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**(2011) 02 AHC CK 0022**  
**In the Allahabad High Court**  
**Case No : C.M.W.P. No. 75298 of 2010**

Anoop Kumar Singh and others

APPELLANT

Vs

State of U. P. and others

RESPONDENT

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**Date of Decision :** 10-02-2011

**Acts Referred:**

Constitution of India, 1950 — Article 246

Uttar Pradesh Intermediate Education Act, 1921 — Section 9(4)

**Citation :** (2011) 5 AWC 5054

**Hon'ble Judges :** Sudhir Agarwal, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Sudhir Agarwal, J.—Heard learned counsel for the petitioners and learned standing counsel for respondents No. 1 to 4.

2. Respondents No. 5 and 6 were issued notices on 19.1.2011. A registered notice was also issued on 21.1.2011. They were also permitted to serve outside the Court by dasti summon. The petitioner has filled affidavit of service stating that the respondents No. 5 and 6 are served on 23.1.2011. However, neither respondents No. 5 and 6 have put in appearance through their counsel nor otherwise. The service is deemed sufficient. Since the pleadings are complete, this Court as requested by learned counsel for the parties.

3. The order impugned in this writ petition has been passed by Joint Director of Education communicating the decision of Regional Level Committee regarding approval to selection against eight vacancies of Class-IV in Pt. Jawahar Lal Krishak Inter College Mahubari, Lar, district Deoria. It has disapproved selection on the ground that selection committee did not consist a member nominated by District Magistrate and the vacancy position is also not clear.

4. In the counter-affidavit filed by respondents No. 1 to 4 it is said that there are 19 sanctioned posts in the College whereagainst nine are vacant. Meaning

thereby eight vacancies for which selection has been made, the existence thereof is not disputed. Hence, the suggestion that vacancy position is not clear, is unfounded and baseless.

5. Now the only question remains, where selection in absence of a nominated member of District Magistrate was valid or not.

6. In the counter-affidavit it is said that respondents have followed the law laid down by this Court in Writ Petition No. 10970 of 2010 Abdul Sattar and Others Vs. State of U.P. and Others, wherein it is held that a selection committee without a member nominated by District Magistrate is not valid and, therefore, the impugned order passed by the Regional Committee is absolutely correct.

7. A perusal of the aforesaid judgment clearly shows that learned single Judge has relied on an earlier decision of this Court in Principal Adarsh Inter College Umari Bijnore v. State of U.P. and others 2010 (1) ADJ 403, as also the Government order dated 11.5.2001 treating it to be an order issued u/s 9(4) of the Intermediate Education Act, 1921 (hereinafter referred to as "Act, 1921"). However, the aforesaid decision in Principal, Adarsh Inter College (supra) as also the Government order dated 11.5.2001 has been considered by another Division Bench recently in Special Appeal No. (970) of 2010 Rajiv Kumar v. State of U. P. and others, decided on 9.12.2010 : 2011 (2) AWC 1944. wherein this Court held that Government order dated 11.5.2001 has not been issued u/s 9(4) of Act, 1921 and, therefore, has not the effect of amending regulations framed under Act, 1921. The observations relevant in the above judgment are as under :

In view of the conclusions drawn hereinabove that the communication dated 11.5.2001 is not a Government order u/s 9(4) of the 1921 Act, the premise on which the two Division Bench judgments namely Principal, Adarsh Inter College, Umari, Bijnore (supra) and the Division Bench pronouncement in the reference answered on 17.9.2010 in Writ Petition No. 1199 of 2003, Jawahar Lal and another (supra) falls through. The said judgments, therefore, have proceeded on a wrong assumption about the status of the communication dated 11.5.2001 mistaking it to be a Government order which was only a letter and had never been issued in exercise of the powers u/s 9(4) of the 1921 Act. In fact, the delegator, i.e., the State never exercised its powers as admitted before this Court. It was a simple inter-departmental communication and not even an executive instruction so as to have any binding force of law. The said decisions, therefore, have laid down a proposition which has no binding effect in law.

We are constrained to say that this was on account of the incorrect position of the status of the communication dated 11.5.2001 projected before this Court in the said two cases, and also before the learned single Judges in all other such cases that have been referred to hereinabove and were approved by the Division Benches. On the contrary the learned single Judge in the case of Smt. Shikha (supra) had rightly appreciated the controversy in correct perspective which was sought to be distinguished later on on the strength of the aforesaid

communication dated 11.5.2001 in the case of Principal, Adarsh Inter College, Umari, Bijnor, 2010 (1) ADJ 403. Needless to say that the aforesaid bureaucratic sloppiness was sought to be covered up by an intelligible draft before this Court in the decisions referred to hereinabove that led to the passing of the judgments on an absolutely wrong premise. A committed paper work of the Secretariat without the law having been amended was kept a complete secret from this Court and a simple matter was got complicated at the hands of the bureaucracy. In other words since the communications sent to this Court were official, they were treated to be uncontestable and an illusion was created either based on misunderstanding or an attempt to somehow cover up the entire issue. The communications were written carefully without giving the correct information to the reader and at the same time protecting its author.

We, therefore, deprecate the manner in which the communication dated 11.5.2001 came to be projected by the State to be a Government order as is evident from the original file that has been produced before us.

The proposal made by the Director of Education, therefore, remained a dead letter and was never translated in the shape of a regulation through any Government order or any lawful amendment worth the name. In our opinion, therefore, the Rules framed for Government servants under the proviso to Article 309 namely the Group-D Employees Service Rules, 1986 would not apply for the procedure to be adopted for selecting and appointing class-IV employees in privately managed and recognized educational institutions. The State Government could have exercised its power by issuing a proper Notification u/s 16G read with Section 9(4) of the 1921 Act as was done when the earlier Notifications were issued bringing about a change in the Regulations as contained under Chapter-III of the 1921 Act. This, having not been done, the conclusion that the communication dated 11.5.2001 amounts to legislation by reference would be an incorrect presumption in law. We, therefore, hold that no such Rules or Procedure apply so long as the Regulations are not amended in accordance with law.

Apart from this the competence of such legislation flows from Entry 25 List III of the Concurrent list which in turn is referable to the powers prescribed under the Constitution in Article 246(2) thereof. The field is, therefore, occupied. The 1921 Act, even though a pre-Constitution Act, stands saved and, therefore, the regulations framed thereunder can be amended only in exercise of such powers.

In our opinion, a Rule framed under the proviso to Article 309 would, therefore, not apply where a competent and valid law exists. The proviso to Article 309 is a transitory provision in relation to service matters exclusively of the State and it does not cover the field of services, like the one presently involved, relating to class-IV employees of privately managed institutions. The status of service with which we are concerned falls totally outside the scope of the proviso to Article 309. The conclusion, therefore, of the learned single Judge in the case of Smt. Shikha (*supra*) explains the law correctly.

The Impugned judgments In the present appeals to the aforesaid extent are set aside and the matter would stand remitted back to the learned single Judge for decision afresh on the merits of each case keeping in view the law as explained hereinabove.

Accordingly, all the judgments of the learned single Judges, which are contrary to the opinion expressed herein, stand overruled. The judgments of the two Division Benches in the case of Principal, Adarsh Inter College (supra) and Jawahar Lal and others (supra) stand accordingly explained. The appeals are allowed.

8. Moreover this Court has also held that the judgment in Principal, Adarsh Inter College (supra) having been given on incorrect premise that the Government order dated 11.5.2001 has been issued u/s 9(4) of Act, 1921 hence that judgment is per incurium does not lay down any binding precedent. In view of the aforesaid Division Bench decision of this Court in Rajiv Kumar (supra), it is evident that under Regulations as stands today, the selection committee cannot be held to be invalidly constituted if it has no member nominated by the District Magistrate inasmuch as the Government order dated 11.5.2001 is not referable to Section 9(4) of Act, 1921 and, therefore, would not have an effect of amending the regulations.

9. In the circumstances, the impugned order cannot sustain. The writ petition is allowed. The impugned order dated 16.9.2010 is hereby quashed. The respondents are directed to reconsider the matter of approval in the light of above observations and pass appropriate order within a period of one month from the date of production of a certified copy of this order. No costs.