

(1986) 10 AHC CK 0016
In the Allahabad High Court
Case No : Writ Petition No. 3432 of 1986

Awadhesh Kumar Verma

APPELLANT

Vs

The District Inspector of Schools and Others

RESPONDENT

Date of Decision : 17-10-1986

Acts Referred:

Uttar Pradesh Intermediate Education Regulations, 1921 — Regulation 99
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 21B(1), 21B(2), 21B(3), 33A

Citation : (1987) 1 AWC 227

Hon'ble Judges : U.C. Srivastava, J; S.C. Mathur, J

Bench : Division Bench

Advocate : Sharad Kumar Srivastava and A. Mannan, for the Appellant; Umesh Kumar Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mathur, J.—The dispute in this petition pertains to the post of Lecturer in physics in Fatehchand Jagdish Rai Inter College, Safdarganj, district Barabanki, for short college. The District Inspector of Schools has directed the Management of the College to appoint Sri Ayodhya Prasad Pandey, opposite party No. 3, to the said post through his letter dated 23-4-1986, Annexure No. 3. The post was held by the Petitioner and implementation of the order of the District Inspector of Schools would have resulted in Petitioner's ouster from service and hence the Petitioner approached this Court. The Petitioner's case is that his appointment to the post stands regularised u/s 33-A of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982, for short Commission Act, and therefore he cannot be ousted from the said post. A few facts necessary for the disposal of the petition may be noticed.

2. Sri Manipal Singh was permanent Lecturer in Physics in the concerned College. He was appointed Principal in Vidyut Parishad Higher Secondary School, Panki, district Kanpur. He joined the said post on 5-8-1980. In order to enable him to

join the post of Principal, the College granted him leave without pay. In the resultant vacancy in the post of Lecturer in Physics in the College, Sri Ghanshyam Misra was appointed on ad hoc basis. Sri Ghanshyam Misra also left the post and thereafter the Petitioner was appointed to the said post with effect from 9-12-1981. It may be stated that Ghanshyam Misra's appointment was in leave vacancy and he did not hold the post in substantive capacity. By order dated 9-12-1981, Annexure No. 1 the District Inspector of Schools, for short DIOS, approved Petitioner's appointment to the post from the date of taking over charge till 20-5-1982 in the vacancy caused by the grant of leave without pay to Sri Mahipal Singh from 4-5-1980 to 20-6-1982. The Petitioner continued to hold the said post on the basis of extensions granted from time to time. It appears that the DIOS, by his order dated 30-10-1984 granted approval to the continuance of the Petitioner on the post of Lecturer upto 19-5-1985 and his services were to stand terminated with effect from 20-5-1985. On 29-4-1985 the Petitioner made some representation to the DIOS through the Management regarding his continuance on the post even after 19-5-1985. The DIOS by his order dated 20-9-1985, Annexure 2, provided that the Petitioner will continue to hold the post till a candidate selected by the U.P. Secondary Education Commission, Allahabad, joins on the post. On the joining of such candidate on the post the services of the Petitioner were automatically to stand terminated. Although the College communicated the vacancy to the Commission, no selection was made for the post. On 12-6-1985 the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Ordinance No. 12 of 1985 was enforced whereby Section 33-A was added to the parent Act. Under this provision a teacher directly appointed before the Commencement of the Ordinance on ad hoc basis against a substantive vacancy in accordance with paragraph 2 of the U.P. Secondary Education Services Commission "Removal of Difficulties) Order, 1981 as amended from time to time who possessed the qualification prescribed under or was exempted from such qualification in accordance with the provisions of the Intermediate Education Act, 1921 was to be deemed to have been appointed in substantive capacity with effect from the date of commencement of the Ordinance, provided such teacher had been continuously serving from the date of appointment up to the date of such commencement. The Petitioner's plea is that he is entitled to the benefit of Section 33-A and, therefore, he would be deemed to have been appointed in substantive capacity with effect from 12-6-1985. The Petitioner has stated that Mahipal Singh became a confirmed Principal in Vidyut Parishad High School with effect from August, 1983 and, therefore, with effect from the date of his confirmation he was holding the post of Lecturer against substantive vacancy. On 20-4-1986 the DIOS directed the Management of the College to appoint Sri Ayodhya Prasad Pandey opposite party No. 3 a reserved pool teacher, to the post of Lecturer in Physics in the concerned College. The consequence of this appointment was that the Petitioner was faced with termination of service. The Petitioner accordingly filed the instant petition claiming that in view of the benefit of Section 33-A being available to him, no appointment could be made to the

post held by him. The Petitioner has accordingly prayed for quashing of the order dated 23-4-1986 and a mandamus to command the opposite parties to allow the Petitioner to continue on the post of Lecturer.

3. In the writ petition the Petitioner has impleaded the DIOS, Barabanki Fatehchand Jagdish Rai Inter College and Sri Ayodhya Prasad Pandey as opposite parties. The College alone has filed counter-affidavit to contest the petition.

4. In the counter-affidavit the College has not disputed the Petitioner's plea that Mahipal Singh joined the post of Lecturer in Vidyut Parishad High School and that he was confirmed on the said post in August, 1983. The College, however, pleads that despite his confirmation Sri Mahipal Singh did not submit his resignation from the post of Lecturer and he continued on sanctioned leave from 4-8-1980 to 30-6-1985 and he submitted his resignation only with effect from 1-7-1985. His request for resignation with effect from 1-7-1985 was considered in the meeting of the Managing Committee held on 23-12-1984 and was accepted. It has further been asserted that on 23-12-1984 itself the Manager of the College wrote to the DIOS informing him of Sri Mahipal Singh's resignation and requesting him to take steps for making appointment to the post of Lecturer in Physics from the session beginning in July, 1985. The plea of the College is that in view of the grant of leave up to 30-6-1985 and in view of the fact that Sri Mahipal Singh resigned from the post only with effect from 1-7-1985, the post of Lecturer in Physics became substantively vacant in the College with effect from 1-7-1985 only. It is asserted that in view of this position the Petitioner cannot claim that he was holding the post of Lecturer against substantive vacancy on 12-6-1985 when the Ordinance was promulgated and, therefore, he cannot claim the benefit of Section 33-A. It is also asserted that the Petitioner was not appointed on ad hoc basis in accordance with the provisions of the Act.

Although the date of Sri Mahipal Singh's confirmation on the post of Principal was not mentioned and only the month and year had been mentioned in the petition, in the rejoinder-affidavit the Petitioner has disclosed the date as 4-8-1983. In the rejoinder-affidavit the Petitioner has reiterated the pleas raised by him in the writ petition and he has further stated that the delayed submission of resignation by Sri Mahipal Singh will have no effect on the nature of the vacancy. According to him, the moment Sri Mahipal Singh was confirmed, the post held by the Petitioner became substantively vacant.

5. Section 33-A mentioned above reads as follows:

33-A.--Regularisation of certain appointments--

(1) Every teacher directly appointed before the commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Board (Amendment) Ordinance, 1985, on ad hoc basis against a substantive vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 as amended from time to time who possesses the qualifications prescribed under, or is exempted from such

qualifications in accordance with, the provisions of the Intermediate Education Act, 1921, shall with effect from the date of such commencement, be deemed to have been appointed in a substantive capacity provided such teacher has been continuously serving the institution from the date of such appointment up to the date of such commencement...

Apart from other conditions there are three main conditions for the applicability of Section 33-A. In the first place the post, on which the claimant had been directly appointed on ad hoc basis, should have been substantively vacant and secondly the ad hoc appointment should be in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, as amended from time to time. The third requirement is that the direct appointment should have been made prior to the commencement of the Ordinance. The material question for determination is as to when the post of Lecturer in Physics became substantively vacant. As already noticed herein before the Petitioner's case is that it became substantively vacant the moment Sri Mahipal Singh was confirmed on the post of Principal while according to the College it became substantively vacant only on the resignation from the post of Sri Mahipal Singh. In support of the plea that the post became substantively vacant from the date of Mahipal Singh's confirmation on the post of Principal, the learned Counsel for the Petitioner has placed reliance upon Fundamental Rule 12-A which reads as follows:

12-A--Unless in any case it be otherwise provided in these rules, a government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post.

6. The above provision applies to Government Servants. Admittedly neither on the post of Lecturer in Physics in the College nor on the post of Principal Sri Mahipal Singh was a Government Servant. The Petitioner's learned Counsel, however, invokes Regulation 99 of Chapter III of the Regulations framed under the U.P. Intermediate Education Act, 1921 for attracting the applicability of Fundamental Rule 12-A. The Regulation reads as follows:

* * * *

Under Clause (1) of the Regulation teachers and other employees of the institutions recognised under the Act of 1921 will be entitled to the same types of leave and for the same periods as may be prescribed by the State Government from time to time for employees working in State Secondary Institutions on equivalent posts. Thereafter the clause proceeds to prescribe the authorities competent to grant various types of leave to different categories of employees. Clause (2) lays down that leave cannot be claimed as a matter of right and even a previously sanctioned leave may be cancelled. The Regulation does not make Fundamental Rule 12-A applicable to teachers of private institutions recognised under the Act of 1921. Our attention has not been drawn to any other statutory provision or administrative order making Fundamental Rule 12-A applicable to

the said teachers. Accordingly, reliance placed on Fundamental Rule 12-A is misconceived.

7. In the absence of any statutory provision or administrative order, the matter will have to be decided on the basis of the general law applicable to the relationship of master and servant in private institutions. Under the general law, the matter will be governed by the terms of contract. An employer may prohibit his employee from taking up any other employment under another employer. In the absence of such a prohibition the employee may take up another employment under another employer. Even where the employer has prohibited the employee from taking up another employment and the latter takes up another employment, the former may condone the breach of prohibition by allowing him to continue with both the employments simultaneously or may grant him leave with or without pay for the period the employee remains in the latter employment. Even under Fundamental Rule 12-A it is not an absolute proposition of law that the Government Servant on substantive appointment to any permanent post ceases to hold lien previously acquired on any other post. The rule opens with the word "unless in any case it be otherwise provided." From this it would appear that even in respect of a Government Servant there may be a rule under which a lien previously acquired on any post may not be lost by the Government Servant on getting substantive appointment to a permanent post subsequently.

8. In view of the fact that the employment of Sri Mahipal Singh in the College was purely private, we may apply the proposition of law discussed above to the facts of the present case. We find that the College granted leave to Sri Mahipal Singh to enable him to join the post of Principal and leave was continued even after he became confirmed on the post of Principal. This would indicate that the College had no objection in Sri Mahipal Singh's acquiring the permanent employment while remaining on leave from the College. The consequence of the confirmation on the post of Principal was that Sri Mahipal Singh acquired rights available under law to confirmed teachers in respect of the post of Principal also. But this does not automatically bring about the termination of his service from the post of Lecturer in Physics in the concerned College. He could still resign from the post of Principal and go back to the post of Lecturer without facing fresh process of selection. His services from the post of lecturer will come to an end only when either he resigns or the Management removes or dismisses him from service or terminates his services. In the present case, far from terminating his services the Management, despite his confirmation on the post of Principal, granted him leave even for the period subsequent to confirmation. A post falls vacant substantively only when the permanent incumbent resigns or his services are terminated or he is removed or dismissed from service. No such thing happened in the present case till 30-6-1985. Till 30-6-1985 the vacancy against which the Petitioner was appointed continued to be leave vacancy. Consequently the post of Lecturer in Physics did not fall vacant substantively till 30-6-1985 and it fell so vacant only with effect from 1-7-1985. Accordingly, although the

Petitioner was working on the post of Lecturer in Physics from a date much prior to the date on which the Ordinance was enforced viz. 12-6-1985 he was not holding the said post on the date of enforcement of the Ordinance against substantive vacancy. As such, the first requirement for the applicability of Section 33-A is lacking. Paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, reads as follows:

2. Vacancies in which ad hoc appointment can be made--The management of an institution may appoint by promotion or by direct recruitment a teacher on purely ad hoc basis in accordance with the provisions of this Order in the following case, namely:

(a) in the case of a substantive vacancy existing on the date of commencement of this Order caused by death, retirement, resignation or otherwise;

(b) in the case of a leave vacancy, where the whole or unexpired portion of the leave is for a period exceeding two months on the date of such commencement;

(c) Where a vacancy of the nature in Clause (a) or Clause (b) comes into existence within a period of two months subsequent to the date of such commencement.

The vacancy against which the Petitioner was appointed is covered by Clause (b). The appointment to this vacancy on ad hoc basis could be made in accordance with the provisions of the Order. The procedure for ad hoc appointment by direct recruitment has been prescribed in paragraph 5 of the Order which reads as follows:

5. Ad hoc appointment by direct recruitment--

(1) Where any vacancy cannot be filled by promotion under Paragraph 4, the same may be filled by direct recruitment in accordance with Clauses (2) to (5).

(2) The management shall as soon as may be, inform the District Inspector of Schools about the details of the vacancy and such Inspector shall invite applications from the local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh.

(3) Every application referred to in Clause (2) shall be addressed to the District Inspector of Schools and shall be accompanied:

(a) by a crossed postal order worth ten rupees payable to such Inspector;

(b) by a self-addressed envelope bearing postal stamp for purposes of registration.

(4)...

(5)...

Under Clause (2) reproduced above applications are to be invited from the local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh. The Order was issued on 31-7-1981 and the Petitioner was appointed thereafter on 9-12-1981. Therefore, the procedure mentioned hereinbefore was required to be followed. There is no averment either in the Writ petition or in the rejoinder-affidavit that the said procedure was followed. Accordingly the second condition for the applicability of Section 33-A has also not been proved to exist. This is additional reason for holding that the Petitioner is not entitled to claim benefit u/s 33-A.

9. Sub-section (3) of Section 21-B which was also added to the parent Act through U.P. Ordinance No. 12 of 1985 provides as follows:

(3) Where any substantive vacancy in the post of a teacher in an institution is to be filled by direct recruitment, such post shall at the instance of the Inspector be offered by the Management to a teacher other than a teacher referred to in Sub-section (2), whose name is entered in the register referred to in Sub-section (1).

Under this provision it is obligatory on the part of the DIOS to nominate a reserved pool teacher for appointment against a substantive vacancy and the management of the institution is also under an obligation to offer appointment to such nominee of the DIOS. It is not in dispute that opposite party No. 3 is a reserved pool teacher within the meaning of Sub-section (1) of Section 21-B. In nominating opposite party No. 3 to the post in question the DIOS has discharged a statutory obligation. We have held hereinabove that the Petitioner did not come to hold the post of Lecturer in Physics in substantive capacity u/s 33-A. As such, the substantive vacancy for the post of Lecturer in Physics was available when the DIOS passed the impugned order dated 23-4-1986, Annexure 3, whereby he required the Management to appoint opposite party No. 3. The validity of this order has not been challenged on any ground except on the basis of the claim made by the Petitioner u/s 33-A. That claim having been rejected, there is no question of quashing the order dated 23-4-1986 or of issuing the mandamus prayed for.

10. In view of the above, the petition fails and is hereby dismissed but without any order as to costs. Interim order, if any, shall stand discharged.

11. Immediately after the judgment was pronounced learned Counsel for the Petitioner prayed for certificate of fitness for preferring leave before their Lordships of Supreme Court. Our judgment does not raise any substantial question of law of general importance which needs to be decided by their Lordships. The certificate prayed for is accordingly refused.