

**Court No. - 9**

**1. Case :-** WRIT - A No. - 12611 of 2024

**Petitioner :-** Rajiv Kumar

**Respondent :-** State of U.P. And 4 Others

**Counsel for Petitioner :-** Vinod Kumar Singh

**Counsel for Respondent :-** C.S.C.,Sankalp Narain,Sharad Chandra

**Alongwith**

**2. Case :-** WRIT - A No. - 11436 of 2024

**Petitioner :-** Hari Sharan

**Respondent :-** State of U.P. And 6 Others

**Counsel for Petitioner :-** Ajendra Kumar

**Counsel for Respondent :-** C.S.C.,Sandeep Kumar,Yogendra Kumar  
Srivastava

**Hon'ble Rohit Ranjan Agarwal,J.**

1. The question which needs adjudication by this Court, raised through these two petitions are as to “Whether once the requisition has been sent by the Committee of Management to the U.P. Secondary Education Service Selection Board (*hereinafter referred to as “the Board”*) in terms of sub-rule (4) of Rule 11 of U.P. Secondary Education Services Selection Board Rules, 1998 (*hereinafter called as “Rules of 1998”*) the post of Principal in an intermediate institution can be filled by way of transfer or the senior most teacher officiating as a Principal is to continue till a duly selected candidate is sent by the Board.”

2. Further, upon the enactment of Uttar Pradesh Education Service Section Commission Act, 2023 (*hereinafter called as “Act of 2023”*) enforced on 17.08.2023 published in official gazette on 21.08.2023 and the Uttar Pradesh Education Service Selection Commission Rules, 2023 (*hereinafter called as “Rules of 2023”*) having been enforced

from 13.12.2023, whether anything done or action taken in pursuance of Rules of 1998 to continue or not.

3. The question relating to intimation of vacancy to the Board and cessation of power to fill up the vacancy by transfer was before the Full Bench in case of **Prashant Kumar Katiyar vs. State of U.P. and others 2013(1)ADJ 523 (FB)**. The Full Bench found that once the procedure as per Rule 11(4) was followed and necessary intimation was given to the Board, there vest no power to fill up the vacancy by transfer. Relevant paras 38 to 41 of the judgment are extracted hereas under :

*“38. In our opinion if the management has determined the vacancy or the District Inspector of Schools has done it as per Rule 11(4) then in that event the alteration of such determination and intimation is controlled only to the extent as provided by sub-rule (3) of Rule 11 which authorises the management and the Inspector to notify any fresh vacancy that may have occurred after such notification. The management or the District Inspector of Schools therefore has not been empowered under the rules to reverse the determination and it can only add to it, subject to the contingency as contemplated under sub-rule (3) of Rule 11. This however does not take away the power to correct any arithmetical or calculative errors that may have crept into such determination.*

*39. To our mind, the function of the management and the District Inspector of Schools, therefore, has to follow this procedure and it is trite law that if a statute requires a thing to be done in a particular manner then it should be done in that manner alone and not otherwise. The procedure under the Act and Rules is mandatory and it has to be done in that manner alone. Reference be had to Para 20 and 23 of the division bench judgment in the case of Km. Poonam Vs. State of U.P. 2008 (3) AWC Pg. 2852 and to Para 24 of the decision in the case of U.P. Secondary Education Service Selection Board Vs. State of U.P. 2011 (3) ADJ Pg. 340. The rules have been framed consciously by making a provision of limited alteration in the determination by adding to the vacancies on account of any fresh occurrence during the year of recruitment itself. Thus impliedly no power has been conferred for altering the vacancies already determined and intimated to the Board for the purpose of notification under the Act and Rules. The requisition to fill up the*

*vacancies after having sent to the Board therefore becomes unalterable as the Board proceeds with the advertisement under Rule 12 by publishing the vacancy in accordance with reservation rules and in accordance with the subject-wise and group-wise vacancies against which appointments are to be made inviting applications from candidates giving their preference of the institution which choice has to be indicated by the candidate. At this stage, to upset the procedure after advertisement by giving any further leverage would be to disturb the entire process of selection and if such a concession is given, the management can indulge into motivated manipulations which are not uncommon and give rise to uncalled for controversies ending up in litigation.*

40. *We would also like to put a note of caution for the District Inspector of Schools while performing his duty of verification of the determination of vacancies. There can be cases where the management deliberately modifies a requirement in the name of extending benefit to some candidate/teacher who may be desirous of seeking promotion but otherwise not eligible within the year of recruitment. The management can withhold such information and it is at this stage that the District Inspector of Schools has to exercise his powers under sub-rule (4). The management at times may not cooperate with the District Inspector of Schools and therefore the District Inspector of Schools has to determine the vacancy as per the records available in his office and inform the Board. The responsibility therefore rests on the District Inspector of Schools to undertake this exercise by putting the management to clear notice during the year of recruitment itself. The District Inspector of Schools on coming to know of any additional vacancy if any that arises or the management having withheld such information is obliged to take action forthwith and disallow the management from taking any undue advantage in such situations. The vacancy that has occurred during the year of recruitment has to be mandatorily informed as noted hereinabove as no selection can be held except through the Board.*

41. *Once it is held that the power of the management and the District Inspector of Schools after determination, and intimation to the Board, to re-introduce any alteration is taken away then the management cannot be given the authority to adopt any other mode of recruitment.”*

4. The matter again came up before Division Bench of this Court in case of **Hari Pal Singh Vs. State of U.P. and others, 2016 (8)**

**ADJ 622** where the Court, relying upon the judgment of Full Bench rendered in **Prashant Kumar Katiyar (supra)**, held that logic of initiation of selection process has to be distinguished in the present process of recruitment where the initiation of determination of vacancy is relevant for the purpose of choosing the mode of recruitment. The Court further held that once determination and notification process is either made or there is a failure on the part of management to do so, then the DIOS has to perform his duty as per Rule 11(4). Once this contingency has occurred, then the option of the mode to recruit by transfer is not available. Relevant paras 15, 16 and 17 of the judgment are extracted hereas under :

*“15. On a consideration of the ratio of the Full Bench in the case of Prashant Kumar Katiyar (supra), what we find is that the learned Single Judge in the impugned decision has extracted paragraphs 36, 37 and 38 of the said judgment and thereafter, it crosses over to paragraph - 43 of the judgment and has then reconciled it with the judgments in the cases of Asha Singh vs. State of U.P. And others 2007 (3) UPLBEC 2497 and Smt. Amita Sinha vs. State of U.P. And others 2008 (4) ESC 2799 to conclude that the appointment through transfer would be legally permissible up to the stage of advertisement only.*

*16. We are unable to uphold the said view of the learned Single Judge, inasmuch as it appears that the learned Single Judge has concluded that the process of direct recruitment starts with the issuance of advertisement and in such a situation, prior to that, the process of appointment by way of transfer would be permissible. The ratio of the Full Bench in the case of Prashant Kumar Katiyar (supra) in paragraphs 38, 39, 40 and 41 has clearly concluded that the power of the Management or the District Inspector of Schools or even the authority which is to give effect to any transfer cannot proceed to adopt any other mode of recruitment after the steps taken for determination and notification as per Rule 11 of the 1998 Rules. It has also been held that the alteration of any such determination is not permissible and cannot be reversed. This has been reiterated in paragraph - 39 of the decision. Not only this in paragraph - 40, the Full Bench also obliges the Committee and the District Inspector of Schools to fulfill their obligations as per Rule 11 for determination and intimation of vacancies. The ratio therefore of the Full Bench*

*read with the aforesaid Rules is clearly to the effect that the authorities, who are obliged to fill up the vacancies occurring in the year of recruitment, have to mandatorily perform their function of determining and notifying the vacancy. The failure by the Management or the District Inspector of Schools to act as per Rule 11 of the 1998 Rules would therefore not generate a right in favour of any person to seek transfer or even in the Committee of Management to defeat the very purpose of Rule 11 of determining or intimating the vacancies to the Selection Board for direct recruitment. The Committee of Management no doubt has the right to select the mode of recruitment when it has to be filled up directly in the event it has an option from a candidate seeking transfer. However, this conscious decision of the Committee of Management to adopt a particular mode has to be taken within the time frame as provided under Rule 11 of the 1998 Rules. If the Committee of Management is allowed to violate the time schedule, then it would be allowing the Committee of Management to have a free play to choose to determine its mode of recruitment at any time which is not the purpose of the Rules. For that matter, under Sub-Rule (4) of Rule 11, the District Inspector of Schools is also obliged to take a decision as per the specifications of the time schedule provided in Rule 11 itself for the Committee as well as for the District Inspector of Schools. This compliance has to be adhered to keeping in view the year of recruitment and also the eligibility of the candidate including his qualification as on the first day of the year of recruitment which would be the 1st of July of the year in question. However, any failure on their part would not extend the right of the Management to any stage beyond that for adopting the mode of appointment by way of transfer. It is this aspect which has been insisted upon by the Full Bench in the paragraphs referred to here-in-above and which has not been noticed by the learned Single Judge in the impugned judgment. Consequently, we are of the opinion that the learned Single Judge has not correctly appreciated the ratio of the Full Bench and has therefore arrived at an incorrect conclusion that the option is open up to the stage of advertisement for making appointment by way of transfer. The impugned judgment therefore cannot be sustained to that extent.*

*17. There is yet another aspect which deserves to be explained, namely, that the process of determination and intimation of vacancy for direct recruitment is a distinct process under Rule 11 of the 1998 Rules. The stage of advertisement comes after the request is received by the Board. The stage of determination and notification of the vacancy is therefore a unique methodology in this process of*

*selection which is a stage prior to advertisement. It is for this reason that the judgment in the case of Prashant Kumar Katiyar (supra), as noted above, has held that this process should not be avoided which is mandatory. Consequently, the learned Single Judge did not appreciate this distinction while applying the principles of commencement of the date of selection process on the strength of the judgments of the Supreme Court and the ratio of the judgments in the cases of Asha Singh (supra) and Smt. Amita Sinha (supra) respectively. The said logic of the initiation of the selection process has to be distinguished in the present process of recruitment where the initiation of the determination of vacancy is relevant for the purpose of choosing the mode of recruitment under the 1998 Rules. Consequently, we are of the opinion that once the determination and the notification process is either made or there is a failure on the part of the Management to do so, then the District Inspector of Schools has to perform his duty as per Rule 11(4). Once this contingency has occurred, then the option of the mode to recruit by transfer is not available. This issue will therefore have to be taken into account by the Joint Director (Education) who would be under our orders in this appeal be now proceeding to examine the matter.”*

5. U.P.Act No.15 was enacted on 21.08.2023 with the object to bring in uniformity, transparency and timeliness in the recruitment process of teachers as there were five various commission functioning in the State for selection of teachers, in the name of; (i) Uttar Pradesh Higher Education Service Commission for the selection of teachers of non-government aided colleges of the State; (ii) Uttar Pradesh Secondary Education Service Selection Board for the selection of teachers of non-government aided intermediate colleges; (iii) Concerned management committee for the selection of the posts of assistant teachers in aided junior high schools and affiliated primary schools; (iv) District Basic Education Officer and Secretary, Basic Education Council for selection of assistant teachers in council schools; (v) Uttar Pradesh Subordinate Services Selection Commission for the selection of instructors in the Department of Vocational Education.

6. The idea for setting up a unified commission was due to the difference in the level of efficiency related to selection by the above named Commission/Institution, as the quality of selection of teachers was affected, there was no uniformity in the process of selection, timely selection of teachers was not being done, and there were several vacant posts of teachers in various institutions, which adversely affected the education/training of the students/trainees in the State. Apart from this, a lack of transparency is also evident in the selection process conducted by institution level selection committee which has resulted in litigations.

7. Section 31 is the repeal and saving clause, which is extracted hereasunder :

*“31. (1) The Uttar Pradesh Higher Education Services Commission Act, 1980, the Uttar Pradesh Secondary Education Service Selection Board Act, 1982 and the Uttar Pradesh Education Service Selection Commission, 2019 are hereby repealed.*

*(2) Notwithstanding such repeal, anything done or any action taken under the Acts referred to in sub-section (1) shall be deemed to have been done or taken under this Act, as if the provisions of this Act were in force at all material times.*

*(3) Save as otherwise provided in this Act, the repeal of the Acts referred to in sub-section (1) shall not have an adverse effect on the general application of section 6 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act no.1 of 1904) in relation the enforcement of provisions.”*

8. Sub-section (2) of Section 31 is the saving clause which provides that anything done or any action taken under the Acts referred to in sub-section (1) shall be deemed to have been done or taken under this Act, as if the provisions of this Act were in force at all material times. Meaning thereby, that all the actions, which were done pursuant to Uttar Pradesh Secondary Education Service Selection Board Act, 1982 (*hereinafter called as “Act of 1982”*) and the rules framed thereunder, were saved by sub-section (2) of Section 31.

9. Rules of 2023 was introduced on 13.12.2023. Sub-rule (2) of Rule 1 provides for commencement of Rules dated 13.12.2023, which came into force with effect from the date of its publication in the gazette. Rule 1 is extracted hereasunder :

*“1(1) These rules may be called the Uttar Pradesh Education Service Selection Commission Rules, 2023.*

*(2) They shall come into force with effect from the date of their publication in the Gazette.”*

10. Chapter V of Rules of 2023 provides for procedure of recruitment. Rule 28 is of great importance and relates to determination of notification of vacancies. It is somewhat *pari materia* to Rule 11 of Rules of 1998. Sub-rule (1) of Rule 28 provides for determination of vacancies in accordance with sub-section (1) of Section 10 of Act of 1923 by the Appointing Authority or Management or Authorized Officer and the same has to be notified through Director (Higher Education) or the Director (Secondary Education), or the Director (Basic Education) or the Director (Training and Employment) or Director General of Atal Residential Schools, as the case may be, to the Commission in the manner hereafter provided.

11. Similarly, sub-rule (2) provides that vacancies for each category of post to be filled in by direct recruitment, including the vacancies that are likely to arise on the last day of the year of recruitment has to be sent by the Appointing Authority or Management or Authorized Officer by July 15 of the year of recruitment to the Authorized Officer.

12. Sub-rule (3) of the Rule 28 envisages a situation that if, after vacancies have been notified under sub-rule (2), any vacancy in the post of teacher or instructor occurs, the Appointing Authority or Management or Authorized Officer shall, within fifteen days of its occurrence, notify the Authorized Officer in accordance with the said



sub-rule and the Authorized Officer shall within ten days of its receipt by him send it to the Commission.

13. Sub-rule (4) further provides that where for any year of recruitment, the Appointing Authority or Management or Authorized Officer does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Authorized Officer shall on the basis of the record in his office, determine the vacancies in such institution in accordance with subsection (1) of section 10 and notify them to the Commission in the manner and by the date referred to in the said sub-rule. The explanation appended to it clarifies that vacancies notified to the Commission under the sub-rule shall be deemed to be notified by the Appointing Authority or Management or Authorized Officer of such institution. Thus, explanation appended to sub-rule (4) is a deeming clause.

14. Sub-rule (5) is of great importance as it provides that post of notified vacancies shall not be filled by a single transfer. However, proviso to sub-rule (5) provides that in special circumstances, if a single transfer is necessary, then it will be necessary to bring the said process to the notice of the Commission as soon as possible, and the vacancy as a result of single transfer will be considered included in the posts notified by the Director, and this vacancy will also be covered by the same selection process. After commencement of the selection process, no single transfer will be done under any circumstances.

15. Thus, it is clear from sub-rule (5) that notified vacancy is not to be filled by single transfer. However, in exceptional cases, when it is brought to the notice of Commission, the single transfer may be considered for the post which has been notified. It cannot be done in a routine manner.

16. Coming to the facts of the case, in Writ A No.12611 of 2024, the post of Principal became vacant on retirement of Principal on 31.03.2019. One Shri Ram Prakash Rathore, who was the senior most teacher, was appointed as an Officiating Principal with effect from 01.04.2019. The requisition for filling up the post of Principal was made online to the Board on 30.09.2019. Thereafter the Officiating Principal of the institution had also notified the DIOS through letter dated 29.05.2023. Thus, the vacancy was notified by the Management through online on 30.09.2019 and through Principal on 29.05.2023. Sri Ram Prakash Rathore attained the age of superannuation on 31.03.2024, thereafter Committee of Management had passed a resolution for appointing one Sri Khemkaran as Officiating Principal. The petitioner made a representation before the District Inspector of Schools, who accepted his claim on 26.04.2024 and appointed him as Officiating Principal and his signatures were attested. He assumed the charge on 27.04.2024 and since then he is working as Officiating Principal. By the order impugned dated 28.06.2024, 5<sup>th</sup> respondent has been transferred to the institution known as Late Gaya Prasad Verma Smarak Krishak Inter College, which is subject matter of dispute.

17. In Writ-A No.11436 of 2024 the post of Principal fell vacant on 30.06.2015 on the retirement of one Dharam Singh. There also stood vacancy of four Assistant Teachers alongwith that of Principal in the institution known as Sarvodaya Inter College, Nazirpur Sakeet, District Etah. Pursuant to the letter of District Inspector of Schools dated 15.7.2019, the Management notified the vacancy online to the Board. This fact was conveyed to the District Inspector of Schools through letter dated 22.07.2019. One Shyam Singh being the senior-most teacher was officiating as Principal of the institution. He attained the age of superannuation on 31.03.2022. The petitioner, who was the senior-most teacher, on 01.04.2022 was given the charge of

Officiating Principal and his signatures were attested on 16.05.2022, since then he is working as Officiating Principal in the institution. The Committee of Management has given consent for transfer of the 4<sup>th</sup> respondent to the institution as he is the relative of the Manager. By the order impugned, the 7<sup>th</sup> respondent has been transferred in the institution on 28.06.2024.

18. In both these writ petitions, the Committee of Management had already sent the requisition to the Board in the year 2019 when the vacancy occurred on the post of Principal. In both the cases, requisition was made online as well as intimation was also sent in writing to the District Inspector of Schools.

19. Sub-section (2) of Section 31, which is a non obstante clause, saves all those action taken and proceedings initiated under Act of 1982, and it shall be deemed to have been done or taken under the Act of 2023. The saving clause of Section 31 clearly saves all the action which were done pursuant to the Act of 1982.

20. Reliance placed by respondent's counsel upon the decision rendered by coordinate Bench in case of **Mayashankar vs. State of U.P. and 4 others, Writ-A No.5106 of 2023**, decided on 13.08.2024 does not help his cause. The Court found that once the Act of 1982 was repealed, the Rules of 1998 framed thereunder also stood repealed.

21. It seems that provisions of Section 31(2) was not brought to the notice of Court, which is the saving clause. Only Section 31(1) of Act of 2023 was placed before the Court, which has been considered in para 23 of the said judgment. Sub-section (2) of Section 31 clearly saves anything done or any action taken under the Act referred to in sub-section (1) shall be deemed to have been done or taken under this Act i.e. Act of 2023. Sub-section (2) starts with a non obstante clause.

Meaning that it will prevail over the repealed provision as provided under sub-section (1) of Section 31.

22. Action taken or anything done under the Act of 1982 and the rules framed thereunder are thus saved by the instant saving clause. In both the writ petitions, the requisition was made as per sub-rule (4) of Rule 11 of Rules of 1998 by concerned Committee of Management online to the Board for making appointment to the post of Principal. Once such requisition was made, the post could not have been filled by transfer.

23. Shelter taken to proviso to sub-rule (5) of Rule 28 does not stand attracted as the action taken by Committee of Management is saved by Section 31(2) and the Additional Director did not have the power to proceed with the single transfer taking benefit of the proviso to sub-rule (5) of Rule 28.

24. Selection and appointment to the post of Principal could only be made by the Board or the Commission under the relevant provisions of the Act and it cannot be on the basis of the transfer relying upon the proviso to sub-rule (5) and Rule 28 of Rules of 2023.

25. The ratio laid down by the Full Bench in **Prashant Kumar Katiyar (supra)** as well as **Hari Pal Singh (supra)** still hold good as once the vacancy is notified to the Board, the same cannot be filled by transfer.

26. In view of the foregoing discussion, I am of the opinion that sub-section (2) of Section 31, which is the saving clause, protects the action of Committee of Management sending requisition to the Board for filling up the post of Principal complying the provisions of sub-rule (4) of Rule 11 of Rules of 1998, thus no transfer can be allowed to fill up the vacancy.

27. Thus, in view of the above, the question raised in both the writ petitions stands answered.

28. In the result, both the writ petitions succeed and are hereby **allowed**. The transfer orders dated 28.06.2024 (Annexure 1 to Writ-A No.12611 of 2024) and 28.06.2024 (Annexure 1 to Writ A No.11436 of 2024) are not sustainable in the eyes of law and the same are hereby set aside.

**Order Date :-** 01.10.2024

Kushal