

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

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Court : Allahabad

Decided On : Sep-21-1998

Reported in : (1998)3UPLBEC2248

Judge : D.K. Seth, J.

Acts : Uttar Pradesh Secondary Education Services Selection Board Act, 1982 - Sections 16, 18, 18(1) and 33; Intermediate Education Act, 1921

Appeal No. : Civil Misc. Writ Petition Nos. 10842 and 27899 of 1992 and 29056 of 1993

Appellant : Harendra Kumar Singh;dhanurdhar Upadhyaya;nagendra Nath Dubey

Respondent : District Inspector of Schools and anr.;state of U.P. and ors.;committee of Management, Aditya Inter

Advocate for Def. : S.C.

Advocate for Pet/Ap. : S.K. Verma, ;Sidhartha Verma, ;R.N. Singh, ;S.N. Singh, ;M.D. Singh and ;V.K. Singh, Advs.

Disposition : Petition dismissed

Judgement :

D.K. Seth, J.

1. Writ Petition No. 10842 of 1992 was filed by one Shri Harendra Kumar Singh who contained that a requisition dated 3.3.1991, signed by the Manager, being Annexure-1 to the writ petition, was notified to the Commission that one Shri Ram Murthy Pandey, holding the post of Lecturer in Sanskrit would be retiring on 30.6.1991, resulting into a substantive vacancy which was required to be filled up. On account of anticipated vacancy an advertisement was issued on 14.3.1991, which is contained in Annexure-2 to the writ petition, inviting candidates for appointment in the said vacancy, for which applications were to be submitted within 23.7.1991. It was also pointed out in the said advertisement that the interview alongwith the original certificates would be held on 14.7.1991 at 11.00 a.m. Thus the advertisement itself contradicts in the matter that the last date for submission of applications was fixed on 23.7.1991 and the interview was fixed on 14.7.1991 viz., before 9 days of the last date for submitting the applications for the appointment. This raises a suspicion about the genuineness of the said advertisement. The interview cannot precede the last date of submission of the application.

2. Mr. S.K. Verma learned Counsel for the petitioner contends that since the petitioner has been appointed pursuant to such advertisement 2.9.1991 following the procedure laid down in Section 18 of the U.P. Secondary Education Services Commission and Selection Board Act, 1982 (At present its name has been changed and it is now know as U.P. Secondary Education Services Selection Board, Act 1982. The words 'Commission and' of the original Act has been omitted by U.P. Act No. 1 of 1993, w.e.f. 6.1.1993), therefore, his appointment should be approved by the District Inspector of Schools and the refusal of the approval cannot be sustained. On this ground this petition has been moved seeking the relief for payment of salary to the petitioner and quashing of the order dated 29.1.1992, passed by the District Inspector of Schools, disapproving the said appointment of the petitioner.

3. The writ petition No. 29056 of 1993 has been filed by one Shri Dhanurdhar Upadhyaya claiming to have been selected and appointed by the Committee of Management pursuant to an advertisement dated 8.7.1991, where it has been pointed that the vacancy, that arose on 30.6.1991, on account of retirement of Shri

Ram Murthy Pandey, Lecturer in Sanskrit would be filled up, for which applications may be submitted within 29.7.1991. for which the interview Was fixed on 30.7.1991, which was alleged to have been issued by the Manager. The said advertisement /letter is contained in Annexure-2 to the said writ petition. In the said writ petition the requisition dated 3.3.1991 is also annexed as Annexure-1 which is the Xerox copy of the original alleged requisition, wherefrom it appears that the said requisition was signed by the Principal. On the basis of such advertisement and requisition, the petitioner claims to have been appointed and therefore he has claimed that the petitioner should be paid his salary from 2.8.1991 on, account of his appointment on 2.8.1991 pursuant to such advertisement and appointment.

4. In the writ petition No. 27899 of 1992 one Shri Nagendra Nath Dubey had claimed that he was appointed in the self same vacancy of Shri Ram Murthy Pandey in the post of Lecturer in Sanskrit on 15.8.1991 pursuant to an advertisement published on 1.7.1991 which is Annexure-2 to the writ petition. The said advertisement appears to be a Xerox copy, but it does not bear any signature either of the Manager or of the Principal. In the said writ petition, the requisition has not been annexed. But it has been claimed that the statement of the said vacancy was forwarded in September, 1990 to the District Inspector of Schools, who had forwarded the same to the Commission in accordance with law. However, he has not disclosed as to on which date the requisition was forwarded by the District Inspector of Schools to the Commission. Though he mentioned September, 1990 as the date on which it was sent to the D.I.O.S. but he was mentioned any specific date. He claims to have been appointed on 14.8.1991 by the Committee of Management. On this ground he had prayed for sanctioning the claim of the petitioner for salary with effect from 1.5.1991.

5. Thus, it appears that against one and the same vacancy these three writ petitions have been filed by the different petitioners each claiming to have been appointed in the self same part on the dates mentioned respectively . It seems that the advertisement on which it was relied upon were also different and said to have been issued either by the Manger or by the Principal.

6. So far as the advertisement in writ petition No. 10842 of 1992 is concerned, it itself shows a discrepancy which creates a doubt about the genuineness of the said advertisement. So far as the requisition contained in Annexure-1 to the said writ petition which is dated 3.3.1991, it shows that it was signed by the Manager whereas the original of which Xerox copy has been submitted by the petitioner in writ petition No. 29056 of 1993 shows that it was signed by the Principal. Therefore, by reason of such discrepancy no reliance can be placed on Annexure-1 to the writ petition No. 10842 of 1992.

7. Be that as it may. Admitted position remains that the vacancy occurred on 1.7.1991 on the retirement of one Shri Ram Murthy Pandey, Lecturer in Sanskrit on 30.6.1991. But the requisition was sent in September, 1990 or 3.3.1991 is immaterial for our present purpose. Even assuming the requisition sent in September, 1990 still that the post did not remain actually vacant for two months as well as one year from requisition was also not complete.

8. Admittedly, the appointment has been made in exercise of power conferred on the Committee of Management under Section 18 of the U.P. Secondary Education Services [Commission and], [Words Commission and ' omitted by U.P. Act No. 1 of 1993, w.e.f. 6.1.1993- Editor)] Selection Board, Act, 1982. In order to appreciate the situation would be useful to quote Section 18 as it stood between 30.6.1991 and 2.9.1991.

'18. Ad hoc Teacher-(1) Where the Management has notified a vacancy to the Commission in accordance with the provisions of this Act, and

(a) the Commission has failed to recommend the name of any suitable candidate for being appoint as a teacher specified in the Schedule within one year from the date of such notification; or

(b) the post of such teacher has actually remained vacant for more than two months, then the management may appoint, by direct recruitment or promotion, a teacher on purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Intermediate Education Act, 1921, or the Regulations made thereunder.

(2) The provisions of sub-section (1) shall also apply to the appointment of a teacher (other than a teacher specified in the Schedule) on ad hoc basis with the substitution of the expression 'Board' for the expression 'Commission'.

(3) Every appointment of an ad hoc teacher under sub-section (1) or sub-section (2) shall cease to have effect from the earliest of the following dates, namely :-

(a) When the candidate recommended by the Commission or the Board, as the case may be, joins the post:

(b) when the period of one month referred to in sub-section (4) of Section 11 expires;

(c) thirtieth day of June following the date of such ad hoc appointment.'

9. Section 18 as it stood then provided that where the management has notified a vacancy to the Commission in accordance with the provisions of the said Act and (a) if the Commission fails to recommend the name of a suitable candidate for appointment within one year from the date of such notification or (b) if such post remains actually vacant for more than two months then the management may appoint by direct recruitment or promotion, a teacher on purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Intermediate Education Act, 1921 or the Regulations made thereunder. Thus there are two conditions one of which has to be fulfilled: Either the post has remained actually vacant for two months or the Commission had failed to recommend the name within one year from the date of notification. In such circumstances, Section 18 confers the management either to appoint by direct recruitment or by promotion on ad hoc basis only after expiry of one year of the notification or after the post had remained vacant actually for two months. Till either of these contingencies take place, the management can derive no power to make ad hoc appointment under Section 18. The power is derived through Section 18 and therefore it has to be confined within the legislative intent, as expressly provided in unambiguous language, has to be followed.

10. In the present case in each of three petitions it appears that the advertisement was published before expiry of two months after the post had remained vacant. The appointment in the case of Dhanurdhar Upadhyaya was made on 2.8.1991 viz., within one month two days. Whereas the appointment in the case of Nagendra Nath Dubey, petitioner in writ petition No. 27899 of 1992 was made on 14.8.1991 viz., after one months 14 days the post had remained vacant. Therefore, the two months period as contemplated in clause (b) of Section 18 (1) of the 1982 Act has not been fulfilled and therefore neither of these appointments can be said to be an appointment made in exercise of power conferred under Section 18 of the said Act. Therefore, the petitioner in writ petition No. 29056 of 1993 and writ petition No. 27899 of 1992 respectively cannot claim any right on the basis of such alleged appointment. In view of such finding, it is not necessary to go into the other questions raised at bar by the learned Counsel in these two cases.

11. Whereas the petitioner Harnedra Kumar Singh in writ petition No. 10842 of 1992 alleged to have been appointed on 2.9.1991 viz. after two months two days but by virtue of an alleged advertisement which was published on 14.3.1991 viz., even before the vacancy had occurred and the two months' period under clause (b) could come into being or start.

12. Power to make appointment under clause (b) of sub-section (1) of Section 18 of the Act is derived by the Committee of Management only after the expiry of two months from the occurrence of the vacancy on being notified. There cannot be anything in anticipation thereof. Therefore, no appointment can be made pursuant to advertisement published on 14.3.1991. That too it appears from Annexure-2 to the said writ petition that the advertisement itself contains contradicting dates viz., that the last date for submitting applications was fixed on 23.7.1991 while the date of interview was fixed on 14.7.1991. Since the genuineness of the said advertisement is suspected, therefore, no reliance can be placed on this advertisement. Then again Xerox copy of the original requisition which is Annexure-1 to the writ petition No. 29056 of 1993 filed by Dhanurdhar Upadhyaya shows that it was signed by the Principal whereas the said alleged requisition filed by petitioner Harendra Kumar Singh in writ petition No. 10842 of 1992 contained in

Annexure-I shows that it was signed by the Manager. Therefore, genuineness of the requisition is also under suspicion. It is not possible to hold that the petitioner in writ petition No. 10842 of 1992 was validly appointed in exercise of power conferred under Section 18 of the 1982 Act.

13. Mr. S.K. Verma, learned Counsel for the petitioner in writ petition No. 10842 of 1992 relied on the decision in the case of Om Prakash Rana v. Swarup Singh Tomar and Ors., (1986) 1 UPLBEC 444, in support of his contention. But the said decision does not help him since the present question with which we are concerned was not involved in the said decision. That case has dealt with the question of filling up of post of transfer whether it could be done or not. It was held that it can be done but only in accordance with the 1982 Act. He then relied upon a decision in the case of Ravi Nath Yadav v. District Inspector of Schools, Allahabad and Ors., (1988) AWC 353. wherein it was held that there was nothing in Section 18 that an appointment on ad hoc basis made by committee of management under Section 18 has to be approved by the District Inspector of Schools or appointment has to be made after obtaining prior permission. In the said case also the provisions with which we are now concerned has not been dealt with. Inasmuch as in the said case, the Removal of Difficulty Orders, 1981 has not been taken into consideration. Section 18 as it stood prior to the 1992 amendment did not provide any procedure. The procedure was laid down in the Removal of Difficulties Order promulgated under Section 33 of the 1982 Act. Therefore. Section 18 as it stood was to be construed reconciling the procedure with those of first and second Removal of Difficulties Order. Since this question in the context of the present case was not called upon to be decided. The said decision also does not throw any light on the question involved in this case. He also relied upon a decision in the case of State of Maharashtra v. Jagannath Achyut Karandldkar AIR 1939 SC 1133 : 1989 Lab. I.C. 1237 (SC), in order to contained that the Removal of Difficulties Order cannot override Section 18. The appointment having been made under Section 18 as has been discussed in the earlier two judgments cited above would attracted in the present case since executive instruction issued in the form of Removal of Difficulties Order cannot restricted the operation of the statutory provisions contained in Section 18. Therefore, the provisions of the said order which though restricted in its application as contained in the said order cannot be

applied or extended to an ad hoc appointment made in 1991. Inasmuch as according to him, the said two orders are restrictive in its application, only in the contingencies are provided therein.

14. There is no doubt about the proposition that the executive instruction cannot restrict the operation of the petitioner provisions but in the present case because of Section 16 of the 1982 Act no appointment made otherwise than the procedure provided under the said Act can be sustained. However, until appointment under Section 16 could be made, Section 18 provided for making adhoc appointment. But it did not provide any procedure as to how such appointment is to be made. Section 33 had provided that having regard to the difficulties that might crop up in the matter of appointment by reason or provisions contained in the 1982 Act the State Government was empowered to issue appropriate Orders for removing such difficulties. The said Orders having been issued in exercise of power conferred on the State Government pursuant to Section 33, the Orders though issued through executive exercise but still is supported by the statutes and thereby lend him a force of the statute. Since such Orders have been issued in exercise of power conferred under Section 33 in order to further the object and purpose as contemplated therein it has to be reconciled with Section 18 which cannot be read independent of the said Orders. The said Orders having been issued to remove the difficulties, the same will very well attract the said procedure as has been held in the case of Radha Raizada and Ors. v. Committee of Management. Vidyawati Darbari Girls Inter College and Ors. , (1994) 3 UPLBEC 1551. wherein it has been held that ad hoc appointment could be made under Section 18, read with Removal of Difficulties Order. Mr. Verma however contended that the ratio laid down in the Radha Raizada case is prospective.' So far as the procedure that has been laid down may be perspective in operation but so far as the proposition of law that has been laid down cannot prospective to the extent that it will not apply to a pending case even if recruitment was sought to be made contrary to the decision in the case of Radha Raizada (supra). On the other hand the said decision had dealt with each aspects and had divided the period in three groups-one after 1992 amendment and the second between the period during which Section 19 remained omitted and that prior to the omission of Section 18. Therefore, the legal proposition laid down in the said judgment has a different application whenever

pending case is decided and has to be tested on the basis of such-legal proposition. Though however the procedure (afresh) laid down therein may not be complied with still then the appointment cannot be held to be invalidated.

15. So far as the legal proposition is concerned there cannot be any second opinion. The case law as it stood on the date of appointment has to be construed. In the present case the same has been construed herein as observed earlier which does not apply in contradiction with the legal proposition laid down in the case of Radha Raizada (supra), or any other decision that has been cited by Mr. Verma as referred to hereinbefore or that might be discussed hereafter.

16. Mr. Verma relied on the decision in the case of Naresh Chand v. District Inspector of Schools and Ors., (1992) 2 UPLBEC 836. which had held that even If the appointment is made on adhoc basis before the expiry of 60 days from the date of notification of the vacancy, the same is not illegal. In the said case it was held that if the appointment is, made before expiry of 60 days in that event it would be an irregularity and not an illegality and that in such case the appointment can be treated to have been made after expiry of 60 days from the date of notifying the vacancy under Section 18 of the said Act.

17. On the same analogy, the said decision has not taken into consideration the Removal of Difficulties Order and had dealt with Section 18 alone, the said decision is also distinguishable in the facts and circumstances of the case as well as on the question involved on the proposition of law. With great respect and humility it may however be observed that the said decision has not referred to the provisions contained in Section 18 to the extent as provided in clauses (a) and (b) respectively of sub-section (1) of Section 18. Therefore, the said decision cannot help us in the facts and circumstances of the present case.

18. Mr. Verma, also relied on a decision in the case of Dwrgesh Kumar v. State of U.P. and Ors., (1993) 3 UPLBEC 1387. According to Mr. Verma, the same decision has not laid down the correct law. However, in the said case Section 18 and the Removal of Difficulties Orders under the 1982 Act were not under consideration. The said decision had primarily concerned with the appointment of a teacher in the L.T. Grade under Section 9 (4) of the U.P. Intermediate Education

Act, 1921 for the purpose as to whether the committee of management has power to make an appointment. In that context, the said decision having proceeded does not throw any light on the question with which we are concerned.

19. Mr. V.K. Singh, learned Counsel however relied on the decision in the case of Radha Raizada (supra), to substantiate his contention particularly paragraph 41 which may be quoted for our present purpose :

'It has already been noticed that Section 18 of the principal Act provides for power to appoint a teacher purely on ad hoc basis either by promotion or by direct recruitment against the substantive vacancy in the institution when the condition precedent for exercise of powers exist namely that the Management has notified the said vacancy to the Commission in accordance with the provisions of the Act and the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher within one year from the date of such notification of the post of such teacher has actually remained vacant for more than two months. However, since the State Government was alive to the situation that the establishment of the Commission may take long time and even after it is established, it may take long time to make available the required teacher in the institution and as such issue three Removal of Difficulties Orders namely Removal of Difficulties Order dated 11.9.1981, Removal of Difficulties Order dated 30.1.1982 and Removal of Difficulties Order dated 14.4.1982. In fact these Removal of Difficulties Orders were issued to remove the difficulties coming in the way of a Management in running the institution in absence of teachers. This power to appoint ad hoc teachers by direct recruitment thus, it available only when pre-conditions mentioned in Section 18 of the Act are satisfied, secondly, the vacancy is substantive vacancy and thirdly, the vacancy could not be filled by promotion. Neither the Act nor the Removal of Difficulties Order defines vacancy. However, the vacancy has been defined in Rule 2 (11) of U.P. Secondary Education Services Commission Rules, 1983. Vacancy' means a vacancy arising out as a result of death, retirement, resignation, termination dismissal, creation of new post or appointment/promotion of the incumbent to any higher post in substantive capacity. Thus both under Section 18 of the Act and under the Removal of Difficulties Order the Management of an institution is empowered to

make ad hoc appointment by direct recruitment, in the manner laid down in Paragraph 5 of the First Removal of Difficulties Order only when such vacancy cannot be filled by promotion and for a period till a candidate duly selected by the Commission joins the post. As noticed earlier both Section 18 of the Act and the provisions of First Removal of Difficulties Order provide for ad hoc appointment of teacher in the institution, later further providing for method and manner of such appointments are part of one scheme. Scheme being provision for ad hoc appointment of teacher in the absence of duly selected teachers by the Commission. The provisions may be two but the power to appoint is one and the same and therefore, the provisions contained in Section 18 and Removal of Difficulties Order are to be harmonized. It is, therefore, not correct to say that appointment of a teacher on ad hoc basis is either under Section 18 of the Act or under the Removal of Difficulties Order. Thus, if contingency arises for ad hoc appointment of teacher by direct recruitment the procedure provided under the First Removal of Difficulties Order has to be followed. Paragraph 5 of the First Removal of Difficulties Order provides that the Management shall, as soon as may be, inform the District Inspector of Schools about the details of vacancy and the District Inspector of Schools shall invite application from the local Employment Exchange and also through public advertisement in at least two news papers having adequate circulation in Uttar Pradesh. Sub-paragraph (3) of paragraph 5 further provides that every such application shall be addressed to the District Inspector of Schools. Sub-paragraph (4) of paragraph 5 of the Removal of Difficulties Order provides that the District Inspector of Schools shall cause the best candidate selected on the basis of quality point specified in Appendix. The compilation of quality point may be done by the Retired Government Gazetted Officer in the personal supervision of the Inspector. Paragraph 6 of the First Removal of Difficulties Order further provides for appointment of such teacher under paragraph 5 who shall possess such essential qualification as laid down in Appendix A referred to in the Regulation 1 of Chapter II of the Regulations made in the Intermediate Education Act.'

20. For the foregoing reasons, these writ petitions fail and are accordingly dismissed.

21. However, there will be no order as to costs.

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