

Reserved

Case :- SPECIAL APPEAL No. - 154 of 2020

Appellant :- Examination Regulatory Authority, Allahabad And Ors.

Respondent :- Rishabh Mishra And Ors.

Counsel for Appellant :- C.S.C.

Counsel for Respondent :- Amit Kr. Singh Bhadauriya

connected with

(1) **Case :-** SPECIAL APPEAL No. - 156 of 2020

Appellant :- Examination Regulatory Authority, U.P. Thru. Secy & Ors

Respondent :- Smt. Amita Tripathi & Others

Counsel for Appellant :- C.S.C.

Counsel for Respondent :- Avdhesh Shukla

(2) **Case :-** SPECIAL APPEAL No. - 157 of 2020

Appellant :- Examination Regulatory Authority, U.P. Thru. Secy & Ors

Respondent :- Smt. Amit Kumar Patel & Another

Counsel for Appellant :- C.S.C.

Counsel for Respondent :- Meenakshi Singh Parihar

Hon'ble Pankaj Kumar Jaiswal, J.

Hon'ble Dinesh Kumar Singh, J.

(1) Sri Raghvendra Singh, learned Advocate General assisted by Sri Ran Vijai Singh, learned Additional Chief Standing Counsel in all appeals, Dr. L.P. Misra alongwith Sri Amit Kumar Singh Bhadauria, learned Counsel for respondents in Special Appeal No.154 of 2020, Sri Sudeep Seth, learned Senior Advocate assisted by Sri Awadhesh Shukla, learned Counsel for respondents in Special Appeal No.156 of 2020 and Sri H. G. S. Parihar, learned Senior Counsel assisted by Ms. Meenakshi Singh Parihar, learned Counsel for respondents and Sri J. N. Mathur, learned Senior Counsel assisted by Ms. Ishita Yadu and Sri Asit Chaturvedi, learned Senior Counsel assisted by Sri Onkar Singh, learned Counsel for intervenors are present.

(2) Heard on the question of admission as well as for grant of interim relief/stay.

- (3) These intra-Court Appeals have been filed by the appellants- Examination Regulatory Authority and others under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 against the order dated 3.6.2020 passed in Writ Petition No. 8056 (SS) of 2020, *Rishabh Mishra & others v. State of U.P. and others*, and other connected matters by which the learned Writ Court was of the considered opinion that there has been a material error in evaluation of the question paper due to which a large number of candidates are liable to suffer for no fault of theirs and has held that a case for interim relief has been made out by the writ petitioners and therefore, the notification dated 8.5.2020 whereby the final answer key has been issued is stayed and all proceedings pursuant to notification dated 8.5.2020 are also stayed till the next date of hearing.
- (4) Learned Writ Court while staying the notification has also referred all the objections raised by the candidates pursuant to publication of provisional answer key to a panel of experts and directed the examinee, after receiving the report of the expert/ Subject Specialist, to file the same before this Court on affidavit. Relevant portion of the order dated 3.6.2020 reads as under:-

"In the present case the Court has examined certain questions as stated above and is of the considered opinion that there has been a material error in evaluation of the question paper due to which a large number of candidates are liable to suffer for no fault of theirs. The State in the counter affidavit while agreeing that there may be certain questions which may be argumentative which may have more than one correct answer, but maintained that this Court need not interfere, inasmuch as the presumption should go in favour of the examining authority.

Once it is clear that there could be more than one correct answers in an objective type question where several options have been

provided by the examining authority, the candidate is required to select only one correct answer, then it is incumbent, necessary and mandatory that infact there should only be one correct answer which could be selected by the candidate, otherwise, he would be liable for additional marks for the negligence of the examining authority and he need not be made to suffer. In an objective type of question paper there is no scope for any deduction or inference nor is there any provision for giving reasons for the answer therefore argumentative questions clearly have to be avoided and have no place in an objective question paper.

In light of the above, I am clearly of the opinion that a case for interim relief has been made out by the petitioners. The Notification dated 08/05/2020 whereby the final answer key has been issued is hereby stayed, and all proceedings pursuant to Notification dated 08/05/2020 are also stayed till the next date of listing.

In the aforesaid circumstances, I deem it appropriate to refer all the objections raised by the candidates pursuant to publication of the provisional answer key to a panel of experts. The examining authority after receiving the report of the expert/subject specialists are directed to file the same before this Court on affidavit.

Looking into the magnitude and the scale of the examination and the number of persons whose future is at stake, I deem it appropriate to refer the provisional answer key along with the objections to experts to be appointed by the Secretary, University Grants Commission, New Delhi. The Examination Regulatory Authority, Uttar Pradesh is directed to send the question paper, provisional answer key along with the objections received from the candidates to the Secretary, University Grants Commission, New Delhi within a period of 10 days from today. On receipt of the papers by the Secretary, University Grants Commission, he shall proceed to appoint a panel of experts within one week, from amongst persons who have adequate knowledge in the subjects in relation to which opinion has been sought. The experts

are required to give their opinion within a period of 2 weeks from the date of receipt of the papers and, therefore, the Secretary University Grants commission, New Delhi is directed to submit the expert opinion to the Examination Regulatory Authority of Uttar Pradesh who shall bring the same on record by filing an affidavit before this Court.

Issue notice to respondent nos. 5, 6 and 7. The counsel for the petitioner is directed to take steps within a period of 10 days from today. The respondents shall have 3 weeks to file a counter affidavit. List this case on 12 July, 2020."

- (5) Brief facts of the case are that after dictum of the Hon'ble Supreme Court in the case of ***State of U.P. and another v. Anand Kumar Yadav and others [(2018) 13 SCC 560]***, the State Government after amending the U.P. Basic Education (Teachers) Service Rules, 1981 [In short, it has been referred to as '**1981 Rules**'] issued guidelines dated 9.1.2018 for conducting first ATRE - 2018 examination against 68,500 vacancies in the primary schools and after conducting written examination on 27.5.2018, result was declared on 13.8.2018. Thereafter, they issued guidelines for conducting second ATRE on 1.12.2018 (second ATRE - 2019) for 69,000 posts of Assistant Teachers. In first ATRE - 2018 examination, the minimum prescribed qualifying marks for General Category was 45% and 40% for reserved category, but in second ATRE - 2019 no minimum qualifying marks was prescribed. On 6.1.2019, the examination of second ATRE - 2019 was held and thereafter, the State Government under Rule 2 (x) of 1981 Rules took a decision and issued the Government Order dated 7.1.2019 fixing 65% minimum qualifying marks for general category and 60% for reserve category. This notification was upheld on 6.5.2020 in Special Appeal No.156 of 2019 and other connected matters. This order has been challenged by the writ petitioners (Shiksha Mitras) by filing Special Leave Petition before the Apex Court. The Hon'ble Supreme Court, in Special

Leave Petition (Civil) Diary No.11198 of 2020, *Ram Sharan Maurya & Ors. v. State of U.P. & Ors.*, vide order dated 21.5.2020, issued notice in all matters returnable on 14.7.2020 and while issuing interim directions, it observed that the "Shiksha Mitras" who are presently holding their posts as Assistant Teachers shall not be disturbed".

- (6) In second ATRE - 2019, after examination, the tentative answer key was published on 8.1.2019, objections were invited and after receiving objections, the same was referred to the experts and after securing their opinion, the final answer key was published on 8.5.2020. Thereafter, on 12/13.5.2020, the result was declared and the State Government accorded permission for appointment of Assistant Teachers on 69,000 vacancies and fixed the schedule by issuing an advertisement. Number of candidates aggrieved by the result challenged the same by filing writ petitions under Article 226 of the Constitution of India on the ground that certain questions are on the face of it erroneous, certain answers are incorrect and some questions are extremely ambiguous and a few of them are debatable and argumentative and therefore have multiple correct answers. Thus, the benefit of the marks of such of these questions are liable to be awarded to the writ petitioners.
- (7) In the aforesaid bunch of writ petitions, a preliminary objection has been raised regarding maintainability of the writ petitions that all the affected persons have to be made a party to the writ petition, meaning thereby that all 1,46,000 successful candidates have to be impleaded in the array of parties.
- (8) Learned Writ Court after considering the preliminary objections and after examining the *prima facie* claim of the candidates, has observed that in case of doubt with regard to any question the benefit should go to the Examining Authority rather than to the candidate, but certain questions/answers have been examined by the learned Writ Court to test the claim of the candidates,

whether the same are frivolous or merit any serious consideration, inasmuch as the fate of large number of candidates would be affected and observed that Question Nos.143, 39, 137, 130 and 131, on the face of it, seem to be incorrect/debatable and deserve revaluation. Learned Writ Court has discussed the correctness of only 5 questions of 'D' series Question Booklet (Question No.39, 70, 131, 137 & 143) but referred the entire Tentative Answer Key alongwith the objections for seeking report of the Expert Committee to be appointed by the University Grants Commission and stayed the notification dated 8.5.2020 by making out a case for interference under Article 226 of the Constitution of India. It is this order which has been impugned in these intra-Court Appeals.

- (9) A preliminary objection has been raised by learned Senior Advocates as well as by Dr. L.P. Mishra appearing for respondents-writ petitioners and intervenors regarding maintainability of the Appeals on the ground that under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952, the Appeal is not maintainable against an interlocutory order. The law on the subject is well-settled and submitted that where the Court has granted interim relief which amounts to final relief or where the Order passed has trappings of the judgment, the Special Appeal is maintainable. Here, the Order impugned does not have the trappings of a judgment because it does not adversely affect the rights of either of the parties and the impugned order is not a judgment within the meaning of Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 and therefore, the appeal is not maintainable and prayed for its dismissal.
- (10) The second objection is that the impugned order has been passed in 31 writ petitions whereas only three appeals had been filed by the Examination Regulatory Authority and in these appeals, they had not impleaded all writ petitioners and

therefore, any order passed in these three appeals may affect the rights of the writ petitioners of all 31 writ petitions (more than 300 writ petitioners) who are not party to these proceedings and if any adverse order is passed against them, then it would be in utter violation of principles of natural justice.

- (11) Dr. L. P. Misra, who is appearing on behalf of some of writ petitioners has submitted that number of Special Leave Petitions have been filed alongwith an application for interim stay of order dated 6.5.2020 and the matter has been fixed on 9.6.2020. In Special Leave to Appeal (C) No(s).6687 of 2020, *Subedar Singh & Ors. v. The State of Uttar Pradesh & Ors.*, wherein a prayer has been made for stay of the selection and therefore, till the matter is decided, the hearing of this matter may be adjourned. Hon'ble Supreme Court on 9.6.2020 issued notice and directed the State of U.P. not to fill-up 37,339 posts of Assistant Teachers. Order dated 9.6.2020 reads as under:-

"The Court is convened through video conferencing.

Permission to file the Special Leave Petition in Diary No.11444/2020 is granted.

Issue notice in SLP (C) D. No.11444/2020.

Heard learned counsel for the parties.

Since the confusion is created by the State Government by issuing further orders relating to selection, etc. the application is moved today in these matters for orders by the petitioners.

Having heard learned counsel for the parties, this Court by the interim order dated 21.5.2020 had passed the following order:-

We have heard all the learned Senior Advocates and other learned Advocates appearing for the petitioners as well as the learned Solicitor General appearing for the State. We have also heard the other

learned Counsel who appeared for the Caveators.

Permission to file Special Leave Petitions is granted.

Issue notice in all matters, returnable on 14.07.2020.

The State shall, on or before 06.07.2020, file its response indicating:

(I) How many Shiksha Mitras are presently working in the State and how many Shiksha Mitras appeared in the instant selection process;

(ii) How many Shiksha Mitras secured more than 45% marks in General Category or more than 40% marks in reserved category; and

(iii) The Roll Numbers of Shiksha Mitras who have secured more than 45% or 40% marks, as stated above.

Pending notice, the services of all Shiksha Mitras who are presently holding their posts as Assistant Teachers shall not be disturbed. However, it shall be open to the State Government to fill up the remaining posts by taking resort to the instant selection.

After the response as indicated above is filed by the State Government, the concerned candidates shall be at liberty to file their response within a week thereafter.

The matter shall be disposed of on the next occasion."

List these matters on 14.07.2020. From the aforementioned order, thus, it is clear that the State Government was directed that the services of all the Siksha Mitras who are presently working as on that date holding the post of Assistant Teachers shall not be disturbed.

However, it was open for the State Government to fill up the remaining posts by taking resort to instant examination. Despite the same, it is, prima facie, borne out from the records now produced that the State Government is proceeding with the selection to fill up all the posts. Such process to be adopted by the State Government shall not be permitted in view of the interim order passed by this Court on 21.5.2020.

It is brought to the notice of this Court by the learned counsel for the parties and it is not disputed by anybody that 37,339 persons who are working as Shiksha Mitras have appeared for the examination. In view of the same, it is open for the State Government to fill up the remaining posts of Assistant Teachers other than 37,339. In other words, 37,339 posts of Assistant Teachers shall be kept vacant. Other posts can be filled up.

List the matters on 14.7.2020 as directed earlier."

- (12) Sri Raghvendra Singh, learned Advocate General who is appearing for the Examination Regulatory Authority and others has submitted that the impugned order is final in nature and therefore, the Special Appeals filed by the appellants are maintainable. He further submitted that in identical writ petitions filed at Allahabad High Court, learned Writ Court after hearing learned Counsel for the parties fixed the matter on 6.7.2020 and this order was placed before the learned Writ Court when the bunch of writ petitions was listed for grant of interim relief, but this aspect of the matter has not been considered. The order dated 30.5.2020 passed in Writ-A No.4052 of 2020 and other connected writ petitions, reads as under:-

"(1) During lockdown period keeping in view the (COVID-19) pandemic, this case has been listed today in my chamber under the order of Hon'ble the Chief Justice.

(2) On 28.05.2020 the following order was passed:-

"Heard Sri Anil Tiwari, learned Senior Advocate assisted by Sri Preet Pal Singh, Sri Radha Kant Ojha, learned Senior Counsel assisted by Sri Shivendu Ojha, Sri Anand Prakash Paul, Sri Satyendra Chandra Tripathi, Sri Rahul Jain, Sri R.N. Yadav, learned counsel for the petitioners and Sri M. C. Chaturvedi learned Additional Advocate General/learned Senior Counsel assisted by Sri Suresh Singh, Sri Pankaj Rai, Sri P. K. Pandey, learned Additional Chief Standing Counsel and Sri Suresh Chandra Dwivedi, learned Standing Counsel for the State-respondents through Video Conferencing.

The facts as stated in all these writ petitions are that the State Government issued a Government Order on 01.12.2018 notifying Assistant Teacher Recruitment Examination 2019 for filling up 69,000 post of Assistant Teachers in Junior Basic Schools in the State of U.P. All the petitioners being fully qualified and eligible applied for the same. Petitioners duly participated in the written examination which was held on 06.01.2019. Thereafter tentative answer key were published on 08.01.2019, objections were also invited from the candidates on or before 11.01.2019. An Expert Committee was appointed to look into the objections submitted by the candidates. The Expert Committee submitted its report/opinion on 18.01.2019.

In the meanwhile a Government order dated 07.01.2019 was issued by the State Government notifying the qualifying marks in respect of the aforesaid examination as 65% for candidates belonging to unreserved category and 60% with regard to candidates belonging to reserved category. The aforesaid Government order was challenged by large number of candidates before this Court as well as before the Lucknow Bench of this Court. Ultimately a decision was given by the learned Single Judge of Lucknow Bench of this Court in Writ Petition No. 1188 (SS) of 2019 on 29.03.2019 by which the Government Order dated 07.01.2019 was quashed. The aforesaid judgment dated 29.03.2019 was challenged in Special Appeal No. 156 of 2019 by the State Government before the Division Bench. The aforesaid Special Appeal was finally allowed by the Division Bench vide judgment and order dated 06.05.2020. Against the judgment delivered by the Lucknow Bench of this Court in Special Appeal No. 156 of

2019 on 06.05.2020, SLP (Civil) Diary No. 11198 of 2020 was filed by the Ram Sharan Maurya and Others vs. State of U.P. and Others. The aforesaid Special Appal was duly entertained by the Apex Court vide its order dated 21.05.2020. The order was passed by the Apex Court is reproduced below:-

"We have heard all the learned Senior Advocates and other learned Advocates appearing for the petitioners as well as the learned Solicitor General appearing for the State. We have also heard the other learned Counsel who appeared for the Caveators.

Permission to file Special Leave Petitions is granted.

Issue notice in all matters, returnable on 14.07.2020.

The State shall, on or before 06.07.2020, file its response indicating:

(i) How many Shiksha Mitras are presently working in the State and how many Shiksha Mitras appeared in the instant selection process;

(ii) How many Shiksha Mitras secured more than 45% marks in General Category or more than 40% marks in reserved category; and

(iii) The Roll Numbers of Shiksha Mitras who have secured more than 45% or 40% marks, as stated above.

Pending notice, the services of all Shiksha Mitras who are presently holding their posts as Assistant Teachers shall not be disturbed. However, it shall be open to the State Government to fill up the remaining posts by taking resort to the instant selection.

After the response as indicated above is filed by the State Government, the concerned candidates shall be at liberty to file their response within a week thereafter.

The matter shall be disposed of on the next occasion.

List these matters on 14.07.2020."

After the aforesaid judgment an amended answer key to the aforesaid examination was published on 08.05.2020 and the result was declared on 12.05.2020. It is argued by the counsel for the petitioners that amended answer key published on 08.05.2020 is wrong and incorrect since certain questions have more than one answers or the answer given so incorrect.

In this view of the matter, it is argued by the counsel for the petitioners that the amended answer key dated 08.05.2020 as well as final results which were uploaded on the website on 12.05.2020 be quashed.

On the other hand It is argued by Sri M. C. Chaturvedi, learned Senior Counsel that after the tentative answer sheets were published on 08.01.2019, objections were invited by the candidates. Thereafter an Expert Committee was appointed who submit its report on 18.01.2019. Pursuant to the same the final Answer key were published on 08.05.2020 and thereafter the result were declared on 12.05.2020. In view of the same it is argued that there is neither any illegality or irregularity in the selection in question.

Heard counsel for the parties and perused the record.

Law in this connection has already been well settled by the Supreme Court in the case of Ranvijay Singh and Others vs. State of U.P. and Others reported in (2018) 2 SCC page 357 as well as in SLP (C) No. (S) 23202-23204 of 2015 Bihar Staff Selection Commission and Others vs. Arun Kumar and Others decided on 06.05.2019 that the Court should not at all re-valueate or scrutinized the answer sheet of the candidates - since it has no expertise in the matter and academic matter and best left to the academician. It appears from the facts as narrated above, an Expert Committee was appointed by the respondents to verify the genuineness of the objections raised by the candidates participated in the aforesaid examination. The aforesaid Expert Committee has already submitted its report/opinion on 18.01.2019.

Having heard Senior counsel for the parties, I am of the view that the report submitted by the Expert

Committee be placed before the Court tomorrow, i.e., 29.05.2020.

Let all these matters be listed in the additional cause list on 30.05.2020."

(3) Pursuant to the same the report submitted by the Expert Committee was placed before me by Sri M. C. Chaturvedi, learned Senior Counsel on 29.05.2020, the same was duly perused by me.

(4) Heard learned counsel for the petitioners and Sri M.C. Chaturvedi, learned Senior Counsel assisted by Sri Pankaj Rai Additional Chief Standing Counsel and Sri S.K. Mishra, learned Standing counsel through Video Conferencing.

(5) Apart from the same Sri M.C. Chaturvedi, learned Senior Counsel also relied upon the following judgements:-

(i) Bihar Staff Selection Commission and others Vs. Arun Kumar and Others reported in SLP (C) Nos. 23202-23204 of 2015.

(ii) Uttar Pradesh Public Service Commission through its Chairman and another Vs. Rahul Singh and another reported in 2018(7)SCC 254.

(iii) Ran Vijay Singh and Others Vs. State of U.P. and others reported in 2018(2)SCC 357.

(iv) Himachal Pradesh Public Service Commission Vs. Mukesh Thakur and another reported in 2010(6)SCC 759.

(6) In my opinion a response by the state-respondents are necessary before deciding the issue in question on merits.

(7) In the circumstances, three weeks' time is granted to the counsel for the respondents to file counter affidavit in all these matters. Rejoinder affidavit be filed within two weeks' thereafter.

(8) List all these writ petitions before appropriate Bench on 06.07.2020. "

- (13) In respect of first preliminary objection, he submitted that the order impugned has been passed on 3.6.2020 whereas time to file Special Appeal is 90 days and therefore, due to lockdown and looking to the urgency in the matter, they have filed only

three Appeals and they will file rest of the appeals during the course of time and therefore, at this stage, on the aforesaid ground, it cannot be said that the Special Appeal is not maintainable.

- (14) He further that the learned Counsel(s) who were appearing on behalf of the writ petitioners are present here and some of them have filed applications for intervention through their respective Counsel and therefore, it cannot be said that their interest would be adversely affected for non-joinder of parties. He further submitted that the learned Single Judge has patently erred in law in taking upon himself functioning of a Subject Expert that certain answers are incorrect and some of the questions have more than two alternative answers. It is also submitted that the learned Single Judge did not record any independent finding. He has placed reliance on the decision of the Apex Court in the case of ***Ranvijay Singh v. State of U.P. [(2018) 2 SCC 357]*** and submitted that the learned Single Judge has not considered Appendix - I of 1981 Rules in its true perspective as the same categorically provides for inclusion of 60% of marks secured in ATRE and therefore, if the writ petitions succeed, additional marks shall be given to them whereas the selectees who had earlier opted for the answer indicated to be correct in the Final Answer Key or have not objected to the same would not be gaining anything but the same shall increase their competition level for no fault of the selectees and therefore, would be detrimental to their interest.
- (15) He also pointed out that the learned Single Judge has not taken note of the judgments of ***Ranjan Kumar v. State of Bihar [(2014) 16 SCC 187]*** and ***Rashmi Mishra v. M.P. Public Service Commission [(2006) 12 SCC 724]*** relied on behalf of the appellants, which mandate the impleadement of each and every candidate and therefore, the learned Single Judge erred in

law in rejecting the plea of non-joinder of necessary parties while granting stay to the writ petitioners.

- (16) He lastly submitted that the learned Writ Court ignored the directions contained in para - 30.5 of the judgment of ***Ranvijai Singh (supra)*** which provides that in case of any doubt in regard to the correctness of the question/answer, the benefit shall go in favour of the appellants and prayed that notices be issued on merit or appeal be admitted for hearing and in the meantime, stay the impugned order dated 3.6.2020, till disposal of final hearing.
- (17) The objection before the learned Writ Court regarding non-joinder of proper parties was based on the law laid down before Apex Court in the cases of ***Ranjan Kumar and others v. State of Bihar and others [supra]*** and ***Rashmi Mishra v. M. P. Public Service Commission and others [supra]*** and thus needs re-consideration. The Special Appeal against the impugned order does have the trappings of a judgment, affects the right of the parties and at this stage, we cannot dismiss the appeal as not maintainable.
- (18) On due consideration of the aforementioned facts and circumstances, we are inclined to issue notices to the respondents in the aforesaid three Special Appeals on admission, on taking steps within a week, returnable within 10 weeks.
- (19) The ratio of ***Ranvijay Singh (supra)*** has not been considered in its true perspective and the learned Writ Court has observed that in case of doubt with regard to any question, the benefit should go to the Examining Authority rather than to the candidate, yet passed the impugned order staying the notification dated 8.5.2020 and all further proceedings thereon and, therefore we are of the view that *prima facie* case for interim relief is made out by the appellants.

- (20) Pending notice, the operation and effect of impugned order dated 3.6.2020 passed in Writ Petition No. 8056 (SS) of 2020, *Rishabh Mishra & others v. State of U.P. and others* and other connected writ petitions, shall remain stayed, until further orders of this Court. However, the State Government is at liberty to proceed further in terms of Apex Court's order dated 21.5.2020 passed in Special Leave Petition (Civil) Diary No.11198 of 2020, *Ram Sharan Maurya & Ors. v. State of U.P. & Ors.* and order dated 9.6.2020 passed in Special Leave to Appeal (C) No(s).6687 of 2020, *Subedar Singh & Ors. v. The State of Uttar Pradesh & Ors.*

[Dinesh Kumar Singh, J.] [Pankaj Kumar Jaiswal, J.]

Order Date :- 12.06.2020
lakshman