

Uma Devi Vs. State of U.P. and Others.

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Court : Allahabad

Decided On : Dec-08-2010

Judge : Amitava Lala; Ashok Srivastava, JJ.

Appeal No. : Special Appeal No.1953 of 2010

Appellant : Uma Devi

Respondent : State of U.P. and Others.

Advocate for Def. : Mr. Ramanad Pandey, Adv

Advocate for Pet/Ap. : Mr. Anoop Trivedi, Adv

Judgement :

1. Heard Shri Anoop Trivedi, learned counsel appearing for the appellant and Shri R.N. Pandey, learned Standing Counsel for the respondents.

2. his special appeal is arising out of the order dated 27.10.2010 passed by the learned Single Judge by which the writ petition was dismissed. The Court held that the appellant was appointed as Assistant Teacher on 21.05.2003 whereas the vacancy in question had occurred on 30.06.2006 and the first day of the year of recruitment would be 01.07.2006. Thus by that time the petitioner had not completed five years' continuous regular service. Action of the committee of Management of the institution in passing resolution on 30.06.2010 cannot be subscribed for the simple reason that for the eligibility qualification, it is the year of

recruitment in which vacancy occurred would be the relevant date and not the date when the Management sought to fill up the vacancy . As eligibility qualification would not depend on the sweet will of the Committee of Management, rather same shall be determined on the criteria fixed by the legislation. Hence, when the appellant was miserably failed to complete the five years' continuous regular service as on 01.07.2006, she would not be eligible for consideration of her promotion as on 01.07.2006. We find that the learned Single Judge has relied upon the various judgments of this High Court which are Vijai K. Singh v. Joint Director of Education, 2008 (1) ADJ 183 (DB) and Poonam(Kum.) v. State of U.P., 2008 (2) UPLBEC 1313. The relevant part of the judgment of the Division Bench in Poonam (Kum.) case (Supra) is as follows:-

" Thus, both the aforesaid issues formulated above are answered accordingly and it is held that the requisition sent by the Management for the vacancy in question and the appointment of the appellant made thereon, being contrary to law, is illegal. We, therefore, do not find any legal and factual error in the judgment of the Hon'ble Single Judge and thus, there is no reason to interfere with the same. However, looking to the equitable aspect of the matter, as there is no fault on the part of the appellant in joining the institution in question and she had no option in view of the recommendation of the Board and was required to submit joining within the specified period, as per Rule 13 of the Rules, it is provided that it would be open to the appellant to approach the Selection Board within one month to consider her claim and adjust her against the existing vacancy validly notified and advertised along with the vacancy in question. The Selection Board, we have no doubt, shall consider the matter sympathetically and take decision expeditiously, preferably within four weeks from the date of filing of such representation by the appellant."

3. Shri Anoop Trivedi, learned counsel appearing for the appellant fairly submitted before this Court that a Division Bench judgment in Subhash Prasad v. Regional

Selection Committee through its Chairman and Others, 2004(3) ESC (All) 1385, goes against the contention but such judgment was delivered on a special circumstances, which will be reflected from para 23 of the said judgment. We have gone through paragraph 23 of Subhash Prasad's case (Supra), which is as follows:-

"In the present case considering the facts and circumstances as brought on record, this date has to be taken as the first of July, 1997 as the Management had to send the statement of vacancies to the Inspector by 15th of July as mandated in Rule 11 of the Rules of 1995. It is, therefore, obvious that five years' continuous service which stood prescribed as one of the minimum eligibility criterion must have been completed in the present case latest by 1st July, 1997. The appellant could not, by any stretch of imagination, be taken to have to his credit five years' continuous service by the aforesaid date. He was, therefore, clearly ineligible for being considered for promotion in the next above Lecturer grade as against the vacancy falling in the promotion quota."

4. However, he has especially relied upon a para 7 of the Supreme Court judgment in Nirmal Chandra Sinha v. Union of India and Others, (2008) 14 SCC 29 to establish that the promotion takes effect from the date from which it is granted and not from the date of occurrence of vacancy or creation of post. He has brought to our notice the Rule 2(I) of the U.P. Secondary Education (Services Selection Board) Act, 1982 to establish that "Year of recruitment" means a period of twelve months commencing from first day of a calendar year. He also relied upon Rules 14(4) of the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 to establish that within three weeks of the receipts of the list from the Management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director and thereafter the Joint Director shall consider the case for the purpose of selection of the candidate.

5. Shri R.N. Pandey, learned Standing Counsel appearing for the respondent has contended before us that under no stretch of imagination the vacancy can be

construed when it will be forwarded by the Committee of Management of an institution as per their sweet will. He has drawn our attention to the Rule 2(hh) of the Uttar Pradesh Secondary Education Services Commission Rules, 1983 to give the definition of word "Vacancy" which is as follows:-

" 2(hh)- '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 a substantive capacity."

Rule 2(i) thereunder gives the definition of "year of recruitment", which is as follows:-

" 2(i)- 'year of recruitment' means a period of twelve months commencing from July 1 of a calendar year."

6. By joining issue thereunder Shri Anoop Trivedi, learned counsel for the appellant has contended that the Rules herein would be the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 and not the rules as referred by the learned Standing Counsel i.e. Uttar Pradesh Secondary Education Services Commission Rules, 1983. But even we go through the said Rules we find the definition of vacancy as given in Rule 1983 is identical to that of Rule 2(3) of Rules 1998, which is as follows:-

" 'Vacancy' means a vacancy arising out as a result of death, retirement, resignation, termination, dismissal or removal of a teacher or creation of new post or appointment or promotion of the incumbent to any higher post in a substantive capacity."

7. We have gone deep to the Act and Rules extensively and also the judgments pronounced by the Division Bench of this Court as well as Supreme Court. So far as the judgment of the Supreme Court in Nirmal Chandra Sinha's case (supra) is concerned, factually we find the persons who were promoted to a post wanted a notional benefit from the date of actual vacancy and not from the date of

appointment. In that case the appellant was promoted on 29.11.1996 and was claiming deemed promotion retrospectively from 13.3.1996. The Court held that a promotion takes effect from the date it is granted and not from the date of occurrence of vacancy or creation of the post. Such type of circumstances is not before us in this appeal. In the instant case specific Acts and Rules are available for the purpose of determination of vacancy and for the purpose of recruitment. Vacancy will arise in a situation as given hereinbefore. Therefore, the year of recruitment for a period of twelve months will be from July 1st of such calendar year when the vacancy will arise. It cannot be fixed isolated. Against this background if the Committee of Management sleep over on such vacancy to make its statement after some years it is an obvious intention to accommodate the candidates of their own choice and in such circumstances imparting education will be suffered. According to us imparting education should be the first criteria to be determined in cases of filling up the vacancies of the institution and if Committee of Management prefers the interest and cause of an individual as against the necessity i.e. imparting education, then the reference made by such type of Committee of Management should be ignored.

8. Now the question is what would be the consequential effect if the matter has not been referred by the Committee of Management for filling up the vacancy. It appears from the Rules being Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 that if in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled up by direct recruitment. Therefore, such rule should be followed. As a result whereof the petitioner was not qualified in the year within the prescribed period as per the definition of the vacancy and year of recruitment, then for imparting education vacancy should be filled up by a suitable candidate by direct recruitment. The persons who were not eligible at the relevant point of time and just to accommodate them, only at the pleasure of the Committee of Management, cannot be permitted. It has been categorically held by several judgments of this Court. In this background, we do not find any merit in the appeal. The special appeal is therefore, dismissed without imposing any cost.