

writ petitioners within a period of three months from the date of presentation of a copy of this order. Some of the persons who are already getting pensions would be entitled to re-determination of their pension in terms of the above direction. However, no recovery would be made from them.

25. In view of the above, these appeals are disposed of.

(2025) 5 ILRA 396
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2025

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE PRAVEEN KUMAR GIRI, J.

Special Appeal No. 727 of 2024
 With
 Special Appeal No. 726 of 2024

Mayashankar **...Appellant**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
 Kailash Singh Kushwaha

Counsel for the Respondents:
 Ashutosh Mani Tripathi, C.S.C., Rohit Singh, Vijay Kumar Ojha

A. Service Law – UP Secondary Education (Service Selection Boards) Act, 1982 – Rules framed under Act of 1982 – Rule 11 – Post of Principal – Power of appointment by way of transfer, extent of – Requisition was sent after vacancy was arisen – However, appointment by way of transfer was made – Permissibility – Held, once the requisition for direct recruitment was sent to the Inspector, by the Management, in terms of rules 11 of the rules framed under the Act of 1982, the transfer of a teacher against such vacancy

was impermissible – Prashant Kumar Katiyar' case relied upon. (Para 16)

B. Service Law – UP Education Service Selection Commission Act, 2023 – Section 31(2) – Post of Principal – Appointment – Requisition was already sent for appointment – How far, such requisition is saved under Act of 2023 – Held, the determination of vacancies and its intimation to the commission virtually commences the process of recruitment in these institutions. Sending of the requisition to the board would, therefore, continue to be saved under the Act of 2023 and the only change would be that now the appointment will have to be made by the commission in place of the board. (Para 34)

Special Appeal allowed. (E-1)

List of Cases cited:

1. Prashant Kumar Katiyar Vs St. of U.P. & ors. 2013 (1) ADJ 523
2. Hari Pal Singh Vs St. of U.P. (2016) 6 All LJ 203

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. These appeals arise out of the judgment and order of learned Single Judge dated 13.8.2024, whereby two writ petitions filed by the appellant are decided. Learned Single Judge has dismissed both the writ petitions and vacated the interim order granted earlier.

2. The controversy leading to filing of the present appeal lies in a limited factual scenario. The appellant herein was appointed as lecturer in Bharat Sewak Samaj Inter College, Hathiyar, Varanasi (hereinafter referred to as the 'institution'). He was appointed as officiating principal of the institution on 30.3.2018. His signatures were also attested by the District Inspector

of Schools on 11.4.2018. A requisition was sent by the Managing Committee of the institution for substantive appointment to be made on the post of principal on 7.7.2018. Although the requisition was sent for substantive appointment but no advertisement was issued. It is at this stage that the process was initiated for transfer of the respondent Nityanand Mishra, who as substantively working as principal of Raj Kumar Higher Secondary School, Kubernath, Kushinagar. For such purposes of transfer recommendation was made by the Joint Director of Education on 30.12.2022. Two subsequent orders have been passed in favour of the contesting respondent by the educational authorities later in point of time. The first order is of 16.5.2023, whereby the Additional Director of Education Secondary disposed of the representation made by the appellant objecting to the resolution made by the Joint Director of Education recommending transfer of contesting respondent in the present institution. The Additional Director of Education by this order affirm the previous recommendation of 30.12.2022. A subsequent order of transfer dated 28.6.2024 is passed by the Additional Director of Education whereby contesting respondent has been transferred to the institution in question. These two orders were the subject matter of challenge before the learned Single Judge.

3. In the first writ petition i.e. Writ-A No.5106 of 2023 the recommendation of the Joint Director of Education dated 30.12.2022 was assailed. This writ petition was entertained and a detailed interim order was passed on 22.5.2023, which is reproduced hereinafter:-

“Heard Sri Kailash Singh Kushwaha, learned counsel for the

petitioner, learned Standing Counsel for the State respondents, Sri Ramesh Chandra Dwivedi, learned Advocate for Committee of Management and Sri Ashutosh Mani Tripathi, learned counsel for respondent no. 6.

The controversy in the present case has arisen on account of recommendation being made in favour of 6th respondent to be transferred as a Principal of the Institution where the petitioner is currently working as officiating Principal.

The submission advanced by learned counsel for the petitioner on the earlier date was that since he was working in the Institution as officiating Principal from 2018 and the post has been requisitioned to the Board for making direct selection, he will lose the opportunity to participate as a senior most teacher of the Institution for considering his candidature for selection in the event post gets occupied by a regular Principal, may be by way of transfer. He had argued that the District Inspector of Schools had no occasion to cancel the requisition already forwarded to the Board in the light of Full Bench judgment of this Court in the case of Haripal Singh v. State of U.P. & 10 Ors, 2016 ADJ 622.

Taking notice of the aforesaid facts, this Court had directed Additional Director of Education to pass final order in pending matter before him, vide order dated 19.04.2023. Now the order has been passed on 16.05.2023 which has been brought on record by way of short counter affidavit filed on his behalf. In the order which has been passed on 16.05.2023 by the District Inspector of Schools, the ground taken is that on 11.01.2023 the Secretary, U.P. Secondary Education Services Selection Board, Prayagraj had issued directives to all the District

Inspector of Schools of the State that "since in the matter of selection and appointment time was being taken therefore, the proper verification will be done of the requisition sent online in between the period from 11.01.2023 to 16.01.2023 on eight points in which one of the point was as to whether the requisition was sent from any Institution or not and as to whether if requisition sent suffers from any irregularity and as to whether the post in respect of which requisition has been sent and transfer is being claimed upon has already been filled up or not," the District Inspector of Schools on 16.01.2023 rejected the requisition of the post of Principal sent from the Institution on account of the fact that a transfer was being considered.

Prima facie in my considered view such a rejection of already requisitioned post by District Inspector of Schools was not called for at all, nor the import of directives issued by the Secretary, U.P. Secondary Education Services Selection Board, Prayagraj can be so construed as to empower the District Inspector of Schools to cancel the requisition. All that was required to be done by the District Inspector of Schools to verify as to whether any such requisition had been sent personally or not. Further, I find that no irregularity has been cited in rejecting the requisition for the post of Principal in the petitioner's Institution. It transpires further that the application of 6th respondent was moved offline only in the month of November 2022 when the post in question had already been requisitioned and there was no order cancelling the same except one order passed by District Inspector of Schools dated 23.04.2022 that the post since was already requisitioned, the second time requisition was not maintainable.

Matter requires consideration.

All the respondents are granted four weeks' time to file counter affidavit. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List on 28.07.2023.

In the meanwhile until further orders of this Court, it is hereby provided that the post of Principal of the Institution where the petitioner is working as officiating Principal shall not be filled up by any transfer except by mode of regular selection by the Board.

In the meantime, petitioner may also file necessary amendment application to challenge the order passed by the Additional Director of Education on 16.05.2023."

4. In terms of the liberty granted writ petition no.5106 of 2023 has been amended so as to challenge the order dated 16.5.2023 and also challenge the recommendation/order dated 16.1.2023, whereby the requisition sent on 7.7.2018 by the Committee of Management itself has been cancelled by the educational authorities. The writ petition no.5106 of 2023 was pending, wherein interim order was continuing when the subsequent order of 28.6.2024 has been passed as a result of which the contesting respondent has been transferred to the institution concerned. This order is the subject matter of challenge in Writ-A No.10109 of 2024. Both the writ petitions have been dismissed.

5. Thus aggrieved the appellant is before this Court challenging the judgment of the learned Single Judge.

6. Sri Ashok Khare, learned Senior counsel, assisted by Sri K.S. Kushwaha, learned counsel for the appellant submits as under:-

(i) Once the requisition for substantive appointment to be made on the post of principal has been sent on 7.7.2018 the resolution of transfer by the Joint Director of Education dated 30.12.2022 was impermissible in view of the Full Bench judgment of this Court in the case of Prashant Kumar Katiyar Vs. State of U.P. and Others 2013 (1) ADJ 523 which has been followed by a Division Bench in the case of Hari Pal Singh vs. State of U.P. (2016) 6 All LJ 203.

(ii) The report/order dated 16.1.2023 is bad in law, inasmuch as the requisition has been set at naught on the ground that a recommendation for transfer is made. Submission is that when the transfer itself was impermissible such recommendation for transfer could not have formed the basis for cancellation of the requisition.

(iii) The process of transfer was initiated in terms of the regulations 55 to 58 of the regulations framed under Chapter III of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as the 'Act of 1921'). The process of recruitment was initiated under the provisions of U.P. Secondary Education (Service Selection Boards) Act, 1982 (hereinafter referred to as the 'Act of 1982') as well as rules framed thereunder. Though the Act of 1982 stood repealed and substituted by the U.P. Education Service Selection Commission Act, 2023 (hereinafter referred to as the 'Act of 2023') yet, the actions taken under the previous enactments of 1982 would clearly be saved by virtue of Section 31(2) of the Act. It is also urged that the rules framed under the Act of 2023, particularly rule 28 would not confer any right upon the Director to recommend transfer against a post already requisitioned under the Act of 1982. It is, therefore, submitted that the orders impugned are bad in law.

7. Sri R.K. Ojha, learned Senior counsel for the respondent, on the other hand, submits that the requisition although could not have cancelled on 16.1.2023 yet, such requisition lost its effect with the introduction of the Act of 2023. Provisions of the Act of 2023 have been highlighted before the Court in order to contend that a distinct process of direct recruitment is countenanced under the Act of 2023 and, therefore, by necessary implication the process of recruitment initiated under the Act of 1982 would lose its efficacy. This, learned counsel submits, is particularly with reference to the requisition sent under rule 11 of the rules framed under the Act of 1982. Sri Ojha places heavy reliance upon rule 28(5) of the rules framed under the Act of 2023 to contend that the power is recognized under the new enactment with the Director to pass appropriate orders of transfer and since such power has been exercised while issuing the subsequent order of 28.6.2024, as such the previous requisition sent under the Act of 1982 cannot be relied upon to question the order of 28.6.2024. He also supports the reasoning assigned by learned Single Judge to come to such conclusion. It is also urged that since the requisition was sent in 2018 and the year of recruitment has since changed, therefore, the previous requisition has otherwise lost its relevance.

8. Learned State counsel submits that the Act of 2023 clearly protects the action taken under the previous Act of 1982 and, therefore, the fact that subsequent Act has intervened by repealing the Act of 1982, the consequences flowing in terms of Section 6 of the U.P. General Clauses Act, 1904 cannot be obliterated.

9. We have heard learned counsel for the parties and have carefully perused the materials placed on record.

10. At the very threshold we may note that the substantive vacancy in the institution has arisen on 1.4.2018. This vacancy was substantive in nature and was required to be filled by direct recruitment. The process of recruitment was initiated by the Committee of Management by sending requisition on 7.7.2018. At this juncture it would be worthwhile to refer to the scheme of direct recruitment under the Act of 1982 as well as the rules framed thereunder. Section 10 of the Act of 1982 provided the procedure by which direct recruitment was to be made in an institution. The Management was required to determine the vacancy existing or likely to fall vacant during the year of recruitment and notify the vacancy to the board in such manner and to such officer or authority, as may be prescribed. In cases other than the Head of the institution the Management was also required to specify the vacancies with reference to the social category to which it belong. The procedure for selection by direct recruitment was to be prescribed by virtue of sub-section 2 of section 10. Pursuant to the Act of 1982 the rules have been framed for securing the objective of the Act of 1982. The determination and notification of vacancy is an aspect which was to be dealt with by rule 11. Rule 11(1) provided that for the purposes of direct recruitment to the post of teacher the Management was to determine the number of vacancies in accordance with sub-section 1 of section 10 and notify the vacancies through the Inspector to the board in the manner provided under rule 11. Specific manner in which the vacancies had to be notified has been specified under the rules. Sub-rule 3 and 4 of rule 11 are also relevant and are reproduced hereinafter:-

“(3). If, after the vacancies have been notified under sub-rule (2), any

vacancy in the post of a teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send it to the Board.

(4). Where, for any year of recruitment, the Management 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 Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 10 and notify them to the Board in the manner and by the date referred to in the said sub-rule. They vacancies to the Board under this sub-rule shall be deemed to be notified by the Management of such institution.”

11. The Act of 1982 primarily was introduced for the purposes of making appointment in the recognized institutions. The conditions of service of teachers etc were otherwise left to be regulated by the provisions of the Act of 1921, whereunder the institution itself was recognized. Section 32 of the Act of 1982 clearly provided that the provisions of the Act of 1982 shall prevail in respect of any inconsistency with the provisions of the Act of 1921.

12. It is well recognized that transfer is an exigency of service. To what extent and in what manner the teacher of one institution could be transferred to another institution is an exigency dealt with by regulation 55 to 58 of the regulations framed under Chapter III of the Act of 1921. These regulations have been amended from time to time. Last such amendment has been made on 7.7.2023. The scheme of transfer enforced vide

notification dated 7.7.2023, contained in regulation 55 to 58, would be relevant and are reproduced hereinafter:-

"55-(1) अल्पसंख्यक संस्थाओं से भिन्न अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में किसी अध्यापक के आनलाइन स्थानान्तरण के प्रयोजन के लिए प्रबन्धतन्त्र विद्यमान रिक्तियों की संख्या और संस्था के प्रधान के पद से भिन्न पद की स्थिति में, उत्तर प्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम, 1994 के अनुसार अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के अभ्यर्थियों के लिए आरक्षित की जाने वाली रिक्तियों की संख्या भी अवधारित करेगा और रिक्तियों की सूचना वेबसाइट पर अपलोड किए जाने हेतु जिला विद्यालय निरीक्षक को उपलब्ध करायेगा।

(2) जिला विद्यालय निरीक्षक ऐसी रिक्तियों का सत्यापन करेगा और संस्था में पंजीकृत छात्र संख्या के आधार पर पद भरे जाने के औचित्य को देखते हुए जनशक्ति के अन्तर्गत मान्य रिक्तियों की सूचना वेबसाइट पर अपलोड करायेगा। प्रतिबन्ध यह है कि चयनबोर्ड के माध्यम से सीधी भर्ती के अन्तर्गत अधियाचित पदों को उक्त वेबसाइट पर अपलोड नहीं किया जा सकेगा।

(3) किसी अल्प संख्यक संस्था से भिन्न किसी संस्था का कोई स्थायी अध्यापक, जिसके अन्तर्गत सम्बद्ध प्राइमरी अनुभाग में कार्यरत अध्यापक भी सम्मिलित है, जो किसी दूसरी संस्था में स्थानान्तरण चाहता है, वेबसाइट पर प्रदर्शित रिक्ति के प्रति ऐसी शर्तों के अधीन आनलाइन आवेदन करेगा, जैसा कि राज्य सरकार द्वारा समय-समय पर अपने आदेश द्वारा निर्गत किया जाये।

प्रतिबन्ध यह है कि 08 महत्वाकांक्षी जनपद (सौनभद्र, चन्दौली, बहराइच, श्रावस्ती, बलरामपुर, फतेहपुर, चित्रकूट सिद्धार्थनगर) का कोई अध्यापक अन्य जनपद में स्थानान्तरण हेतु आवेदन नहीं करेगा, किन्तु पारस्परिक स्थानान्तरण की स्थिति में अन्य जनपद में स्थानान्तरण आवेदन कर सकेगा।

(4) उक्त आनलाइन आवेदन-पत्र की प्रिन्ट आउट अध्यापक के मामले में संस्था प्रधान को तथा संस्था प्रधान के मामले में प्रबन्धक को प्रस्तुत करेगा।

56-जहाँ आवेदन पत्र संस्था के प्रधान को प्रस्तुत किया गया है, वहाँ वह उसे परीक्षणोपरान्त अपनी संस्तुति के साथ निर्धारित अवधि के अन्तर्गत आनलाइन अग्रसारित करेगा तथा आनलाइन आवेदन पत्र की हार्डकापी संस्था प्रबन्धक को प्रस्तुत करेगा।

57-(1) संस्था का प्रबन्धक मामले को प्रबन्धतन्त्र के समक्ष रखेगा और प्रबन्धतन्त्र विचारोपरान्त अपनी अनापत्ति एवं संकल्प-पत्र जारी करेगा।

(2) प्रबन्ध समिति की अनापत्ति/संकल्प-पत्र प्राप्त होने पर प्रबन्धक आवेदन पत्र को आनलाइन अग्रसारित करेगा तथा संकल्प-पत्र/अनापत्ति प्रमाण-पत्र को अपलोड करेगा।

(3) प्रतिबन्ध यह है कि किसी शैक्षिक सत्र में कार्यरत प्रवक्ता, सहायक अध्यापक एवं सम्बद्ध प्राइमरी अनुभाग में पृथक-पृथक कार्यरत कुल पदों के सापेक्ष 20 प्रतिशत से अधिक अध्यापकों के आवेदन पत्र स्थानान्तरण हेतु अग्रसारित नहीं किए जा सकेंगे। संस्था प्रधान के मामले में 20 प्रतिशत की व्यवस्था प्रभावी नहीं होगी।

(4) प्रबन्धक उक्त आनलाइन आवेदन पत्र की हार्डकापी, प्रबन्धतन्त्र के संकल्प की प्रति जिसमें प्रबन्धतन्त्र की सहमति इंगित की गयी हो, सेवा-पुस्तिका, चरित्रपंजी एवं अन्य अभिलेख जो आवेदक द्वारा आनलाइन आवेदन-पत्र में इंगित किया गया है, की तीन-तीन प्रतियों में सम्बन्धित जिले के जिला विद्यालय निरीक्षक को हार्डकापी भेजेगा।

58-निरीक्षक विनियम 57 के अधीन प्राप्त आवेदन पत्र को इस प्रयोजन के लिए रखे गये रजिस्टर में दर्ज करायेगा तथा आवेदक द्वारा आनलाइन प्रस्तुत आवेदन पत्र में उल्लिखित सूचनाओं का सत्यापन/परीक्षण करते हुए वेबसाइट पर आनलाइन सम्बन्धित संयुक्त शिक्षा निदेशक को अग्रसारित करेगा तथा आवेदन पत्र की दो प्रतियाँ समस्त संलग्नकों सहित सम्बन्धित संयुक्त शिक्षा निदेशक को प्रेषित करेगा।"

13. The regulation 58 as it stood prior to its amendment on 7.7.2023 and was applicable on the date of passing of the resolution by the Joint Director of Education on 30.12.2022 is also reproduced hereinafter:-

"58-निरीक्षक विनियम 57 के अधीन प्राप्त आवेदन पत्र को इस प्रयोजन के लिए रखे गये रजिस्टर में दर्ज करायेगा और उसे जहाँ वह संस्था जिसमें स्थानान्तरण चाहा गया हो उसकी अधिकारिता के भीतर स्थित हो, वहाँ वह संस्था में पद रिक्त होने एवं अधियाचित न होने की पुष्टि करने के पश्चात निर्धारित वेब साइट पर आन लाइन मण्डलीय संयुक्त निदेशक को अग्रसारित करेगा तथा हार्ड कापी भी भेजेगा।"

14. The applicable provisions of the Act of 1982 as well as the provisions relating to transfer of teacher from one institution to another came up for consideration before a Full Bench of this Court in Prashant Kumar Katiyar (supra). To what extent transfer would be permissible after the requisition has been sent for filling up of the post fell for determination before the Full Bench. The Full Bench after noticing the scheme of the Act held as under in para 38 to 41 of the judgment:-

“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 de-termination.*

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 v. State of U.P.,*

2008(1) at ADJ 273 (DB) and to Para 24 of the decision in the case of U.P. Secondary Education Service Selection Board v. State of U.P., 2011 (3) ADJ 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 forth with 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 herein-above as no selection can be held except through the Board.

41. Once it is held that the power 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.”

15. The judgment in Prashant Kumar Katiyar (supra) was later interpreted by some of the learned Single Judges to apply till such time as the advertisement is not issued. Learned Single Judges took the view that the embargo in making of transfer in terms of the Full Bench judgment would be attracted once the process of selection has commenced with issuance of advertisement. This view was reversed by a Division Bench of Lucknow Bench in Hari Pal Singh (supra). Relevant passage from the judgment of Hari Pal Singh (supra) in para 15 and 16 are reproduced hereinafter:-

“15. On a consideration of the ratio of the Full Bench in the case of Prashant Kumar Katiyar (2013 (3) ALJ 658) (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 v. State of U.P. and others [2007 (3) UPLBEC 2497] and Smt. Amita Sinha v. State of U.P. and others [2008 (4) ESC 2799] : (2009 (1) ALJ 611) 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 con-cluded 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 (2013 (3) ALJ 658) (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.”

16. In view of the position in law having been settled by the Full Bench of this Court in Prashant Kumar Katiyar (supra) as clarified in Hari Pal Singh (supra) it became abundantly clear that once the requisition for direct recruitment was sent to the Inspector, by the Management, in terms of rules 11 of the rules framed under the Act of 1982 the transfer of a teacher against such vacancy was impermissible.

17. The regulation 58 as it stood prior to its amendment on 7.7.2023 also provided in clear terms that an application for transfer could be entertained only if the requisition had not been sent. There was thus no scope for any confusion on this aspect of the matter.

18. In light of the discussions aforesaid, we find that the requisition since was already sent for direct appointment to be made against the post of principal in the institution on 7.7.2018 it was not open for the Joint Director of Education to have made any recommendation for transfer of the contesting respondent to the institution concerned. What is further surprising is that the authorities misconstrued the statutory

scheme and erroneously came to the conclusion that just because recommendation for transfer had been made, therefore, the requisition for direct appointment itself had become invalid. This erroneous interpretation is clearly reflected from the order passed by the educational authorities on 16.1.2023, which is quoted hereinafter:-

“अद्धतन स्थिति

Final rejected by DIOS

Reason- अधियाचित संस्था का पद स्थानान्तरण से भर जाना अथवा शासन द्वारा स्थानान्तरण प्रस्तावित हो जाने के कारण

Rejection Date 16.1.2023”

19. In view of our discussions held above, we have no difficulty in holding that the recommendation made by the Joint Director of Education in favour of the contesting respondent on 30.12.2022 as well as the decision of the authorities taken on 16.1.2023 holding the requisition sent on 7.7.2018 for direct recruitment to have become invalid are unsustainable. Contrary view taken by the learned Single Judge is clearly based on misconstruction of the statutory scheme and, therefore, cannot be approved of.

20. The position, however, has undergone a change with the repeal of the Act of 1982 as well as introduction of the new Act of 2023. We are, therefore, required to consider as to what would be the effect of the requisition sent earlier under the previous regime as well as the action of the authorities in transferring the contesting respondent to the institution concerned.

21. So far as the Act of 2023 is concerned, it makes no reference to transfer. The Act of 2023 is also an act

providing for appointments to be made in a variety of institutions including secondary education. This Act of 2023 is applicable in the facts of the present case. Section 10 of the Act of 2023 provides for determination of vacancies, requisition and selection procedure. Section 10 of the Act of 2023 is reproduced hereinafter:-

“10. Determination of Vacancies, Requisition, and Selection Procedure

(1) For the purpose of making an appointment of a teacher or instructor by direct recruitment, the Appointing Authority or Management or Authorized Officer shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and, in the case of a post other than the post of head of the institution, also determine the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and Other Backward Classes of citizens in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (U.P. Act no. 4 of 1994), and persons belonging to economically weaker sections in accordance with the Uttar Pradesh Public Services (Reservation for Economically Weaker Sections) Act, 2020 (U.P. Act no. 10 of 2020) and other directions issued by the Government from time to time, and notify the vacancies to the Commission in such manner and through such officer or authority as may be prescribed. The Commission shall decide the eligibility and accordingly advertise the vacancies received in the manner as may be prescribed.

(2) The procedure of selection of candidates for direct recruitment to the posts of teachers or instructors shall be such as may be prescribed.

(3) Regarding appointment in religious and linguistic minority educational institutions for maintaining quality of education, process of selection shall be completed by compulsorily inviting educationist of that particular religion and language (having knowledge of theology and culture) as experts.”

22. There are other two provisions under the Act of 2023 which requires consideration in the facts of the present case. The first is Section 30 of the Act of 2023 which provides for overriding effect of the Act of 2023 over the provisions of the Act of 1921. This provision in terms is similar to the provisions contained under Section 32 of the previous of the Act of 1982. Section 31 provides for repeal and savings. Sub-section 1 of Section 31 provides for repeal of the Act of 1982 apart from certain other enactments with which we are not currently concerned. Sub-section 2 and 3 of Section 31 are relevant and are reproduced hereinafter:-

“(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 to the enforcement of provisions.”

23. Before adverting to the implications flowing from the above provisions we would like to refer to one provision from the rules of 2023, framed under the Act of 2023. Rule 28 of the rules of

2023 falls in Chapter V which deals with procedure of recruitment. Rule 28 contemplates determination and notification of vacancies. Though we are primarily concerned with sub-rule 5 of rule 28 but as other provisions of such rule may also have relevance, therefore, we deem it appropriate to reproduce rule 28 in its entirety:-

“28. रिक्तियों का अवधारण और अधिसूचित किया जाना

(1) नियुक्ति प्राधिकारी अथवा प्रबन्धतंत्र अथवा प्राधिकृत अधिकारी, सीधी भर्ती के प्रयोजन से अधिनियम की धारा 10 की उपधारा (1) के अनुसार रिक्तियों की संख्या का अवधारण करेगा और रिक्तियों को, यथास्थिति, निदेशक (उच्च शिक्षा) या निदेशक (माध्यमिक शिक्षा) या निदेशक (बेसिक शिक्षा) या निदेशक (प्रशिक्षण एवं सेवायोजन) या महानिदेशक, अटल आवासीय विद्यालय के माध्यम से आयोग को यहां दी गयी रीति से अधिसूचित करेगा

(2) सीधी भर्ती द्वारा भरे जाने वाले प्रत्येक श्रेणी के पद के लिए भर्ती के वर्ष के अन्तिम दिनांक को सेवानिवृत्ति के कारण होने वाली सम्भावित रिक्तियों को सम्मिलित करते हुए नियुक्ति प्राधिकारी अथवा प्रबन्धतंत्र अथवा प्राधिकृत अधिकारी द्वारा रिक्तियों का विवरण भर्ती के वर्ष की 15 जुलाई तक उपनियम (1) के अधीन प्राधिकृत अधिकारी को भेजा जायेगा और प्राधिकृत अधिकारी अपने कार्यालय के अभिलेखों से सत्यापन करने के पश्चात प्रत्येक श्रेणी के पदों की रिक्तियों के बारे में विषयवार एवं आरक्षण श्रेणीवार रिक्तियों का समेकित विवरण तैयार करेगा। इस प्रकार तैयार किया गया समेकित विवरण प्राधिकृत अधिकारी द्वारा उसी भर्ती वर्ष के 31 जुलाई तक आयोग को भेजा जायेगा।

परन्तु यह कि यदि राज्य सरकार का समाधान हो जाये कि ऐसा करना समीचीन है तो वह लिखित आदेश द्वारा किसी विशेष भर्ती के वर्ष के संबंध में आयोग को रिक्तियाँ अधिसूचित किये जाने के लिए कोई अन्य दिनांक नियत कर सकती है।

(3) यदि, उप-नियम (2) के अधीन रिक्तियों के अधिसूचित किये जाने के पश्चात अध्यापक अथवा अनुदेशक के किसी पद पर कोई रिक्ति होती है, तो नियुक्ति प्राधिकारी अथवा प्रबन्धतंत्र अथवा प्राधिकृत अधिकारी इसके होने के पन्द्रह दिन के भीतर उक्त उपनियम के अनुसार प्राधिकृत अधिकारी को अधिसूचित करेगा और प्राधिकृत अधिकारी उसे प्राप्त करने के दस दिन के भीतर आयोग को भेज देगा।

(4) जहाँ, भर्ती के किसी वर्ष के लिए नियुक्ति प्राधिकारी अथवा प्रबन्धतंत्र अथवा प्राधिकृत अधिकारी, उप नियम (2) में विनिर्दिष्ट दिनांक तक रिक्तियाँ अधिसूचित नहीं करता या

उक्त उपनियम के अनुसार उन्हें अधिसूचित करने में असफल रहता है तो प्राधिकृत अधिकारी अपने कार्यालय के अभिलेख के आधार पर अधिनियम की धारा 10 की उपधारा (1) के अनुसार ऐसी संस्था में रिक्तियों को अवधारित करेगा और उक्त उपनियम में निर्दिष्ट रीति से और दिनांक तक आयोग को अधिसूचित करेगा।

स्पष्टीकरण-इस उपनियम के अधीन आयोग को अधिसूचित की गई ऐसी रिक्तियां संस्था के नियुक्ति प्राधिकारी अथवा प्रबन्धतंत्र अथवा प्राधिकृत अधिकारी द्वारा अधिसूचित की गयी समझी जायेगी।

(5) अधिसूचित रिक्तियों के पदों को एकल स्थानान्तरण द्वारा नहीं भरा जायेगा, परन्तु यह कि विशेष परिस्थितियों में यदि एकल स्थानान्तरण आवश्यक हो तो यथा संभव शीघ्र, उक्त प्रक्रिया को आयोग के संज्ञान में लाया जाना आवश्यक होगा और एकल स्थानान्तरण के फलस्वरूप रिक्त पद निदेशक द्वारा अधिसूचित पदों में सम्मिलित माना जायेगा और यह रिक्ति भी उसी चयन प्रक्रिया से आच्छादित रहेगी। चयन प्रक्रिया प्रारम्भहोने के बाद किसी भी दशा में एकल स्थानान्तरण नहीं किया जायेगा”

24. Learned Single Judge has taken note of sub-rule 5 of rule 28 to come to the conclusion that transfer in special circumstances is permissible and once the Director has passed an order transferring the contesting respondent to the institution concerned it cannot be invalidated on account of the previous requisition sent by the Managing Committee under the 1982 regime.

25. We may note that the issue raised by the petitioner in laying challenge to the decision of 16.1.2023 declaring requisition to have become invalid has not been adverted to by the learned Single Judge. There is neither any consideration nor any finding of the Court in this regard. We have already held that the decision of the educational authorities holding the requisition to have become invalid was impermissible and contrary to the statutory schemes. We are, therefore, required to examine the consequences flowing from such determination in the facts of the present case. The requisition made under

the Act of 1982 is treated to be subsisting and the issue is as to whether the making of transfer on the post in question was permissible?

26. Section 31(2) of the Act of 2023 clearly provides that notwithstanding repeal of the Act of 1982 anything done or any action taken under the Act of 1982 shall be deemed to have been done or taken under the Act of 2023 treating it enforced at all material times. This provision has a vital significance in the facts of the present case.

27. The basic purpose and object of the Act of 1982 as also the Act of 2023 is to make fair and transparent substantive appointment in the educational institutions. The basic change made in the two enactments is with regard to the methodology to be followed in making of selection. As against the board in the previous act it is now the commission which is entrusted with the responsibility of making appointments.

28. So far as the transfer of a teacher from one institution to another is concerned this exigency is neither specifically dealt with under the Act of 1982 nor is dealt with under the Act of 2023. The exercise of power of transfer has been analysed by the Full Bench in Prashant Kumar Katiyar in the context of the Act of 1982 to ensure that the process of regular recruitment is not encumbered. Since the commencement of the appointment process under the Act of 1982 as also under the Act of 2023 is the making of requisition for appointment, and the Full Bench in the context of 1982 Act conclude that once such requisition is sent by Management the power to fill up the post by way of transfer would not be

permissible. The underlying object only was that the recruitment required to be made under the Act of 1982 is not interfered with on account of transfer made by the Management. This exigency continues to hold good even in the changed statutory scheme under the Act of 2023. The aspect of determination and notification of vacancies is dealt with in rule 28 of the 2023 rules. The appointing authority or the management is to determine the number of vacancies in accordance with sub-section 1 of section 10 of the Act; notify the vacancies through the Director or other authorities, as the case may be, to the Commission in the manner prescribed. Sub-rule 2 of rule 28 is similar to rule 11(3) as per which the vacancies that are likely to arise are to be ascertained and the authorized officer, after verification of records from office, is to prepare a consolidated list of vacancies subject-wise and category-wise etc. Sub-rule 3 of rule 28 is *pari materia* to rule 11(3). Rule 28(4) is also similar in letter and spirit to rule 11(4) of the rules framed under the Act of 1982.

29. Sub-rule 5 of rule 28 is somewhat distinct, inasmuch as it deals with a different exigency. This sub-rule provides that the posts of notified vacancies shall not be filled by single transfer. Its proviso is in the nature of exception which specifies that in special circumstances, if a single transfer is necessary, then it will be brought to the notice of the Commission as soon as possible, and the vacant post 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 same selection process. The last line of the proviso contemplates that after the commencement of the selection process no single transfer will be done under any circumstance. The last sentence in sub-rule

5 only exemplifies that first sentence of sub-rule 5 that a single post would not be filled by transfer.

30. Sub-rule 5 of rule 28 has been relied upon by the learned Single Judge to hold that transfer in certain circumstances would be permissible by the Director.

31. Sri Ojha, appearing for the transferred Principal also submits that the transfer would be permissible in the changed scenario till the commencement of selection process. The submission of Sri Ojha is also that the selection process ordinarily commences with the issuance of advertisement and since such exigency has not arisen, therefore, the exercise of power by the Director would be valid and does not require any interference.

32. We are not inclined to accept such submission, inasmuch as rule 28(5) is not intended to regulate the exigency of transfer of a teacher. Rather, it only provides for the procedure to be followed where such transfer is effected. We are inclined to take such view, inasmuch as rule 28 regulates determination and notification of vacancies and specifies as to in what manner the vacancies are to be determined and notified to the commission. Sub-rule 5 is a part of rule 28 which again is referable to section 10 of the Act of 2023. Sub-rule 5 provides that posts of notified vacancies shall not be filled by a single transfer. Once we hold that notification of vacancy under the Act of 1982 will continue by virtue of Section 31(2) of the Act of 2023 the transfer on such notified vacancy would be impermissible. This provision has to be read with the proviso according to which in special circumstances where a single transfer is necessary, then the resultant vacancy would be brought to the notice of the commission, as soon as possible, and the vacant post as a result of single

transfer will be considered included in the vacancies notified to the Director and shall be filled by the same selection process. Sub-rule 5, therefore, is intended to deal with the special exigency i.e. creation of vacancy on account of transfer. In what manner transfer is to be effected is otherwise not specified in rule 28.

33. Sub-rule 5 of rule 28, in our considered view, has to be read in conjunction with regulation 55 to 58 of the regulations framed under Chapter III of the Act of 1921. Regulation 58, as amended, clearly provides that transfer would be impermissible against a notified vacancy. This is otherwise the position on account of the Full Bench judgment of this Court in Prashant Kumar Katiyar (supra). Regulation 55 to 58 would, therefore, govern the exigency with which we are presently concerned i.e. transfer of a teacher. Rule 28(5) of the rules of 2023 read with regulation 58 also makes it explicit that transfer would not be permissible against notified vacancies. This interpretation would be consistent with the statutory scheme, inasmuch as any encumbrance in the process of recruitment ought not to be made once the vacancy is notified. We are, therefore, of the view that rule 28(5) in itself is not the enabling provision for the Director to pass an order of transfer independent of the provisions contained under regulation 58, of the regulations framed under Chapter III.

34. The only issue remaining is with regard to the import of Section 31(2) of the Act of 2023. Section 31(2) provides that anything done or any action taken under the Act of 1982 would be treated to have been done under the Act of 2023. The only exigency in which such action would not be saved would be where the Act of 2023 provides for a course inconsistent with what is contemplated under the Act of 1982. The

determination of vacancies and its intimation to the commission virtually commences the process of recruitment in these institutions. Sending of the requisition to the board would, therefore, continue to be saved under the Act of 2023 and the only change would be that now the appointment will have to be made by the commission in place of the board. If any contrary interpretation is adopted it would result in unwanted consequences and impede the object of making substantive appointment. We may also note that the direct recruitment in such institutions was previously regulated by the Act of 1982 and is now to be made under the Act of 2023. The appointment whether is made by board or is made by commission is not material for the present purposes. However, the vacancy once is notified by management the filing up of post has either to be under the Act of 1982 or has to be under the Act of 2023. Such vacancies cannot be allowed to be filled by way of transfer.

35. For the reasons and discussions held above, these special appeals succeed and are allowed. Judgment and order passed by learned Single Judge dated 13.8.2024 is set aside. Writ petitions filed by the appellant also succeeds and are allowed. The orders passed by the Director dated 30.12.2022, dated 16.5.2023 and dated 28.6.2024 are set aside. No order is passed as to costs.

(2025) 5 ILRA 409

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 13.05.2025

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ A No. 790 of 2020

Rajan

...Petitioner

Versus

State of U.P. & Ors.

...Respondents