

CASE NO.:
Appeal (civil) 1771 of 2008

PETITIONER:
Dhananjay Malik & Ors

RESPONDENT:
State of Uttaranchal & Ors

DATE OF JUDGMENT: 05/03/2008

BENCH:
H.K. SEMA & MARKANDEY KATJU

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO 1771 OF 2008
(Arising out of S.L.P.(c) NO 1466 of 2006)
WITH
CIVIL APPEAL NO. 1772 OF 2008
(Arising out of S.L.P (C) No. 2743 of 2006
AND
CIVIL APPEAL NO. 1773 OF 2008
(Arising out of S.L.P (C) No.7989 of 2006)

H.K. SEMA, J

1. Leave granted.

2. These appeals are directed against the judgment and order dated 16.12.2005 passed by the Division Bench of the High Court of Uttaranchal at Nainital in Special Appeal No.18 of 2004.

3. Special Leave Petition (Civil) Nos.1466 and 2743 of 2006 have been filed by the selected candidates. The High Court by the impugned order set aside the entire selection and appointments of Assistant Teachers (Physical Education) in Garhwal Mandal. According to the High Court, the selection and appointments were made in violation of the Rules. By an interim order dated 27.1.2006 this Court stayed the operation of the order of the High Court and, therefore, they are still holding the posts, for which they have been selected.

4. An advertisement was issued on 24.6.2002 for Garhwal Region for the selection and appointment of the Physical Education Teachers (L.T.Grade). The requisite qualification indicated in the advertisement is B.P.E. or Graduate with Diploma in Physical Education. The unsuccessful candidates in the interview challenged the selected candidates on various grounds. One of the grounds was that the advertisement and selection were not based in accordance with the Rules called U.P. Subordinate Educational (Trained Graduates Grade) Service Rules, 1983 (in short the Rules). We will examine the Rules a little later. The unsuccessful writ petitions were dismissed by the Single Judge. On appeal by the unsuccessful candidates, the order of the Single Judge was reversed and the appeals were allowed. Hence, these appeals by special leave.

5. We have heard the parties.

6. Before we proceed further we may point out at this stage that the writ petitions were rightly dismissed by the Single Judge and the Division Bench of the High Court fell in error in entertaining the appeals.

7. It is not disputed that the writ petitioners-respondents herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as B.P.E. or graduate with diploma in physical education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.

8. In *Madan Lal vs. State of J & K*, (1995) 3 SCC 486, this Court pointed out that when the petitioners appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the present case, as already pointed out, the writ petitioners-respondents herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.

9. In a recent judgment in the case of *Marripati Nagaraja vs. The Government of Andhra Pradesh*, (2007) 11 SCR 506 at p.516 SCR this Court has succinctly held that the appellants had appeared at the examination without any demur. They did not question the validity of fixing the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process.

10. We are of the view that the Division Bench of the High Court could have dismissed the appeal on this score alone as has been done by the learned Single Judge.

11. The next question that arises for consideration is as to whether the Government can, by way of administrative instructions, fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed, if rules are silent on any particular point?

12. The 1983 Rules prescribe the requisite educational qualifications for the post of Assistant Teacher-physical education as under:-

"Graduation degree in Physical Education
or Diploma in the Physical Education
from any recognised Institution."

The aforesaid Rule has been clarified by the Government of India, Ministry of Education, on 26.11.1965 to the effect that B.P.E degree holders should be treated at par with those who hold B.A./B.Sc., B.Com degree plus a diploma in physical education and should not be required to possess an additional B.A.,B.Sc/B.Com. degree for purposes of employment as Directors of physical education or on other similar posts. The aforesaid position has been further clarified by the Government in paragraph 12 of its counter affidavit that

qualification of B.P.E. includes the graduation as well as diploma of physical education.

13. A Constitution Bench of this Court in the case of Sant Ram Sharma vs. State of Rajasthan, AIR 1967 SC 1910, has pointed out at p.1914 SC that the Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

14. The aforesaid ruling has been reiterated in paragraph 9 of the judgment by a three Judge Bench of this Court in the case of Union of India vs. K.P. Joseph, (1973) 1 SCC 194, as under:

"Generally speaking, an administrative Order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in Sant Ram Sharma v. State of Rajasthan and Another, AIR 1967 SC 1910, that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 309 of the Constitution are silent on any particular point, the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service."

15. For the reasons aforesaid, Civil Appeals arising out of Special Leave Petition (Civil) Nos. 1466 and 2743 of 2006 filed by the successful candidates are allowed. The impugned judgment and order of the Division Bench of the High Court is set aside. No costs.

CIVIL APPEAL ARISING OUT OF S.L.P (C) No.7989 of 2006

16. This appeal filed by the non-selected candidates is dismissed.