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Ashok Kumar Singh Vs. District Inspector of Schools and anr.

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Court : Allahabad

Decided On : Jan-28-2004

Reported in : 2004(2)AWC1087

Judge : R.B. Misra, J.

Acts : Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties Order) (Second), 1981; ;Uttar Pradesh Secondary Education Services Commission and Selection Board Act, 1982 - Sections 9(4) and 18; Uttar Pradesh Secondary Education Service Commission (First Amendment) Rules, 1992

Appeal No. : C.M.W.P. No. 48353 of 1999

Appellant : Ashok Kumar Singh

Respondent : District Inspector of Schools and anr.

Advocate for Def. : S.C. Dwivedi and ;Arvind Kumar Trivedi, Advs., ;M.C. Chaturvedi, Addl. C.S.C. and ;S.S. Sharma, S.C.

Advocate for Pet/Ap. : V.K. Singh, ;G.K. Singh and ;Akhilesh Singh, Advs.

Disposition : Petition allowed

Judgement :

R.B. Misra, J.

1. Heard Sri V. K. Singh, learned counsel for the petitioner and Sri S. S. Sharma, learned standing counsel for the respondents.

2. In this petition prayer has been made to quash the impugned order dated 5.11.1999 (Annexure-1 to the writ petition) which was passed by the District Inspector of Schools, Etawah, with further prayer for issuance of mandamus commanding the respondent to make payment of salary to the petitioner regularly along with arrears with effect from 1.12.1978.

3. According to the learned counsel for the petitioner post of Principal in the Dr. Ram Manohar Lohiya Inter College, Dhanuwan, Etawah had fallen vacant on account of retirement of Sri Vishram Singh on 30.6.1996. One senior most Lecturer Sri Ram Pal Singh was appointed as ad hoc Principal. In these circumstances, short term vacancy arose and one Sri Agent Singh who was senior most L.T. grade teacher was appointed as Lecturer on ad hoc basis to the short term vacancy in the L.T. grade. However, for fulfilling the vacancy, the post was advertised on 5.11.1998 in two newspapers having wide circulation and large number of candidates participated in the selection including the petitioner where the petitioner was found suitable and was appointed on 23.11.1998, consequent upon, the petitioner joined the said college on 1.12.1998. The relevant papers in respect of getting financial approval was forwarded by the management of the said college to the D.I.O.S. on 11.1.1999, however, no heed was taken by the D.I.O.S. the petitioner preferred Writ Petition No. 35465 of 1999 which was disposed of on 19.8.1999 with the direction to decide the issue in question and the issue of giving approval within a period of two months. Consequently, the District Inspector of Schools, Etawah has passed an order on 5.11.1999 rejecting the claim of the petitioner which is the impugned order under challenge in this writ petition.

4. The refusal of D.I.O.S. while disapproving the appointment of the petitioner is based on two grounds :

(a) A ban was imposed by the State Government on making appointments vide order dated 30.7.1991.

(b) The State Government has rescinded the First, Second, Third and Fourth Removal of Difficulties Orders, 1981/1982 with effect from 25. 1. 1999, therefore appointment could not have been made.

5. Counter-affidavit has been filed rejecting the similar stand, which has been taken by the D.I.O.S. with the indication that in view of the Government Orders dated 21.7.1992 and 31.8.1991 direction was issued where no appointment was supposed to be made and despite this direction for not making appointment the Committee of Management on its own in derogation to the above two directions had made the appointment.

6. In respect of the ban imposed on 30.7.1991 the matter was considered by this Court in two judgments Miss. Sunita Sharma v. D.I.O.S., Mathura, 2003 (2) AWC 1172 : 2003 (2) ESC 659 (All), as well as in Smt. Sudha Chaturvedi v. State of U. P. and Ors., 2003 (2) ESC 661 (All), and this Court has observed that there was no ban Imposed by the State Government for making appointment on the short-term vacancies and if at all any ban was there the same was applicable only between 29.6.1991 to 26.9.1991. therefore, the judgment of Miss. Sunita Sharma and Smt. Sudha Chaturuedi (supra) and the decision of the D.I.O.S. in not giving approval to the appointment of the petitioner is irrelevant as contended on behalf of the petitioner. According to the petitioner in respect of the second objection indicated by the D.I.O.S. that the Removal of Difficulties Orders, 1981/1982 with effect from 25.1.1999 appointment could not have been made, therefore, it cannot be said that there was no power at the time when the petitioner was appointed.

7. In Miss Sunita Sharma (supra), this Court has noted in paragraphs 7 and 8 as given below :

'7. Learned counsel for the petitioners has placed reliance on the decision of this Court passed on April 16, 1992 in Civil Misc. Writ Petition No. Nil of 1992, Mahendra Pratap Singh v. District Inspector of Schools, Mau (Enclosed as Annexure-13 to the writ petition), whereby while allowing the writ petition of Mahendra Pratap Singh this Court vide its order dated 16th April, 1992 has noticed that the ban which was imposed by Telex dated 29.6.1991 and G.O. dated 17.7.1991 has been superseded by another G.O. dated 26th September. 1991 by

which the ban has been lifted.'

8. On behalf of the learned counsel for the petitioners reliance has been made on a decision in District Inspector of Schools, Kanpur Nagar and Ors. v. Diwakar Lal and Ors., 2000 (3) AWC 2182 : 2000 (3) ESC 1670 (All), Special Appeal No. 40 of 2000 decided on 25th May, 2000, wherein it is mentioned that the fresh ground in the counter-affidavit cannot be taken by the authority concerned. Para 7 of the above case reads as under :'7. The learned single Judge held that by adding a ground in the counter-affidavit which did not find mention in the Impugned order passed by the District Inspector of Schools, the respondents cannot be permitted to support the impugned order by carving out a new case or raise a new ground for the first time before the appellate higher authority or Court to make the order valid. In support reference was made to the case of Mohinder Singh Gill v. Chief Election Commission, AIR 1978 SC 851.'

8. In the case of Smt. Sudha Chaturvedi (supra) this Court has also noted as given below :

'The order dated 23.4.1997 was passed by the Deputy Director of Education on the representation of the petitioner for payment of salary. According to the petitioner her appointment was made against the vacancy which had occurred on account of promotion of senior most teacher to the post of Head Master on ad hoc basis in Adarsh Kanya Intermediate College, Sikhar, Mirzapur and the Deputy Director by its order dated 23.4.1997 by observing factual aspect of the petitioner has declined to sanction of appointment and salary on the ground that the ban was imposed at the time of making appointment whereas on this specific point the ban was communicated by G.O. No. 3136/15/7/1 (220)/91, dated 30th July, 1991 enclosed as Annexure C.A. No. 3. However, it has been submitted on behalf of the petitioner that this ban was only till 26.9.1991 whereas the petitioner was appointed against short-term vacancy on 15.2.1996 and has joined the service on 16.2.1996, according to her since then she has continuously been in service as Assistant Teacher L.T. grade in the said college and is not being paid salary despite the direction. This Court in Vinod Kumar Srivastava v. District Inspector of Schools, Jalaun and Ors., 2002 (3) AWC 2058 : (2002) 2 UPLBEC 1597, has

observed that the vacancy created on the post of the teacher by virtue of the promotion of that teacher to the post of ad hoc Principal is treated to be short-term vacancy and appointment of the writ petitioner on that vacant post, after due publication of its advertisement in two newspapers and selection by Selection Committee was Illegal and the papers sent to the D.I.O.S. for financial approval, if rejected after 7 days shall not affect the writ petitioner's entitlement to pay and continuance on the post appointed. This Court in Vinod Kumar Srivastava's case has observed as below :

'(5) For this purpose the petitioner has placed reliance on Shri Niwas Singh v. District Inspector of Schools, Ghazipur and Ors., 1997 (Supp) AWC 687 ; (1999) 2 UPLBEC 1621 ; (1998) 1 UPLBEC 276. In para 2 of Shri Niwas Singh (supra), it was observed :'2. The version of the petitioner is that Shri Satyendradeo Singh was permanent Principal of the Institution. He retired on 30th June, 1991. On his retirement one Sri Daya Shankar Singh, the seniormost lecturer was promoted as ad hoc Principal by the committee of management. On account of promotion of Sri Daya Shanker Singh a vacancy arose in the institution on the post of Lecturer. Sri Digvijay Singh was promoted to the post of Lecturer from the post of L.T. grade, teacher. On his promotion the vacancy to the post of Assistant Teacher in L.T. grade fell vacant. As the promotion order had not been confirmed, there was a short term vacancy.'

9. In para 7 of Shri Niwas Singh (supra) it was held :

'7. The procedure for making ad hoc appointment on short terms vacancy has been given in U. P. Secondary Education Services Commission (Removal of Difficulties Order) (Second), 1981. The power has been given to the Committee of Management to make short term appointment on the basis of the procedure prescribed therein. It does not require that any permission of the District Inspector of Schools is to be obtained before any selection for appointment is to be made. Para 2 (3) only provides that the Management shall intimate the vacancy to the District Inspector of Schools and after making the selection in the manner prescribed therein, the names of the selected candidates shall be forwarded to the District Inspector of Schools and on such communication, the I District Inspector of

Schools shall communicate his decision in respect of approval of selection within seven days of the date of receipt of papers by him failing which the Inspector will be deemed to have given his approval.'

10. In the order dated 13.12.2001 of this Court passed in writ petition Bhuvnesh Kumar Tyagi v. District Inspector of Schools and Ors., it was observed as below :

'On account of retirement of one Lecturer in the College, said vacancy was filled in by ad hoc promotion and thus short-term vacancy arose in the college in L.T. grade. As the aforesaid vacancy in L.T. grade was filled up on short term basis, the Manager requested the D.I.O.S, to fill up the same. As no action was taken by the D.I.O.S., the management appears to have advertised the post in question in two dally news papers namely 'Pioneer' and 'Aaj'. The extracts of the advertisement published in the news papers are Annexures-1 and 2 to the writ petition. The petitioner claims to have been duly selected in respect to which an appointment letter was issued on 20.2.1999. In the light of the appointment letter so issued, the petitioner joined his duties on 22.2.1999. When the papers were sent by the management to the D.I.O.S. on 22.3.1999, and no orders were passed, reminders were also given on 24.3.1999 and 6.4.1999 for issuing necessary order according financial approval. Thereafter, by order impugned in this petition, i.e., 30.4.1999, it has been communicated that as no permission has been obtained for making appointment on the post in question grant of approval/financial sanction is not possible. It is this order of the D.I.O.S. which made the petitioner aggrieved to come to this Court.'

'As the petitioner was duly selected in pursuance of the advertisement for short term vacancy and in view of the fact that even after seven days, no disapproval was communicated and as such he was entitled to continue on his post and to receive salary.'

11. In reference to J.A. Inter College, Khurja v. State of U.P. and Ors., 1996 (3) ESC 151 (SC) and Radha Raizada v. Committee of Management Vidyawati Darbari Girls Inter College, (1994) 3 UPLBEC 1551 (FB) and in reference to Chatur Singh v. Regional Deputy Director of Education, Agra, Writ Petition No. 37497 of 1996, decided on 3.12.1996 (All), it was held in Smt. Pratima Chauhan

and Anr. v. Regional Deputy Director of Education (Madhyamik), Agra and Ors., (1999) 2 UPLBEC 1621 as under :

'(c) Service -- Ad hoc appointment on post of teacher for filling short term vacancy made after advertising that post only in one newspaper -- Will not invalidate appointment. It is only a technical irregularity. Such appointee can be allowed to continue till regularly selected candidate from commission is available for appointment. However, such ad hoc appointee will have no right to claim regularisation.'

12. In para 4 of the decision of Smt. Sudha Chaturvedi (supra), this Court has observed that 'I find that the petitioner's appointment was made against the short-term vacancy after advertising the said post in two newspapers published and widely circulated and after duly selected by the Selection Committee the petitioner was appointed on 16.2.1992 and till date no regular selection has been made by the Uttar Pradesh Secondary Services Selection Board/Commission and Smt. Veena Mishra who was appointed earlier as an ad hoc Principal is still continuing. The Deputy Director of Education, Vth Region, Varanasi on 23.4.1997 has not controverted the factual aspect of validity of the appointment of the petitioner in the short-term vacancy but for lack of permission due to ban wrongly declined to give a financial approval which was accordingly reiterated by the Deputy Inspector of Schools on 2.11.2000. In this respect the petitioner has placed reliance on Ramesh Mohan Pandey and Ors. v. District Inspector of Schools, Deoria and Ors.. 1995 (1) AWC 402 : 1995 (1) ESC 511 (All), which reads as below :

'The ban was, however, lifted on certain conditions by G.O. dated 26th September, 1991. In para 5 of the said G.O. it was clarified that all the selection, appointment made prior to 26.9.1991, during the period the ban was imposed, shall be treated as cancelled. This further refers to Government Order dated 29.5.1991 whereby selection and appointments were stayed. The ad hoc appointments, were being made under the provisions of Section 18 of U. P. Secondary Education Services Commission and Selection Board Act, 1982. Section 18 was deleted by U. P. Secondary Education Service Commission and Selection Board (Second Amendment) Act, 1982. This amendment came into force with effect from 14th

July, 1992. The powers to make all appointments were conferred on the District Selection Committee as provided under U. P. Secondary Education Service Commission (First Amendment) Rules, 1992.'

It is clear from the discussions made above that the ad hoc appointments for the period between 29.6.1991 to 26.9.1991 remained banned. The appointment for the period after 14th July, 1992 was to be made in accordance with the provisions of U. P. Secondary Education Service Commission (First Amendment) Rules, 1992. In between the period of 26.9.1991 to 13.7.1992 there does not appear to be any ban for making ad hoc appointments in accordance with the provisions of Section 18 of U. P. Act No. 5 of 1982. The powers of the Government to issue a Radiogram and orders imposing ban on appointments have been upheld by their Lordships of the Supreme Court in Dr. Ramji Dwivedi v. State of U. P. and Ors., 1983 UPLBEC 426, and it was held that under Sub-section (4) of Section 9 the State Government enjoys power to make, modify or rescind any Regulation and with this power it can issue radiogram or orders banning appointments.'

13. I have heard learned counsel for the parties. I find that the petitioner's appointment was made after proper advertisement to the short term vacancy and the duly selected committee has found the petitioner suitable and has given the appointment and has allowed the petitioner to serve on the post and for the appointment giving financial approval by the D.I.O.S. is not legally sustainable as is well settled that the amendment brought shall be only of prospective in nature unless it is mentioned in the amendment that it will have a retrospective effect. The State Government while rescinding the Removal of Difficulties Orders has not indicated for any retrospective operation of its order, therefore, the second objection in respect of not granting approval is incorrect in these circumstances, the petitioner is entitled to be given approval, therefore, the order dated 5.11.1999 is not legally sustainable and is set aside and the mandamus is issued to the respondents to consider the case of the petitioner and issue a financial approval in respect of the appointment within a period of two months from the date of production of certified copy of this order.

14. The writ petition is allowed. No order as to cost.

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