

Sunil Kumar Mishra Vs. Regional Selection Committee and ors.

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SooperKanoon Citation : sooperkanoon.com/484525

Court : Allahabad

Decided On : Dec-08-2003

Reported in : 2004(1)AWC620; (2004)2UPLBEC1520

Judge : R.K. Agrawal, J.

Acts : Uttar Pradesh Secondary Education Services Selection Board Act, 1962 - Sections 2(1), 33B and 33C; Uttar Pradesh Secondary Education Services Commission Rules, 1995 - Rules 11 and 14

Appeal No. : C.M.W.P. No. 13214 of 2003

Appellant : Sunil Kumar Mishra

Respondent : Regional Selection Committee and ors.

Advocate for Def. : V.K. Singh, ;Ashok Khare, Advs. and ;S.K. Srivastave, S.C.

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

Disposition : Petition allowed

Judgement :

R.K. Agrawal, J.

1. By means of the present writ petition, the petitioner Sunil Kumar Mishra seeks the following reliefs :

(a) to issue a writ, order or direction in the nature of certiorari quashing the order dated 6.3.2003, passed by the Joint Director of Education, 7th Region, Gorakhpur, respondent No. 1 filed as Annexure-1 to the writ petition and the order dated 5.3.2003, passed by the Regional Selection Committee filed as Annexure-2 to the writ petition.

(b) to issue a writ, order or direction in the nature of mandamus commanding, the respondents to promote the petitioner as Lecturer in History on permanent basis.

2. Briefly stated the facts giving rise to the present writ petition are as follows :

'There is an institution known as Lokmanya Inter College (hereinafter referred to as the Institution), situated in Jankinagar, Seorahi, in the District of Kushinagar. It is a recognised institution and is governed by the provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as the Act), the U.P. Secondary Education Services Selection Board Act, 1982, (hereinafter referred to as the 1982 Act) and the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (hereinafter referred to as the Payment of Salaries Act), and the Rules and Regulations framed thereunder.'

3. According to the petitioner he was initially appointed as L.T. grade teacher in the institution on 1.8.1989. His services were regularised under Section 33B of the 1982 Act, by the Deputy Director of Education vide order dated 12.7.1976. When a post of lecturer in the Institution fell vacant on account of retirement of Gyan Bhaskar Sinha on 30.6.1997, the petitioner staked his claim before the Committee of Management for promotion on the post of lecturer in the institution claiming himself to be the seniormost qualified teacher. The Committee of Management, passed a resolution on 24.5.1998 for promotion of the petitioner on the post of lecturer in History. The District Inspector of Schools vide order dated 8.6.1998 granted approval to the ad hoc promotion of the petitioner under 50% promotional quota and he continued to function as Lecturer in History. According to the petitioner, feeling aggrieved by the promotion of the petitioner, Subhash Prasad, respondent No. 4, made a representation to the U.P. Scheduled Castes and Scheduled Tribes Commission stating therein that while granting promotion to the post of lecturer, reservation policy has not been adhered to.

4. A development took place wherein the Vice Chancellor of Sri Deen Dayal Upadhyaya University, Gorakhpur vide order dated 11.10.1999, cancelled the result of petitioner's M.A. (Previous) examination and the M.A. degree. The order dated 11.10.1999 was challenged by the petitioner by filing Civil Misc. Writ Petition No. 45155 of 1999, which was allowed vide judgment and order dated 25.11.1999 and the order dated 11.10.1999 was quashed.

5. In the meantime, the Committee of Management passed a resolution promoting Subhash Prasad, respondent No. 4 on the post of Lecturer on permanent basis under 50% promotional quota. The Joint Director of Education, issued a notice on 24.2.2003 calling upon the petitioner to appear before him on 5.3.2003 alongwith all the educational certificates. According to the petitioner, he appeared before the Joint Director of Education on 5.3.2003 and requested him for fixing some other date so as to enable him to file the relevant documents on which the Joint Director of Education, fixed 7.3.2003. The petitioner appeared before the Joint Director of Education on 7.3.2003 and submitted the documents. However, the Regional Selection Committee met on 5.3.2003 and recommended the cancellation of the petitioner's promotion and further accepted the promotion of Subhash Prasad, respondent No. 4. The decision was communicated by the Joint Director of Education, to the District Inspector of Schools vide letter dated 6.3.2003. The two orders dated 5.3.2003, passed by the Regional Selection Committee promoting the respondent No. 4 on the post of lecturer as communicated by the Joint Director of Education, on 6.3.2003 are under challenge in the present writ petition.

6. I have heard Sri G.K. Singh, learned counsel for the petitioner and Shri Ashok Khare, learned senior counsel assisted by Sri Vinod Kumar Singh on behalf of opposite party No. 4 and Sri S.K. Srivastava on behalf of respondent No. 3.

7. The learned counsel for the petitioner submitted that Subhash Prasad respondent No. 4 was initially appointed as L.T. grade teacher on ad hoc basis on 21.4.1993. To the best of the knowledge of the petitioner his services have not yet been regularised and, therefore, the Regional Selection Committee as well as the Joint Director of Education, has wrongly accepted the promotion of Subhash Prasad respondent No. 4, as he has not been substantively appointed as L.T.

grade teacher under Rule 14 of the U.P. Secondary Education Service Selection Board Rules, 1998, and he could not have been promoted. According to him for being promoted on the post of lecturer who was working in trained graduate grade ought to have completed 5 years continuous regular service as such on the first day of the year of recruitment which in terms of the circular dated 13.12.1999 means the first day of July in a calendar year of 12 months in which the vacancy had arisen.

8. He thus submitted that the post of lecturer fell vacant on 30.6.1997 and Subhash Prasad was appointed in L.T. grade on 21.4.1993, therefore, by no stretch of imagination he was fit for being promoted on the first day of year of recruitment, i.e., 1st July, 1996, as he had not completed 5 years in L.T. grade. He further submitted that the Regional Selection Committee has erroneously placed reliance on the fact that the petitioner's M.A. degree has been cancelled and it has only been stayed by this Court. It had not considered, the fact that the order dated 11.10.1999, cancelling the petitioner's degree has been quashed and, therefore, the degree awarded to him holds good.

9. Shri G.K. Singh further submitted that the action of the Regional Selection Committee as well as the Joint Director of Education, in promoting Subhash Prasad, respondent No. 4 is in violation and utter disregard of equity, fair play and natural justice inasmuch as no opportunity of hearing was provided to him. He submitted that the Joint Director of Education, has permitted him to submit the documents till 7.3.2003, whereas the Regional Selection Committee had proceeded to decide the matter on 5.3.2003, itself.

10. Sri Singh further submitted that there is no reservation applicable in the case of promotion and, therefore, the Regional Selection Committee, had committed an error of law in applying reservation while promoting Subhash Prasad, respondent No. 4 on the post of lecturer. He relied upon the following cases :

(1) Mohan Lal Mehrotra v. Comptroller and Auditor General of India, 1979 AWC 602 ;

(2) Deo Chand Ram v. Commissioner, Varanasi Division, Varanasi and Ors., 1995

(2) AWC 1043 : 1995 (2) ESC 420 ;

(3) Ajit Singh (II) v. State of Punjab and Ors., 2000 (1) AWC 574 (SC) : (1999) 7 SCC 209.

11. He further submitted that the provisions of Article 16(4A) of the Constitution of India is only an enabling provision which has to be backed by a legislation and as in the present case the Reservation Act, 1994, had not provided any reservation on the post to be filled up by way of promotion, the earlier Government Order cannot be applied.

12. Placing heavy reliance on the provisions of Rule 11 of 1995 Rules, Shri G.K. Singh submitted that the year of recruitment would thus directly relate to the notification of the vacancy by the Committee of Management to the District Inspector of Schools. In any event, he submitted that the vacancy was notified in the year 1998, by the Committee of Management to the District Inspector of Schools. Thus, the first day of the year of recruitment would be 1st January, 1998, and on that date the respondent No. 4 did not possess the necessary qualification of 5 years continuous service. According to him continuous service means service on substantive basis, and as the respondent No. 4 was appointed on ad hoc basis, he was ineligible for being considered for promotion.

13. He further submitted that the recruitment and appointment cannot be equated and they have different meaning. He relied upon a decision of the Hon'ble Supreme Court in the case of Praphull Kumar Swain v. Prakash Chandra Misra and Ors., JT 1993 (1) SC 360.

14. Sri Ashok Khare, learned senior counsel submitted that the petitioner was appointed on ad hoc basis as assistant teacher in L.T. grade on 1.8.1989 against a short term vacancy said to have been caused on account of promotion of Bhargava Prasad as lecturer in the institution. However, the promotion of Bhargava Prasad was not accorded approval by the Educational Authorities and in its absence no short term vacancy of assistant teacher in L.T. grade could possibly arise. He further submitted that the appointment of the petitioner as assistant

teacher in L.T. grade on ad hoc basis was not accorded approval by the District Inspector of Schools nor any salary was being paid to him. He approached this Court by filing Civil Misc. Writ Petition No. 1385 of 1992 in which an interim order was granted on 7.1.1992 directing the respondents to make the payment of salary of the petitioner as an ad hoc appointee. It is on the basis of this interim order that the petitioner is functioning and has been paid salary as assistant teacher in L.T. grade. He submitted that functioning on the basis of stay order confers no legal entitlement to the petitioner for regularisation. He relied upon a decision of the Hon'ble Supreme Court in the case of Committee of Management, Arya Nagar Inter College v. Sree Kumar Tiwari, 1997 (2) UPLBEC 1133 and of this Court in the case of Niranjana Rai v. District Inspector of Schools, Ghazipur and Ors. 1991 (1) AWC 483 : 1991 (2) UPLBEC 1416. He relied upon the decision of this Court in the case of Praveen Pratap Singh Bhadauria v. District Inspector of Schools, Varanasi and Ors., 1999 (3) AWC 2696.

15. According to him, the order of regularisation dated 12.7.1996 is an order subject to the Writ Petition No. 1385 of 1992 filed by the petitioner. He further submitted that Subhash Prasad, respondent No. 4 had been appointed as assistant teacher in L.T. grade on ad hoc basis on 21.4.1993. He was regularised by the Regional Selection Committee vide order dated 12.2.1999, which will relate back to 20.4.1998, when the provisions of Section 33C were added in the 1982 Act.

16. Sri Khare further submitted that the Committee of Management in compliance with the order/letter dated 21.4.1998 sent by the District Inspector of Schools, Kushi Nagar, had passed a resolution on 24.5.1998, proposing the promotion of the petitioner on the post of lecturer in History. The District Inspector of Schools vide order dated 8th June, 1998 had only given approval to the ad hoc promotion of the petitioner on the post of lecturer in History. According to him, the promotion on ad hoc basis does not confer any right to claim regular promotion and thus when the Regional Selection Committee was considering the question of regular promotion, it had rightly promoted the respondent No. 4, as the respondent No. 4 belongs to Scheduled Caste and the provisions of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other

Backward Classes) Act, 1994, hereinafter referred to as the Reservation Act is applicable in the case of promotion also. He further submitted that by means of the G.O. dated 10.10.1994, the State Government had Issued a roster for filling up the post while applying the reservation policy and provided reservation in promotion also to the Scheduled Castes and Scheduled Tribes candidates. According to the said roster the first vacancy is to be filled up by the candidates belonging to the Scheduled Castes and, therefore, the Regional Selection Committee has rightly promoted respondent No. 4 on the post of lecturer, as the said post of lecturer was liable to be filled up from amongst the reserved category candidates. He relied upon the following decisions :

(1) Krishna Pal Singh v. Government of U.P. and Ors., 1981 UPLBEC 521 ;

(2) Comptroller and Auditor General of India and Ors. v. Mohan Lal Mehrotra and Ors., (1992) 1 SCC 20 ;

(3) Sudhir Kumar Anand and Ors. v. U.P. State Electricity Board and Ors., 2001 (1) AWC 490 : 2001 (1) UPLBEC 708,

17. Shri Khare also relied upon Article 16(4A) of the Constitution of India and submitted that the State Government can provide reservation in promotions also. He also invited the attention of the Court to Section 3 (7) of the U.P. Public Services (Reservation for Scheduled Castes and Scheduled Tribes and Other Backward Classes) Act, 1994, which provides that if on the date of commencement of this Act reservation was in force under any G.O. for appointment to posts to be filled up by promotion such G.O. shall continue to be applicable till they are modified or revoked. He submitted that prior to the enactment of the Reservation Act, 1994, which came into force w.e.f. 11.12.1993, the State Government had already issued an order providing for reservation of 21% for Scheduled Castes and 2% for scheduled tribes in respect of the posts to be filled up by way of promotion and, therefore, the said G.O. would be applicable.

18. Sri Khare further submitted that the year of recruitment has been defined under Section 2 (l) of the 1982 Act to mean a period of twelve months commencing from first day of a calendar year and, therefore, it would be treated as

first day of January in which the recruitment has to take place and not 1st July, 1996, as canvassed by the petitioner. Shri Khare learned counsel appearing for respondent No. 4, however, submitted that the respondent No. 4 had completed 5 years in the year 1998, i.e., 21.4.1998 and it is not required that he should have experience of 5 years on substantive basis. He relied upon a decision of this Court in the case of Ram Swarup v. State of U.P., 1996 (3) AWC 2.250 (NOC) : 1996 (3) ESC 155. He further submitted that the year of recruitment shall mean the date or a year in which the recruitment process actually commenced, i.e., when the Commission or the Board decides to fill up the vacancy or where the vacancy is to be filled up by way of promotion when the Regional Selection Committee takes up the matter. He thus submitted that the respondent No. 4 was fully eligible and entitled for being promoted on the post of lecturer in History.

19. Having heard the learned counsel for the parties I find that the post of lecturer in the institution fell vacant on 30.6.1997, on account of retirement of Gyan Bhaskar Sinha. The vacancy was notified by the Committee of Management to the District Inspector of Schools, Kushinagar, in terms of Rule 11 of the U.P. Secondary Education Service Commission, Rules 1995 (hereinafter referred to as the 1995 Rules). The District Inspector of Schools vide order dated 21.4.1998 directed the Committee of Management to send proposal for ad hoc promotion on the post of lecturer in the institution, whereupon the Committee of Management vide resolution passed on 24.5.1998 had recommended for ad hoc promotion of the petitioner on the post of lecturer. The resolution was accorded approval by the District Inspector of Schools vide order dated 8th June, 1998. It appears that on some representation being made by Subhash Prasad before the U.P. Scheduled Castes and Scheduled Tribes Commission, Lucknow, the matter was considered by the Regional Selection Committee in its meeting held on 5.3.2003 and the Regional Selection Committee promoted Subhash Prasad on the post of lecturer in the Institution treating the said post to be a reserved post. It may be mentioned here that Subhash Prasad was appointed as assistant teacher in L.T. grade on ad hoc basis on 21.4.1993 and he was regularised by the Regional Selection Committee vide order dated 12.2.1999. The question is as to whether the Reservation Policy is applicable in a case where the post is to be filled up by way of promotion or not. The State Government as far back as on 12.7.1978 had

issued an order providing for reservation of posts to Scheduled Castes, Scheduled Tribes and other Backward Classes in a case where the vacancy is to be filled up by way of promotion. The aforesaid G.O. came up for consideration before this Hon'ble Court in Krishna Pal Singh case (supra) and a Division Bench of this Court held the said G.O. to have statutory force and would be effective notwithstanding any regulation framed by the Board. This Court held that if the Regulation 6 framed under the U. P. Intermediate Education Act, 1921, is read along with Regulation as contained in the Government order dated 12.7.1978, it would be clear that if the vacancy occurs in the L.T. grade that should be filled up by promoting a member of Scheduled Castes, Scheduled Tribes or other Backward Classes, if he possess the minimum requisite qualifications.

20. In the case of Sudhir Kumar Anand and Ors. (supra) a Division Bench of this Court has upheld the validity of Section 3 (7) of the Reservation Act. It has held as follows :

'The validity of Sub-section (7) of Section 3 of U.P. Act No. 4 of 1994 has been questioned by Sri Ravi Kiran Jain on the ground that the State Legislature was not competent to enact Sub-section (7) of Section 3 of the U.P. Act No. 4 of 1994 in view of the pronouncement by the Apex Court in Indra Sawhney's case. The argument is misconceived. It is evident that Sub-section (7) of Section 3 by itself does not provide for any reservation. Rather it simply visualises that the Government orders providing for reservation in promotion, as on the date of commencement of the Act, will continue to be applicable till they are modified or revoked. Accordingly, we are of the view that the Government orders on the subject of reservation in favour of Scheduled Castes for appointment to posts to be filled by promotion in force on the date of the commencement of the Act were capable of being invoked independently of Sub-section (7) of Section 3 of U.P. Act No. 4 of 1994 by virtue the directions contained in Indra Sawhney's case and after insertion of the Clause (4A) in Article 16 of the Constitution w.e.f. 17.6.1995, no exception can be taken to the provisions contained in Subsection (7) of Section 3 of U.P. Act, which became valid and operative by strength of Clause (4A) of Article 16 of the Constitution. It is true that but for insertion of Clause (4A) in Article 16, Sub-section (7) of Section 3 would not have been available for being invoked on

expiration of period of five years from 15.11.1993 but now after insertion of Clause (4A) in Article 16 of the Constitution, Section 3 (7) of U.P. Act No. 4 of 1994 has become a valid law and, therefore, it cannot be struck down as violative of Articles 14 and 16 of the Constitution. It may be pertinently observed that now after insertion of Clause (4A) in Article 16 of the Constitution the appropriate Government, in exercise of its executive powers under Articles 73 and 162 of the Constitution, as the case may be, can provide for reservation in favour of Scheduled Castes/ Scheduled Tribes in matter of promotion of any class or classes of posts in the services under the State Government order dated 31.3.1996 (Annexure-C.A. 7) and other Government orders referred to therein were issued by the State Government in exercise of its executive power under the Constitution. The Government order aforesaid was adopted by the Board in its meeting held in April, 1966, by noting the proposal submitted by its Member Secretary vide note dated April 20, 1996. The direction contained in the said Government order was that the Board would make general reservation in the vacancies to be filled by direct recruitment and by promotion through competitive examination limited to departmental candidates belonging to Scheduled Castes but it contained a further direction that the Board would 'in the matter of such reservation have been or may be issued by the State Government from time to time'. Subsequent Government order dated 20.3.1974 as amended by the Government order dated 27.12.1974 provides for reservation in favour of Scheduled Castes/Scheduled Tribes in posts to be filled by promotion on the criterion of 'seniority subject to reject of the unfit'.

21. The Hon'ble Supreme Court in the case of Ajit Singh (II) (supra) has held that the language in each of the Articles 16(4) and 16(4A) of the Constitution of India is in the nature of an enabling provision. In paragraph 31 of the judgment, the Hon'ble Supreme Court has held as follows :

'In view of the overwhelming authority right from 1963, we hold that both Articles 16(4) and 16(4A) do not confer any fundamental rights nor do they impose any constitutional duties but are only in the nature of enabling provisions vesting a discretion in the State to consider providing reservation, if the circumstances mentioned in those Articles so warranted.'

22. A Full Bench of this Court in the case of V.K. Bannerji v. State of U.P. and Ors., 1999 (1) ESC 644, has upheld the validity of the Government order dated 10.10.1994, increasing reservation quota in promotion in favour of Scheduled Castes candidates from 18% to 21% under Section 3 of the Reservation Act.

23. The decision of this Court in the case of Mohan Lal Mehrotra (supra) relied upon by the learned counsel for the petitioner has been reversed by the Hon'ble Supreme Court in the case of Comptroller and Auditor General of India and others (supra). In the aforesaid case, the Hon'ble Supreme Court has held that administrative orders cannot be issued in contravention of the statutory Rules, but can be issued to supplement them and reservations for Scheduled Castes/Scheduled Tribes could be made by means of the administrative orders also and need not always be statutory. The Hon'ble Supreme Court has held as follows :

'The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would alter the statutory rules in force. The rules do not provide for any reservation. In fact, it is silent on the subject of reservation. The Government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of the statutory rules but it could be issued to supplement the statutory rules (See : the observations in Sant Ram Sharma v. State of Rajasthan). In fact similar circulars were issued by the Railway Board introducing reservations for Scheduled Castes and Scheduled Tribes in the Railway services both for selection and non-selection categories of posts. They were issued to Implement the policy of the Central Government and they have been upheld by this Court in Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India.'

24. In the case of Deo Chand Ram (supra) this Court has held that in the absence of amendment of statutory rules instructions contained in Government order if contrary to the statutory rules have no binding effect and preference must be given to the statutory rules. It has held as follows :

'In the present case, the rules regulating the promotions do not extend the benefit of reservation to the promotion post in question, as already noticed hereinabove.

There is no reservation for Scheduled Castes and Scheduled Tribes made under the rules governing promotions to the posts for Registrar Kanoongo. This Court in its decision in the case of Mohan Lal Mehrotra and Ors. v. Comptroller and Auditor General of India. New Delhi and Ors., 1979 AWC 602, rendered by a Division Bench after noticing the several decisions of the Apex Court held that alterations in the existing rules by the administrative instructions could not be made and the existing rule could be modified only by amending the statutory rules in accordance with the provisions of the Constitution in exercise whereof they had been made. It was clearly held that no reservation for the Scheduled Castes and Scheduled Tribes in appointments made by promotion could be made on the basis of Government instruction/ Government orders in the statutory rules regulating the matter relating to promotion. It is, therefore, obvious that Government orders or instructions cannot alter a statutory rule in force. Observations similar in nature were made by another Division Bench of this Court in the case of Krishna Pal Singh v. Government of Uttar Pradesh and Ors., 1981 UPLBEC 521, holding that a Government order containing administrative instructions cannot override or amend the statutory rule prescribing procedure and criteria for promotion. It was further observed that in absence of amendment of statutory rule, instructions contained in the Government order, if contrary to the statutory rules have no binding effect and preference must be given to the statutory rule. It was, however, clarified that it has to be examined in each case as to whether any such Government order itself can be said to have a statutory character of the rule.

'This submission is devoid of merit and is not at all acceptable. The aforesaid provision only gives extended life to the Government order referred to therein. The Government Order by itself could not have the effect of altering or amending the statutory rules in question framed in exercise of the jurisdiction envisaged under Article 309 of the Constitution of India, specially when the Government was not vested with any Jurisdiction to Issue such orders by virtue of any provision contained in the rule itself. Further even in the rules in question, it had been specifically provided that the matters on which the rules are silent, the rules can be supplemented by the rules framed in exercise of the jurisdiction envisaged under Article 309 of the Constitution of India and till then by the rules framed under the notification dated 16.7.1937 or the rules framed under Section 241(2) of the

Government of India Act, 1935, which were to continue in operation as contemplated under Article 313 of the Constitution of India. In face of such a stipulation specifically provided for in the provisions contained in the relevant statutory rules itself, the petitioner cannot derive any benefit out of the provisions contained in Section 3 (7) of the aforesaid Act of 1994.'

This Court has relied upon the decision in the case of Mohan Lal Mehrotra and others (supra) which decision as already mentioned hereinabove had been reversed by the Hon'ble Supreme Court. Moreover, the Court has not taken into consideration the provisions of Article 16(4A) of the Constitution of India and, therefore, no benefit can be derived from the aforementioned decision.

25. Thus, the submission of Sri G. K. Singh learned counsel for the petitioner that reservations in appointments to the post to be filled up by way of promotion cannot be made, cannot be accepted.

26. Section 3 (7) of the Reservation Act provides that if on the date of commencement of this Act Reservation was in force under Government order for appointment to post to be filled by promotion, such G.O. shall continue to be applicable till they are modified or revoked. In this view of the matter, the earlier Government order which provides for reservation in favour of Scheduled Castes in the appointment on posts to be filled by promotion continues to be applicable.

27. The question still remains as to whether the petitioner or respondent No. 4 is eligible and entitled for being promoted on the post of lecturer or not. The contention of Sri Khare that the petitioner was appointed on ad hoc basis in the vacancy occurred on account of the ad hoc promotion of Bhargava Prasad as lecturer whose promotion was not approved and consequently the appointment of the petitioner also fails cannot be accepted at this stage as the petitioner has been regularised vide order dated 12.7.1996, which order has become final. It may be mentioned here that the Writ Petition No. 1385 of 1992 has been got dismissed on 15.11.1999 by the petitioner as not pressed. The respondent No. 4 cannot be permitted to challenge the said order at this stage. Thus, the decisions of this Court in the case of Niranjana Rai (supra), Committee of Management Arya Nagar Inter College (supra) and Praveen Pratap Singh Bhadauria (supra) which have

been strongly relied upon by Sri Khare are not attracted in the present case.

28. It is not in dispute that the vacancy on the post of lecture occurred on 1.7.1997. The petitioner had been appointed on 1.8.1989 whereas respondent No. 4 has been appointed on 21.4.1993. The contention of Shri Khare that the respondent No. 4 was regularised by the Regional Selection Committee vide order dated 12.2.1999, which will relate back to 20.4.1998, when the provisions of Section 33C were added in the 1982 Act is misconceived inasmuch as under Section 33C (1) of the 1982 Act which provides for regularisation of certain appointments of teacher who fulfils the conditions mentioned in Clauses (a) to (d) of Sub-section (1) will be given substantive appointment by the management. Sub-section (3) of Section 33C provides for recommendation of the names of teachers for substantive appointment in order of seniority as determined from the date of their appointment. In Rule 17 (9) of the U.P. Secondary Education Services Selection Board Rules, 1998, (hereinafter referred to as the 1998 Rules), the management has been empowered to make substantive appointment from the list sent by the Joint Director of Education, to the institution concerned in order in which the names stand in the list and the appointment so made has been made effective from the date of order of such appointment. In this view of the matter, the date of the order of appointment of respondent No. 4 on substantive basis that is 12.2.1999 would be material and it will not relate back to 20.4.1998 when Section 33C was inserted in the 1982 Act.

29. The year of recruitment has been defined under Section 2 (1) of the 1982 Act as follows :

'Year of recruitment means a period of 12 months commencing from 1st day of a calendar year.'

30. It is not in dispute that the 1998 Rules are not applicable in the present case and it is governed by the 1995 Rules. In the 1995 Rules, Rule 14 provides for procedure for recruitment by promotion. It reads as follows :

'14. Procedure for recruitment by promotion.-

(1) Where any vacancy is to be filled by promotion all teachers working in trained graduates (L.T.) grade or Certificate of Teaching (C.T.) grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates (L.T.) grade, as the case may be, without their having applied for the same.

Notes.-

1. For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in Sub-rule (3), and forward it to the Commission through the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the proforma given in Appendix 'A'.

(4) Within three weeks of the receipt of the list from the record of his office and forward the list to the Commission.

(5) The commission shall consider the cases of the candidates on the basis of the records referred to in Sub-rule (3) and may call such additional information as it may consider necessary. The commission shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Deputy Director.

(6) Within ten days of the receipt of the panel from the commission under Sub-rule (5), the Inspector shall send the name of the selected candidate to the management of the institution which has notified the vacancy and the management shall accordingly on authorisation under its resolution issue the appointment order in the proforma given in Appendix 'E' to the such candidate.'

31. From a reading of the aforesaid Rules, it is clear that for being promoted on a post a person should fulfill the following conditions :

(1) He should possess qualification prescribed for the post.

(2) He should have completed 5 years continuous service as such on the first day of a year of recruitment. He should be working as trained graduate L.T. grade for being considered for promotion in lecturers grade or working as in certificate of teaching (C.T. grade) for being considered for promotion to trained graduate L.T. grade.

Thus, the qualification prescribed is to be seen on the first day of year of recruitment, i.e., first day of 12 months commencing from the first day of a calendar year or in other words 1st January of that year.

32. Rule 11 of the 1995 Rules provides for determination and notification of vacancies. It provides that the management shall determine the number of vacancies in accordance with Sub-section (1) of Section 15 of the 1982 Act and notify through the Inspector to the Commission in the manner provided in the said Rule. The management is enjoined under Sub-rule (2) to send a statement of vacancies for each category of post to be filled in by direct recruitment or by promotion including the vacancy that are likely to arise due to the retirement on the last day of year of recruitment in the prescribed proforma by July 15 of the year of recruitment and thereafter the District Inspector of Schools after notification of the vacancies send the same to the Commission by July 31. It also provides that if any vacancy which occurs after July 15, has not been notified it shall be notified within 15 days of the occurrence of vacancy. Sub-rule 4 takes care of a situation where the management fails to fulfill its obligation in notifying the vacancy and empowers the District Inspector of Schools to determine the vacancy and notify the same to the Commission.

33. In the case of Praveen Kumar, Singh (supra), the Hon'ble Supreme Court has held that term recruitment connotes and clearly signifies enlistment, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradistinction, the word 'appointment' means an actual act

of posting a person to a particular office. It further held that the recruitment is just an initial process. That may lead to eventual appointment in the service.

34. The 1982 Act has only defined the year of recruitment. The year of recruitment has not been defined in the Act or the Rules framed thereunder. Under Rule 11 of the 1995 Rules, the Committee of Management is enjoined to intimate the vacancy to the District Inspector of Schools for being forwarded to the Commission. Under Rule 14 of the 1995 Rules, the procedure in respect of vacancies which are liable to be filled up by promotion, has been provided. The intention appears to be that where the vacancy has to be filled up by way of direct recruitment, the date on which it is notified to the Commission and where the vacancy to be filled up by way of promotion, the date on which the vacancy occurs should be construed as to be falling in the year of recruitment. If any other interpretation is given, then it would give a handle to the Committee of Management to hold back the procedure of promotion in order to enable the persons who are ineligible on the date when the vacancy has occurred, to become eligible for promotion at a subsequent date and thereafter initiate the process of recruitment either by way of direct recruitment or by way of promotion.

35. Thus, the word recruitment would also cover notifying the vacancy in accordance with Rule 11 of the 1995 Rules. In this view of the matter, the year of recruitment would be the year in which the vacancy has been notified by the Committee of Management or by the District Inspector of Schools as the case may be, which in the present case would be the year 1998. Thus, the qualification has to be seen as on 1.1.1998. Admittedly the respondent No. 4 did not possess 5 years teaching experience on 1.1.1998 and, therefore, he was ineligible for being considered for promotion on the post of lecturer in History in the institution. It is not necessary to have 5 years teaching experience on substantive basis as held by this Court in the case of Ram Swamp (*supra*). Since the respondent No. 4 did not possess 5 years teaching experience on the first day of the year of recruitment as required under Rule 14 of the 1995 Rules, the Regional Selection Committee had committed a manifest error of law in promoting him on the post of lecturer. The resolution passed by the Regional Selection Committee dated 5.3.2003 and consequential order dated 6.3.2003 passed by the Joint Director of Education,

VIIth Region, Gorakhpur, cannot be sustained and are hereby set aside.

36. In view of the foregoing discussions, the writ petition succeeds and is allowed. The Regional Selection Committee is directed to consider the case of promotion in accordance with law in the light of the observations made above within a period of one month from the date a certified copy of this order is filed before him.

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