

Dinesh Kumar Vs. District Inspector of Schools, Muzaffarnagar and Others

Dinesh Kumar Vs. District Inspector of Schools, Muzaffarnagar and Others

SooperKanoon Citation : sooperkanoon.com/484540

Court : Allahabad

Decided On : Aug-21-1998

Reported in : 1998(4)AWC224; (1998)3UPLBEC1915

Judge : D.K. Seth, J.

Acts : Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 - Sections 16, 18, 32 and 33; Uttar Pradesh Secondary Education Services Commission Rules, 1983 - Rules 9, 9A and B; Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981; Uttar Pradesh Intermediate Education Act, 1921; ; Uttar Pradesh Intermediate Education Regulation, 1921 - Regulation 6

Appeal No. : C.M.W.P.No. 18014 of 1991

Appellant : Dinesh Kumar

Respondent : District Inspector of Schools, Muzaffarnagar and Others

Advocate for Def. : C.S. Khare, Adv.

Advocate for Pet/Ap. : V.B.Khare, Adv.

Judgement :

D. K. Seth, J.

1. The petitioner alleges that on account of the seniormost teacher in Economics having been promoted on ad hoc basis to the post of Principal, a short-term vacancy occurred. It is alleged that the petitioner was appointed in the said short-term vacancy through direct recruitment as Lecturer in Economics. He claims that he possesses the requisite qualification for being so appointed. The petitioner claims to have been appointed under the U. P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981. He is aggrieved by the grant of approval to his appointment by the order dated 1st December, 1990, which limited the period of his appointment till 20th May, 1991. By reasons of such limitation imposed on the appointment, the petitioner's service was sought to be terminated by an order dated 18th May, 1991, which is Annexure-IV to the writ petition. The petitioner has accordingly challenged the said order dated 18th May, 1991 contained in Annexure-IV. The prayers made in the writ petition may be beneficial for our present purpose to be quoted herein below :

(i) a writ of certiorari to quash the order dated 18.5.1991, Annexure-IV.

(ii) a writ of mandamus commanding the opposite parties to treat the petitioner as a Lecturer in Economics and to pay him his salary as such till the permanent incumbent on the post returns.

(iii) any other writ, order, or direction to which the petitioner is foundentitled under the circumstances of the case.

2. Mr. V. B. Khare, learned counsel for the petitioner has contended that the respondent No. 3, who is claiming the said post under paragraph 2 of the Second Removal of Difficulties Order is ineligible on account of absence of 5 years' continuous service in the L.T. Grade, namely, the lower grade than that of Lecturer as contemplated in Regulation 6, Chapter II of the Regulations framed under the U. P. Intermediate Education Act. read with Rule 9 of the U. P. Secondary Education Services Commission Rules, 1983. Therefore the respondent No. 3 cannot claim any right to the said post. He contends that by virtue of paragraph 3 of Second Removal of Difficulties Order, the appointment of the petitioner in the short-term vacancy could not be limited. Such appointment is subject to cessation only on the circumstances mentioned in paragraph 3 of the said Removal of

Difficulties Order, which does not envisage any other limitations. He further contends that he has been appointed after following the procedure laid down in the Second Removal of Difficulties Order, and, therefore, he is liable to continue till the period contemplated in paragraph 3 of the Second Removal of Difficulties Order. As such the limitation provided in the order of approval as well as the order of termination on account of such limitation imposed in the order of approval, cannot be sustained. On these grounds, he claims the reliefs as mentioned above.

3. Mr. C. S. Sharma, learned counsel for respondent No. 3 on the other hand contends that, admittedly, both the petitioner and respondent No. 3 do possess the requisite qualification for being appointed as Lecturer in Economics. According to him, it is not 5 years' continuous service in the Grade lower but it is 5 years' continuous service as teacher either in C. T. Grade or in L. T. Garde, or both combined. He also refers to Rule 9 of the said Service Commission Rules and points out that there is nothing to indicate in the said Rules that 5 years' continuous service should be in the next lower grade. Therefore, according to him, by virtue of paragraph 2 of the Second Removal of Difficulties Order, the post can be filled up only by promotion since the petitioner was the seniormost permanent teacher, duly qualified for such promotion under the said paragraph. According to him if there is inconsistency between the rules framed or orders issued under the Service Commission Act and the Regulations framed under U. P. Intermediate Education Act. in that event the provisions contained in the U. P. Intermediate Education Act or the Regulations framed thereunder would stand eclipsed and those of the Service Commission Act. Rules and orders shall prevail. Therefore, according to him. respondent No. 3 is eligible and entitled to promotion to the said post.

4. Mr. K. R. Singh, learned standing counsel on the other hand contends that paragraph 2 of the Second Removal of Difficulties Order contemplates appointment on short-term, vacancy, whereas under the Service Commission Act, no procedure has been laid down for the purpose of recruitment on ad hoc basis against short-term vacancy. In absence of any such provision, the recruitment is to be governed by the Second Removal of Difficulties Order. He further contends that by reason of Section 32 of the Service Commission Act. the provisions provided

either under the said Act or in the Rules or the orders framed thereunder, would prevail and the provisions, if there be any, inconsistent with these provisions would stand eclipsed to that extent, which is in conflict with the later provisions.

5. Mr. V. B. Khare on the other hand, in reply contends that by reason of Section 32 of the Service Commission Act. the inconsistency has been reconciled and according to him. there is no inconsistency with regard to the qualifications as laid down. Since almost Identical provisions are included in Regulation 6 of the Rules framed under the U. P. Intermediate Education Act hereinafter referred to as 1921, Act and Rule 9 of the Service Commission Act, 1982, (hereinafter referred to 1982 Act) the respondent No. 3 cannot claim promotion and the petitioner having been appointed, is eligible to continue till the contingency contemplated in paragraph 3 of the 'Second Removal of Difficulties Order' is satisfied.

6. I have heard the learned counsel for the respective parties at length.

7. It is an admitted position, as very fairly admitted by Mr. V. B. Khare, that the petitioner was appointed under the provisions of the Second Removal of Difficulties Order. It is also admitted that Mr. Sharma has claimed that the respondent No. 3 is entitled to promotion under paragraph 2 of the Second Removal of Difficulties Order. As rightly pointed out by Mr. K. R. Singh. learned standing counsel recruitment In the short-term vacancy is to be guided and governed by paragraph 2 of the Second Removal of Difficulties Order. Appointment can only be made on the recommendation of the Board after the commencement of the said Act. Appointment made in contravention of the provisions of the said Act. by reason of Section 16 shall be void. Section 18 had provided for making ad hoc appointments pending appointment by the Commission. Thus Section 18 had carved out an exception to the provisions contained in Section 16. The scheme of Section 18 shows that the said exception has been carved out in respect of appointments, which are to be made by the Commission. Admittedly, such appointment by a Commission could be made only in respect of substantive vacancy. There is no scope for the Commission to make any appointment in respect of short-term vacancy. Thus Section 18, in effect, had carved out an exception confined in respect of appointment against substantive

vacancy. It had never contemplated any appointment in short-term vacancy. Inasmuch as the exception that was carved out, was in respect of appointment to be made by the Commission. So by no stretch of imagination, it could be said that appointment could be made against short-term vacancy by the Commission. Section 33 of the said 1982 Act has provided jurisdiction to the State Government to issue orders to remove difficulties in case of appointment of teachers by reason of the enactment of the 1982 Act. Since 1982 Act has not provided for appointment against short-term vacancies, therefore, the necessity of making provisions for short-term vacancies arose. This necessitated the Issuance of such Removal of Difficulties Order by the State Government in exercise of the jurisdiction under Section 32 of the 1982 Act. By reason thereof, the First and Second Removal of Difficulties Order, 1981 were issued by the State Government.

8. Rules have been framed under the Service Commission Act, which incorporated Rule 9 providing for making appointment by promotion within the scope and ambit of the said Act. Inasmuch, the 1982 Act contemplated appointment either by promotion or by direct recruitment but all by the recommendation of the Board. This substantive vacancy the recommendation of the Board and approval would be necessary, whereas the same procedure cannot apply in respect of short-term vacancies in absence of specific provisions thereof. Rule 9 did not contemplate by any procedure for appointment on ad hoc basis. In order to avoid such a situation, it was left necessary to insert by way of amendment in 1993, Rules 9A and 9B providing procedure, by notification dated 16th July. 1992, for ad hoc appointment both through direct recruitment and by promotion. If Rule 9 had contemplated procedure for ad hoc appointment, in that event, it would not have been necessary to amend Rule 9 and insert Rules 9A and 9B in addition thereof providing for procedure governing the ad hoc appointment. Thus, it appears that Rule 9 did not govern ad hoc appointment against substantive vacancy. Then again Rules 9A and 9B having regard to Sections 16 and 18, of the 1982 Act, cannot be interpreted to mean that it also governs ad hoc appointment against short-term vacancy. It is wholly outside the purview of the Service Commission Act but because of the difficulties created by reason of Section 16. read with Section 18. the same has been neutralised in exercise of the powers contemplated under Section 33 by issuing the Removal of Difficulties Order. Thus, the limited scope of

ad hoc appointment against short-term vacancy is altogether a distinct separate and distinguished field of appointment, which is neither governed by Sections 16 and 18, read with Rule 9A or 9B. But then in the present case, the vacancy having arisen some times in 1990 before Rules 9A and 9B were incorporated and the said two rules having not been given retrospective effect, there is no scope for arguing that the provisions of Rules 9A and 9B may be attracted in respect of any appointment in a short-term vacancy that was undertaken in 1990.

9. In that view of the situation, the contention of Mr. Khare with regard to the qualification contemplated in Regulation 6 of Chapter 11 of the Regulations framed under the 1921 Act. read with Rule 9 framed under the 1921 Act has no manner of relevance and is not necessary to be gone into. The field having been exclusively covered and governed by the Removal of Difficulties Order, the question has to be confined within the Scope and ambit of paragraph 2 of the said order.

10. Paragraph 2, clause (1) provides that the short-term vacancies are to be filled up by promotion of the permanent seniormost teachers of the institution in the next lower grade. Only when the post cannot be filled up by promotion due to non-availability of a teacher in the next lower grade in the Institution possessing the prescribed minimum qualification, the post can be filled up by direct recruitment under clause (2).

11. Thus, it is necessary to refer to the relevant procedure provided in paragraph 2 of the said Second Removal of Difficulties Order so far as is necessary for our present purpose. Accordingly, clauses (1) and (2) of paragraph 2 are quoted hereinbelow :

(1) If short-term vacancy in the post of a teacher, caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise, shall be filled by the management of the institution, by promotion of the permanent seniormost teacher of the institution ; in the next lower grade. The Management shall immediately inform the District Inspector of Schools of such promotion along with the particulars of the teacher so promoted.

(2) Where any vacancy referred to in clause (1) cannot be filled by promotion due to non-availability of a teacher in the next lower grade in the institution, possessing the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in clause (3).'

A plain reading of the said clause (1) shows that the post is to be filled up by promotion of the permanent seniormost teacher of the Institution possessing minimum prescribed educational qualification, in the next lower grade. It does not provide any other qualification, namely, to the extent that he must possess any minimum period of service in the next lower grade. The only qualification is that he should be permanent seniormost teacher with minimum educational qualification, in the next lower grade. This interpretation, obviously appears to be in consonance with the scheme in which the said orders were issued. Since these appointments are made for a very limited period in short-term vacancy, therefore, it was felt necessary that it should be filled up by promotion only when specifically the posts were filled up either by promotion or by direct recruitment reserving certain percentage for both the classes whereas, against the short-term vacancy, the same has been altogether obliterated and only when there is no such teacher, the same can be filled by recruitment made directly. In that view of the matter, it is not possible to bring about the analogy of the qualifications laid down either in Regulation 6. framed under the 1921 Act or Rule 9. framed under the 1982 Act with regard to the continuous service. The minimum qualification as H appears from para 2 of the Second Removal of Difficulties Order relates to the educational qualification, which is not in dispute in the present case. It does not relate to any other qualification because of the explicit expression used in clause (1) to the extent that by promotion of the permanent seniormost teacher of the Institution in the next lower grade. Whereas, in Rule 9. the expression 'next Lower grade' has not been used, on the other hand the expression used therein is substantive post. It may be either C. T. or in the L. T. Grade. However, the expression used in this provision may be borrowed for some other purpose unrelated to a field, which is exclusively covered by Second Removal of Difficulties Order, but in a field, which is not covered by the Second Removal of Difficulties Order. When there is no ambiguity, it is not necessary to borrow any of the other provisions used in any other rules or regulations. The Removal of Difficulties Order stands altogether on a

different footing and bears a distinct and separate characteristics by reason of Section 33, which has empowered the State Government, to issue such orders for removing difficulties. If such order itself creates further difficulties, then it would not be an order for removing difficulties. If it is necessary to borrow other provisions from the other rules and regulations, in that event the Removal of Difficulties Order would invite more difficulties, which again requires to be removed. Because of its distinct characteristics, having been issued under Section 33. it cannot be governed by any of the provisions of 1982 Act or 1921 Act since the same has been brought about only to remove the difficulties that are being created by the reason of the provision of 1982 Act. Therefore, it has to be interpreted independent of the regulations framed under the 1921 Act or the Rules framed under the 1982 Act. particularly in view of the fact that neither of the said provisions had dealt with the question of short-term (ad hoc) appointment against short-term vacancy. Rules 9A and 9B have been Incorporated in order to give effect to Section 18 of the 1982 Act. Section 18 has not provided for any provision In respect of appointment against short-term vacancy and as such, Rules 9A or 9B cannot be borrowed to supplant or supplement the provisions incorporated in the Removal of Difficulties Order.

12. Thus, by reason of clause (1) of paragraph 2, it appears that the said short-term vacancy is to be filled up by promotion of the next seniormostteacher of the Institution in the next lower grade. Admittedly, the respondent No. 3 is the seniormost teacher in the next lower grade in the institution have the requisite qualification. In such a situation, the petitioner cannot claim any right to continue pursuant to such appointment, which is contrary to clause (1) of paragraph 2, read with clause (2) thereof, since by virtue of clause (2) of paragraph 2. the petitioner could have been appointed only if there was no permanent seniormost teacher in the Institution in the next lower grade. Since the respondent No. 3 was already there, he was eligible under clause (1). There was no scope for recruitment under clause (2) and as such, the petitioners appointment could not have been made through direct recruitment.

13. In that view of the matter, there is no illegality or infirmity in the order approving the petitioner's appointment by incorporating a limitation in respect of

the period of his appointment. Therefore, termination of his services on the basis of the limitation provided in the order of approval, in no way, can be assailed as illegal or ineffective.

14. It is alleged by the petitioner that the respondent No. 3 is not permanent teacher in the L. T. Grade, since his appointment in L. T. Grade has not been confirmed. The respondent No. 3 on the other hand claimed that his appointment was confirmed in the L. T. Grade w.e.f. 1st January, 1986. In paragraph 5 of the counter-affidavit, the respondent No. 3 has asserted that he had been continuously working since 1st January, 1986 as confirmed permanent Asstt. Teacher in L. T. Grade. This assertion has been dealt with in paragraph 2 of the rejoinder-affidavit, where it has been disputed.

15. In such circumstance, it is not possible for this Court, in absence of sufficient material to decide as to whether respondent No. 3 was confirmed L. T. Grade Teacher w.e.f. 1st January, 1986 or not. Therefore, the question requires fresh determination by the D.I.O.S.

16. Mr. Khare had relied upon the decision in the case of Prem Balika Rai v. Regional Inspectress of Schools, Varanasi and others, 1993 (2) UPLBEC 922, wherein it was held that even in the case of appointment under the Removal of Difficulties Order, 5 years' continuous service in the lower grade for promotion of a candidate, is mandatory. But the said decision had confined the consideration on the question of seniority between a member of ad hoc appointee. The Court was not called upon in the said case to decide the issue, which is involved in the present case, whereas it was called upon to decide the question of seniority as has been specified in the first paragraph of the said judgment, namely, that it relates to a seniority dispute amongst the ad hoc appointees. Therefore, the ratio decided therein cannot be attracted in the facts and circumstances of the case.

17. Mr. C. S. Sharma, however, relied upon the decision in the case of Siya Nand Singh Tyagi v. Smt. Shashi Prabha Sharma and others, 1996 (2) UPLBEC 1203, which in paragraph 27 has taken the same view, which I have taken in this judgment.

18. Mr. Khare had relied upon the decision in the case of Umesh Chandra v. District Inspector of School, Jaunpur and others, 1987 UPLBEC 105, rendered by a Division Bench of this Court in order to contend that the petitioner's service cannot be terminated on the ground of limitation provided in the order beyond the scope of paragraph 3 of the Removal of Difficulties Order. In view of the observations made above, the said ratio cannot be attracted in the present case. Inasmuch as in the present case the very right of the petitioner for being directly recruited is being disputed.

19. Mr. Khare had relied upon a decision in the case of Ram Swaroop v. State of U. P. and others, 1996 (3) ESC 155 (All), in order to contend that 5 years' continuous service in the next lower grade is a necessity. But from the facts of the said case. It appears that it had dealt with the provisions contained in Rules 9, 9A and 9B. The Court was not concerned with the Removal of Difficulties Order in the said case. Therefore, the interpretation of Rules 9, 9A and 9B given in the said decision cannot be attracted to help Mr. Khare in the facts and circumstances of the present case.

20. Accordingly, this writ petition is disposed of by directing the District Inspector of School to consider the question in the light of the observations made above afresh as to whether respondent No. 3 was a seniormost permanent teacher in the Institution in the next lower grade. If it is so, in that event, the order of termination of service of the petitioner, need not be interfered with. If it is otherwise, in that event, respondent No. 3 cannot claim promotion to the said post on account of his having holding ad hoc post. It is not contemplated in the Removal of Difficulties Order. Since it provides promotion of a seniormost permanent teacher in the Institution. In that event, the order of termination as well as the limitation provided in the approval, would be governed by the decision as might be taken afresh by the District Inspector of Schools having regard to paragraph 3 of the Second Removal of Difficulties Order and to the facts and circumstances of the case. There shall be no orders as to costs.