

State of Orissa and Others

Vs

Mamtarani Sahoo and Another

Civil Appeals Nos. 9002 to 9008 of 1994

(Sujata V. Manohr, D.P. Wadhwa JJ)

03.09.1997

ORDER

1. All these appeals arise from a batch of writ petitions which were filed before the Orissa High Court by ad hoe Headmasters/Headmistresses who were appointed for a period of six months at a time by the Managing Committee of the schools concerned and were continued in that fashion for a number of years with the approval of the Inspector of Schools. All these appointments expressly contained a term to the effect that they would continue till regularly selected candidates were appointed to the posts in question. The respondents prayed for regularisation and they further prayed for a declaration that the new mode of recruitment set out in executive instructions dated 1-9-1990 and 5-6-1991 should be quashed and that no new appointments should be made under these executive instructions. The High Court in its impugned judgment has held that until rules are framed under Section 10(3) of the Orissa Education Act, 1969 the District Selection Board cannot function under executive instructions. It has further directed that the appellants should be continued as Headmasters/Headmistresses until regular appointees are appointed to the said posts.

2. The State of Orissa has filed the present appeal.

3. Section 10 of the Orissa Education Act, 1969, prior to its amendment by Act 15 of 1989 provided as follows :

"Conditions of service of the staff of aided institutions. - (1) The qualification required for appointment as teachers and other members of the staff of aided educational institutions and their conditions of service relating to salary, leave, pension, provident fund, age of retirement, disciplinary action and other matters shall be as may be prescribed :

Provided that the terms and conditions of service prescribed in respect of teachers and other members of the staff who, on the condition of a common cadre, have been absorbed in such cadre, shall not in any way be less favourable than the terms and conditions which were applicable to them immediately prior to such condition.

(2) The State Government may constitute a Selection Board consisting of such members as may be prescribed.

(3) The Selection Board shall prepare in the prescribed manner a list of candidates for appointment as teachers in aided educational institutions and all such appointments shall be made in accordance with the rules made in that behalf from out

of the candidates included in the list so prepared."

4. Section 10(2) of the Orissa Education Act, after the amendment made by Act 15 of 1989, was replaced by the following :

"10. (2) The State Government shall by notification constitute a Selection Board for the State to select teachers for recognised private higher secondary institutions and colleges and one such Board for each district to select teachers for recognised private high schools and upper primary schools. Such Boards may consist of such members as may be specified by such notification."

5. Section 10(3) provided that appointments shall be made in accordance with rules made in that behalf from out of the candidates in the list prepared by the Selection Board. The rule-making power is contained in Section 27 which enables the State Government, after previous publication, to make rules for carrying out all or any of the purposes of the Act. In exercise of this power, the State Government has published the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter referred to as "the Rules of 1974"). These Rules which have been in existence long prior to the amendment of Section 10(2) provide, inter alia, for constitution of the Selection Board, procedure for application to the Board and appointment of staff in aided institutions. The Rules also prescribe drawal of pay and allowances, conduct of employees, their probation and confirmation, maintenance of confidential character roll in the service-book, termination of service, superannuation and provisions for disciplinary action. There is no doubt that prior to the amendment of Section 10(2), these Rules governed the appointments of teachers, Headmasters and Headmistresses in recognised private higher secondary institutions and colleges as also in recognised private high schools and upper primary schools. By reason of the amendment of Rule 10(2), instead of the State Government constituting a Selection Board for appointments to all these institutions, now a provision is made for constituting (1) a Selection Board for teachers of recognised private higher secondary institutions and colleges; (2) a Selection Board for each district for the purpose of selecting teachers in recognised private high schools and upper primary schools - the latter consisting of Standards 6 and 7. Section 10(2) further provides that the Selection Board as prescribed may consist of such members as may be specified by notification.

6. Thereafter, the State Government issued a notification dated 19-12-1990 pursuant to the amended Section 10(2), constituting a Selection Board for each district to select teachers for recognised high schools and upper primary schools. This notification, however, was superseded by a notification dated 18-6-1991. The composition of District Selection Boards as set out in this notification, is as follows :

#1. Principal of the government college situated at Ex officio the District Headquarters which is a lead President college as specified in the Appendix to the Resolution of the Government of Orissa in the Education and Youth Services Department, No. 44032 EYS, dated 6-10-1989.2. Inspector of Schools in charge of secondary Ex officio education posted at District Headquarters. Secretary3. In a district where there are more Member than one Inspector of Schools, other Inspector of Schools.4. The DI concerned of Schools when recruitment/ Member selection/promotion relating to primary (including upper primary) schools are in respect of an education district.##

7. In the meanwhile, by a resolution dated 12-3-1991 issued by the Government of Orissa, Education Department, procedure for selection was prescribed for these District Selection Boards. The recital states :

"It has been stated in para 4 of the aforesaid letter (dated 28-1-1991) that the District Boards will take steps to recruit candidates following the provisions of the Orissa Education Act and the Rules framed thereunder. Doubts have been raised in some quarters as to the procedure to be followed by the District Selection Boards for recruitment of candidates. After careful consideration Government have been pleased to lay down the following procedure for the guidance of the District Selection Boards in recruiting candidates."

8. In the result, a procedure has been prescribed for reporting of vacancies by the Secretary of the Managing Committee of an aided educational institution, processing of such applications, advertisement inviting applications, the particulars to be contained in such advertisement, scrutiny of applications, assessment of candidates, marks to be assigned at the time of assessment of candidates, age and qualifications [which are the same as laid down in Rule 7(c) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974] etc. By a further resolution of 25-3-1991 issued by the Government of Orissa, Education Department, a further procedure has been provided for the preparation of lists, fees and account.

9. It is the contention of the respondents that these administrative instructions cannot take the place of Rules which are contemplated under Section 10(3) of the Orissa Education Act and they cannot be given effect to. Hence, District Selection Boards cannot function.

10. In order to appreciate this contention, it is necessary to look at the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974. Since these Rules have been framed long prior to the amendment of Section 10(2), some of the Rules which deal with a Selection Board as contemplated under the unamended Section 10(2) would obviously not be applicable to the District Selection Boards which are now constituted under a notification issued under the amended Section 10(2). But this does not mean that the Rules of 1974 are abrogated in toto or that they do not apply at all to the selection of teachers/Headmasters or Headmistresses by the District Selection Boards and their service conditions. The administrative instructions which we have referred to earlier are meant precisely to provide for those matters which are not covered by the existing Rules, namely, the composition of and the method of selection by the District Selection Boards. They supplement the existing statutory rules to the extent that such statutory rules do not apply because of a change in the provisions of Section 10(2). All other provisions in the Rules including those relating to the terms and conditions of employment continue to operate. It is only those provisions which relate to the composition, method of selection and the procedure of making applications to the State Selection Board which are required to be modified and have been so modified by administrative instructions.

11. In the case of Sant Ram Sharma v. State of Rajasthan (AIR 1967 SC 1910 : (1968) 2 LLJ 830) this Court has held that till the statutory rules are framed, the Government can issue administrative instructions regarding principles to be followed in promotions of the officers concerned to the selection grade posts. It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already

framed. In the present case, the Rules provide, inter alia, for constitution of a State Selection Board. They are silent on the question of appointment of District Selection Boards and the procedure for inviting applications and selecting candidates by the District Selection Boards. Since the Rules are silent in this regard, administrative instructions have been issued confined to these aspects on which the Rules are silent. Undoubtedly, it would have been far better, had the Government amended the existing Rules to provide for these matters; but that is no ground for preventing District Selection Boards from functioning when there are administrative instructions which supplement these Rules. It has been strenuously urged before us that unless statutory rules are framed in respect of District Selection Boards, no regular appointments can be made by the District Selection Boards. We do not find any merit in this contention looking to the fact that there are administrative instructions which supplement the existing Rules. In fact, the High Court had itself held that Rules 5(8), 6(9) and 8 which authorise the Management Committee of the school to make ad hoc appointment for a period of six months with the approval of the Inspector of Schools, continue to operate. We do not see on what basis such a selective operation of rules can be considered. The Rules have not been abrogated and they continue to govern the recruitment and conditions of service of teachers.

12. The respondents have pointed out that by reason of a judgment of this Court in the case of *Rabinarayan Mohapatra v. State of Orissa* ((1991) 2 SCC 599 : 1991 SCC (L & S) 782 : (1991) 16 ATC 547) this Court has upheld the Orissa Aided Educational Institutions (Appointment of Teachers Validation) Act, 1989 validating certain appointments of teachers. It has observed : (SCC p. 603, para 6)

"The Validation Act covers the field up to 31-12-1984. The State of Orissa will do well to consider the cases of all those who have completed one year or more as ad hoc teachers after 31-12-1984 and come out with a scheme or any other appropriate measure to regularise their services."

The respondents have submitted that if any such regularisation scheme is framed, they should not be denied the benefit of such a scheme. There is considerable justification for this submission.

13. In the premises, the judgment of the High Court is set aside and the writ petitions are dismissed. However, all those Headmasters/Headmistresses who are functioning on an ad hoc basis with the prior approval of the Inspector of Schools, will be entitled to continue until regular appointments are made. They will also be eligible for consideration for regular appointment by the District Selection Board concerned along with other applicants. They will be entitled for such consideration by the District Selection Board which shall waive the age bar, provided at the time of their initial appointment, they were within the prescribed age limit. The District Selection Board may take into account their record of service while functioning as such ad hoc Headmasters or Headmistresses. We also make it clear that if any scheme for regularisation of such ad hoc Headmasters/Headmistresses is framed, all those who were functioning as such ad hoc Headmasters/Headmistresses with the approval of the Inspector of Schools on the date of the High Court's judgment which is impugned before us, will be entitled to be considered for regularisation if they are qualified under that scheme for such consideration. The appeals are allowed accordingly.