Sri Nitya Nand Sharma it has been alleged that Sri R.K. Sharma is not a life member of the society and the society also does not exist at present. But it is not necessary to go into these questions in view of what has been stated above and also because even on merits I am unable to accept the submissions made on behalf of Sri R.K. Sharma. The first submission on his behalf is that the authorised controller does not have authority to give consent for appointment of Principal in the college by transfer as the authorised controller who can be appointed either under Intermediate Education Act, 1921 or under the Payment of Salaries Act, 1971, is only authorised for day to day management and cannot take a decision having long term impact on the functioning of the college. In support of this proposition, an unreported decision of this Court dated 16-1-1998 passed in Writ Petition No. 41689 of 1996, Yash Pal Singh v. Upper Shiksha Nideshak and Rambir Singh v. DIOS, 2000 (1) Education and Services Cases 442(DB), have been relied upon. Upon going through the said decisions I do not find the said decisions holding anywhere that the authorised controller does not have the authority to give 'consent for transfer' in his capacity as management of the college. On the contrary as already pointed out above the note at end of Regulation 61 (2) of Chapter-III, is quite explicit and according to that note any person or officer being in charge of the management of the college will be treated as the management for the purposes of giving consent for appointment by transfer.

34. The second submission on behalf of Sri R.K. Sharma is that the former Principal, Sri Manmohan Sharma had attained the age of superannuation on 25-10-2000 but under the scheme he was to continue on the post till the end of academic session i.e. 30-6-2001. Therefore, the vacancy was scheduled to occur on the post of the Principal of S.S.B. College on 30-6-2001. According to this submission the order of appointment by transfer dated 27-4-2001 has been passed before occurrence of the vacancy and is, therefore, not valid and is also malafide. However, Rule 11 of the U.P. Secondary Education Services Selection Board Rules 1998, indicate that exercise for filling up of the vacancy including a vacancy likely to occur in the year of recruitment is required to commence even before the vacancy had occurred. In the circumstances I am unable to accept this submission also.

35. Writ Petition No. 22214 of 2001 is, therefore, dismissed as being without merits. The interim order passed therein is hereby, vacated :

Writ Petition No. 22928 of 2001 is by Sri Sharan Veer Singh, who claims to be the senior most teacher of S.S.D. Intermediate College. He claims on the same grounds as above that he is entitled to be the Acting Principal and the post of Principal of the College is not liable to be filled up by transfer.

36. Since it has already been held above that appointment by transfer on the post of Principal of the College is valid, therefore, this writ petition is also dismissed and the interim order is, hereby, discharged.