

(1978) 02 AHC CK 0047

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1584 of 1976, connected with
Civil Miscellaneous Writ Petition No. 328 of 1977

Bar Swaroop Misra

APPELLANT

Vs

State of Uttar Pradesh and others

RESPONDENT

Date of Decision : 03-02-1978

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Education Laws Amendment Ordinance, 1977 — Section 36
Uttar Pradesh Intermediate Education Act, 1921 — Section 16(gg), 16E, 16F
Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975 — Section 14

Citation : (1978) 02 AHC CK 0047

Hon'ble Judges : H.N.Seth, J and B.N.Sapru, J

Final Decision : Allowed

Judgement

H. N. Seth, J.

As the transactions giving rise to these two petitions under Art. 226 of the Constitution are closely connected with each other, it will be convenient to deal with them together.

Briefly stated the facts giving rise to the two petitions are as follows: Authorised Controller of S. A. V. Inter College, Bharthana (Etawah), vide his letter dated 21st October, 1975, appointed the petitioner Har Swarup Misra on the post of Assistant Mathematics Teacher (Trained Graduate) in temporary capacity. The petitioner joined his duties on 22nd October, 1975. While the petitioner was still serving as a teacher, he was, on 17th May 1976, informed by the Principal of the College that vide Government Order dated 17th February, 1976 his temporary appointment would stand terminated with effect from 30th June, 1976. In the meantime the State Government, on 26th June, 1976, issued another order on the subject and the petitioner was informed that his services stood extended upto 30th September, 1976. Thereafter, Principal of the Institution, vide his communication dated 31st August, 1976, relieved the petitioner from his duties.

Being aggrieved by the order of the Principal relieving him from his duties, the petitioner filed writ petition no. 1584 of 1976 before this Court, on 7th October, 1976. He claimed that before the period of his temporary appointment came to an end on 30th September, 1976 the State Government had vide its order dated 24th September, 1976 extended the same upto 15th November, 1976. He therefore, prayed for a writ to quash the order of the Principal dated 30th September, 1976 and for other ancillary reliefs.

The petitioner also obtained an ex parte interim order from this Court on 17th October, 1976, whereunder operation of the impugned order was to remain stayed till 15th November 1976. Subsequently, in view of some other orders passed by the State Government, this Court permitted the stay order dated 7th October, 1976 to continue to be operative till 31st December, 1976. On 11th January, 1977, the respondents filed a counter affidavit stating that after the ad hoc appointment of the petitioner had come to an end on 30th September, 1976., the post held by him was filled up by transferring one Sri Om Prakash Gupta, who was a teacher working in another College and there was thus no question of the petitioner continuing to be in the service of the Institution thereafter. In the meantime the State Government had on 21st January 1977, passed another order on the subject. The petitioner filed a rejoinder affidavit refuting the stand taken by the respondent and contended that by virtue of State Government's order dated 21st January 1977, his services stood extended upto 20th May, 1977. According to him, the Management was wrongly preventing him from functioning as a teacher and was illegally withholding the salary which fell due to him after 31st December, 1976. He, accordingly, made an application praying that operation of the interim order dated 7th October, 1976 which had continued to be operative till 31st December, 1976 be further extended upto 20th May, 1977. However, this time, petitioner's application for further continuance of the interim order was rejected by the court on 8th February 1977 with an observation that the petitioner could if so advised, file a fresh petition for challenging the order transferring Sri Om Prakash Gupta to fill up the post held by the petitioner. The petitioner then filed the connected petition No. 328 of 1977 before this Court on 14th March 1977 and claimed that the order transferring Sri Om Prakash Gupta to fill up the post occupied by him was vitiated as the name had been passed in contravention of various statutory provisions and prayed that it may be quashed and the respondents be directed to permit him to work as a teacher and to pay him his salary.

Before the two petitions could come up for hearing, Governor of the State issued Ordinance No. 5 of 1977. The petitioner now claims that in view of the provisions contained in the ordinance, he has acquired the status of a permanent teacher of a Institution, in a substantive capacity, with effect from 21st April, 1977.

Both the petitions have been contested by the respondents who claim that the order transferring Sri Om Prakash Gupta to fill up the post which was temporarily held by the petitioner, was quite legal and valid. According to them petitioner's

temporary appointment had come to an end on 30th September 1976, Accordingly he has no locus standi to question the validity of the order transferring Sri Om Prakash Gupta as a teacher in the S. A. V. Inter. College, Bharthana.

In order to resolve the controversy between the parties it will be pertinent to examine the facts of the case in the light of relevant statutory provisions.

Section 16E and 16F of the Intermediate Education Act, 1921 (hereinafter referred to as the Act) dealt with the subject matter of selection and appointment of teachers and heads of recognized institutions. The State Legislature passed the U. P. Secondary Education Laws (Amendment) Act 1975. U. P. Act 26 of 1975 (hereinafter referred to as the Amendment Act). Section H of the Amendment Act substituted new sections 16E and 16F in place of the existing sections 16E and 16F in the Act. Section 22 of the Amendment Act enabled the State Government to pass orders, not inconsistent with the provisions of the Act with a view to remove the difficulties in its working. For some reason, the State Government could not immediately on the coming into force of the amendment Act make provision for the constitution of the selection committee in accordance with section 14 thereof. In absence of such a provision a large number of educational institutions were not in a position to recruit necessary teaching staff and their functioning was adversely affected. As a difficulty in the working of the institution had arisen and as the State Government expected that the same may be removed shortly, it in exercise of the powers conferred by section 22 of the Amendment Act, passed a Removal of Difficulties Order on 18th August, 1975 (hereinafter referred to as the first Removal of Difficulties Order) Clause 2 (a) of the Order ran thus;

"Notwithstanding anything contained in section 14 of the aforesaid Act any substantive or leave vacancy or any vacancy existing or occurring during the current academic session of the head of the institution or a teacher of the Institution may be filled in by the committee of management on ad hoc basis in the manner provided hereunder till such period not exceeding six months in any case as a person duly selected in accordance with section 14 aforesaid is appointed against such vacancy."

This clause enabled the Managing Committee to fill in substantive or leave vacancy or any vacancy of a teacher existing or occurring during the current academic session on ad hoc basis till such time as the person duly selected in accordance with section 14 of the Amendment Act was appointed to fill in that post, subject, however, to the condition that in no case the appointment was to last for more than six months. Subclauses (b) and (c) thereof provided for the procedure for making ad hoc appointments in the vacancy of heads of Institution and teachers by promotion from amongst the members of the staff of the same institution. Subclause (d) then laid down that where a vacancy could not be filled, in the manner laid down in clauses (b) and (c) the name could be filled in by the Managing Committee on an ad hoc basis for the same maximum period as

laid down in subclause (2) by appointment of outsiders after selection by a committee consisting of three members constituted for the purpose. Since under clause (a), ad hoc appointment made under the Removal of Difficulties Order was intended to last only till such time as a person duly selected in accordance with section 14 of the Amendment Act was appointed against the concerned vacancy, subject, however, to the conditions that the appointment in no case was to exceed six months, appointment made under clause 2 (d) of the order also was intended to last only till an appointment to fill the vacancy was made in accordance with the procedure laid down in section 14 of the Amendment Act, subject, however, to the condition that in no case it was to last for more than six months. It appears that aforesaid provision for making ad hoc appointments had been made as it was expected that in the mean time it would be possible to take appropriate action to enable regular appointments being made in accordance with the procedure laid down in section 14 of the Amendment Act.

The Committee of Management of S.A.V. Inter. College, in exercise of the powers given to it under clause (2) (d) of the aforesaid Removal of Difficulties Order, appointed the petitioner as a teacher in trained graduate's grade in temporary capacity vide appointment letter dated 20th October 1975. The appointment letter translated into English reads thus:

"In connection with your application you are informed with pleasure that you have been appointed on the trained graduates post in the scale of Rs. 30010350E.B.12470E.B.16550, in temporary capacity. You should immediately come to the College and submit your report of assuming charges to the Principal."

Temporary appointment of the petitioner, in "the context, was to last till a regular appointment in accordance with the procedure laid down in section 14 of the Amendment Act was made to fill in the concerned vacancy and as provided in the Removal of Difficulties Order this appointment was not to last beyond six months.

However, because of certain reasons, appropriate action to enable the Managing Committees to make appointments in accordance with section 14 of the Amendment Act could not be taken for quite some time and the State Government had to exercise its power under section 22 of the Amendment Act a number of times. On 17.12.1976 the State Government passed another order entitled U. P. Secondary Education (Removal of Difficulties) II Order 1976, preamble of which ran thus:

"And whereas difficulty in giving effect to certain provisions of section 14 of the aforesaid Act still continues and it is necessary to extend the period of ad hoc appointments made under U. P. Secondary Education (Removal of Difficulties) Order 1975."

(emphasis supplied)

Clause (4) of the order provided that under subclause (a) of clause (2) of the First Removal of Difficulties Order 1975, for the words, "not exceeding six

months", the words, "not extending beyond June 30, 1976" were to be substituted. Consequently the appointments made under the 1975 Removal of Difficulties Order, for the period till regular appointments in accordance with section 14 of the Amendment Act was made and duration of which was not to exceed six months, could now, subject to the same condition, last upto 30th June 1976. Accordingly, the petitioner in this case was rightly informed by the Principal vide letter dated 17th May 1976 that in view of the Government Order, his appointment was to continue upto 30th June 1976.

Before however, the appointment of the petitioner came to an end on 30th June 1976.. the State Government issued a third Removal of Difficulties Order on 28th June 1976 where under for the words "not extending beyond 30th June 1976." in clause 2 (a) of the First Removal of Difficulties Order (substituted by second Removal of Difficulties Order) were substituted by the words, "not extending beyond 30th September 1976". Consequently, the ad hoc appointment of the petitioner was now to last upto 30th September, 1976 unless in the meantime a regular appointment to fill in the vacancy had been made after following the procedure laid down in section 14 of the Amendment Act. As no regular appointment to fill up the post had been made principal of the Institution again vide his letter dated 31st August, 1976 rightly informed the petitioner, that his ad hoc appointment was to come to an end on 30th September, 1976.

According to the respondent, clause 2(a) of the First Removal of Difficulties Order (as amended by second and third Removal of Difficulties Order) provided that, the ad hoc appointment made there under was to come to an end on the expiry of the period for which it had been made. In the instant case the Principal had, vide his letter dated 31/8/1976, clearly informed the petitioner that his services were to come to an end on 30th September, 1976. The management also did not take any step to extend petitioner's service beyond that date. Petitioner's appointment letter, properly construed and interpreted in the light of surrounding circumstances, clearly indicated that he had been appointed on ad hoc basis for specified period and that his services were to come to an end on the expiry of that period i.e., on 30th September, 1976. It was, therefore, not at all necessary to give any notice etc., to the petitioner before treating his services as having to come to an end on that date Further, the District inspector of Schools had, on 9th September, 1976, directed that two Assistant Teachers viz., Om Prakash Gupta and Surjan Chandra Pandey were being transferred to the Institution for being appointed in the trained graduates grade. These teachers were to assume charge on 1st October, 1976. Consequently, the vacancy in which the petitioner had been working on adhoc basis had been filled in. In a regular way and in accordance with Regulations 5562 of Chapter III of the Regulations framed under the Intermediate Education Act and the petitioner could not, under the Removal of Difficulties Order, claim to remain in service after a regular appointment to filling in the vacancy, in accordance with regulations framed under the Intermediate Education Act, had been made.

We are unable to accept the aforesaid submission made by the learned Counsel. Object underlying the first Removal of Difficulties Order clearly was to enable the management of educational institutions to make stop gap arrangement by appointment of teacher on adhoc basis for the duration it was not possible for to make regular appointment, in accordance with the procedure laid down in Section 14 of the Amendment Act. The Removal of Difficulties Order envisaged that in case a regular appointment as aforesaid was made within a period of six months the adhoc appointment made there under was to stand determined on the making of such regular appointment, otherwise it was to stand terminated on the expiry of six months. The outer limit of six months for such adhoc appointments. Envisaged by the 1st Removal of Difficulties Order, was under the subsequent Removal of Difficulties Order (i.e., 2nd, 3rd and 4th Removal of Difficulties Order), Extended upto 15111976. Accordingly, in the normal course the adhoc appointment made in pursuance of the 4th Removal of Difficulties Order was to, unless regular appointment in accordance with Section 14 of the Amendment Act was made earlier, last upto 15111976. Even if for the sake of argument it be assumed that it was open to the Managing Committee to make an appointment for a shorter duration, not coterminus with the making of an appointment in accordance with Section 14 of the Amendment Act. It will have to be seen whether in the instant case the petitioner was in fact appointed for any such shorter period. Normally, it will be possible to construe such ad hoc appointments as appointments made for a shorter duration only if the appointment order specifically says so. An adhoc appointment made without specification of period has, in the context, to be treated as an appointment lasting till such time as a regular appointment to fill in the concerned vacancy is made in accordance with the procedure laid down in Section 14 of the Amendment Act. In that instant case, petitioner's appointment letter did not specify the period for which he had been appointed. It merely stated that the petitioner had been appointed in temporary capacity, which in the context could only mean that petitioner's appointment was to last till such time as the concerned vacarcy was not filled by making an appointment in accordance with the procedure laid down by section 14 of the Amendment Act. However, the appointment remained subject to the statutory restriction on it was not to extend beyond the date mentioned in the first Removal of Difficulties Order as modified by subsequent Removal of Difficulties Orders. As a matter of fact, this is how petitioner's letter of appointment was interpreted by the respondents when they acquiesced in his continuing to remain in service upto 30th September, 1977. In this context the letter dated 31st August 1976 (Annexure III) whereby the Principal informed the petitioner that his service was to come to end on 30th September, 1976, cannot be construed as an action of the Managing Committee in appointing the petitioner upto a specified date. By means of that letter the Principal merely informed the petitioner that as per various Removal of Difficulties Orders passed by the State Government his appointment was to come to an end on 30th September, 1976. Indeed this was the true legal position on that date. Subsequently, on 24th September, 1976 the State Government passed

the 4th Removal of Difficulties Order laying down that the outer limit to which an adhoc appointment could now be extended, was instead of 30th September 1976. Accordingly, the petitioner became entitled to continue in service upto 15th November, 1976 unless in the meantime a regular appointment to fill in the vacancy by following the procedure laid down in section 14 of the Amendment Act had been made.

As explained above, according to various Removal of Difficulties Orders mentioned above, adhoc appointments made thereunder were to last till the vacancy was filled in by making appointment under section 14 of the Amendment Act. It means that the Government at that time intended that the vacancy on which the adhoc appointment had been made was to be filled in only in the manner prescribed in section 14 of the aforesaid Act and in no other manner. Section 14 of the Amendment Act did not contemplate the filling in of such vacancy by transferring a teacher from one institution to another institution. Nonelection in accordance with the procedure laid down in section 14 of the Amendment Act had been made and the petitioner's appointment which was, by virtue of Fourth Removal of Difficulties Order, to last upto 15th November 1976, did not come to an end on 30th September 1976 and as there was no vacancy no question of filling in the same by transferring a teacher from another institution arose. In the circumstances the order of the District Inspector of Schools, transferring Shri Om Prakash from another institution, with a view to fill up the post held on adhoc basis by the petitioner, could not effect petitioner's right to hold that post upto the 15th of November 1976.

Even though appointments already made were to lapse on 15th November, 1976 the State Government did not issue any Removal of Difficulties Order like the earlier ones before that date. Consequently, the adhoc appointment already made under the earlier Removal of Difficulties Order lapsed on 15th November, 1976. The State Government, however felt that some provision had to be made to safeguard the services of such teachers and as the difficulty in giving effect to the provisions of the Amendment Act still continued, it passed the Fifth Removal of Difficulties Order on 27th November 1976. Clause (7) of that order provided that where the Committee of Management had filled a post by appointing a person under the Removal of Difficulties Order 1975, such post was to be held by that person till 31st December, 1976 or till a regular appointment, in accordance with the Act and the Regulation made there under, whichever was earlier, had been made. It is not disputed that after the State Government made the Fifth Removal of Difficulties Order no regular appointment, in accordance with the Act and the Regulations made there under, had been made. Accordingly, the petitioner became entitled to hold the post on which he had been appointed on adhoc post till 31st December 1976.

Again by clause (3) of the Sixth Removal of Difficulties Order dated 21st January 1977 such adhoc appointments were extended upto 20th May, 1977 or till a person was appointed to fill in that post in a regular manner. As in the instant

case, no regular appointment, after making of either the Fifth or Sixth Removal of Difficulties Order, had been made, the petitioner continued to be entitled to hold the post on which he had been appointed on adhoc basis, upto 20th May, 1977.

In the meantime, on 21st April 1977, Governor of the State issued an Ordinance entitled the U. P. Education Laws Amendment Ordinance 1977 being Ordinance No. V of 1977. Section 36 of the aforesaid amendment inserted a new section 16 (gg) in the Intermediate Education Act 1921, which runs thus:

Regularisation of appointment of Ad hoc teachers:

(1) Notwithstanding anything contained in section 16 (e), 16 (f) and section 16 (ff) every teacher of an institution appointed between August 18, 1975 and September 30, 1976 (both days inclusive) on adhoc basis against a clear vacancy and possessing prescribed qualifications or having been exempted from such qualification in accordance with the provisions of this Act shall, with effect from the date of commencement of the section, be deemed to have been appointed in a substantive capacity provided such teacher has been continuously serving the institution from the date of his appointment upto commencement of this section.

Explanation: For the purposes of this subsection the period during which any break in services of teacher has occurred between the date of his adhoc appointment and the date of commencement of this section for any reason, not arising out of his misconduct or his own volition shall be disregarded."

It is not disputed that in this case the petitioner was appointed as a teacher in a substantive vacancy on an adhoc basis. The date of appointment fell between 18th August 1975 and 30th September 1976. He also possessed the requisite qualifications for appointment as a teacher. There was interruption in his service for any reason arising out of his misconduct or on account of his own volition. Accordingly, notwithstanding that there was a break in petitioner's service between 15th November, 1976 and 27th November, 1976 and again between 1st January 1977 and 21st January 1977, these breaks had to be, as provided in explanation is section 36 of Ordinance No. V of 1977, disregarded. It will be deemed that notwithstanding that break, the petitioner had continued to be in employment and that he had been appointed in a substantive capacity.

It was urged on behalf of the respondents that in the instant case, as the petitioner in fact, did not serve that institution after 1st January 1977, it could not be said that he had continuously been serving the institution upto 21st April 1977, the date when Ordinance No V of 1977 came into force. Accordingly, he ceased to be a teacher of the institution and cannot derive any benefit from Ordinance No. 5 of 1977,

We are unable to accept this submission. A person is deemed to be serving the institution as long as he continues to be in its employment, notwithstanding the fact that the Management does not take work from him or that he is for reasons,

beyond his control, prevented from working as such. In the instant case, it has been found that throughout the relevant period the petitioner continued to be in the employment of the institution. He was, during the period 25111976 to 27111976 and 111977 to 2141977 prevented from working as a teacher for reasons connected with his volition or misconduct. Accordingly, it has to be taken that the petitioner had throughout being serving the institution right upto the date when Ordinance V of 1977 came into force i. e. on 2141977. Since the petitioner possessed qualification for being appointed to the post, it would be deemed that he had been appointed thereto in a substantive capacity.

In view of the aforesaid discussion we are of the opinion that the petitioner's appointment continued to be operative throughout and that in the meantime he has acquired the status "of a permanent teacher as laid down in Ordinance No. 5 of 1977. There was absolutely no occasion for the respondents to fill the concerned vacancy by transferring a teacher from another institution. Both the orders dated 31st August, 1976 relieving the petitioner from his duties and the action of the respondents in filling up the vacancy by transferring a teacher from another institution, were illegal and liable to be set aside.

In the result, both the petitions succeed and are allowed. The order of the Principal dated 30th September 1976 relieving the petitioner from his duty as also that passed by the District Inspector of Schools transferring Om Prakash Gupta as Assistant teacher of S. A. V. Inter College are quashed. The respondents are directed to treat the petitioner as continuing in service of the S. A. V. Inter College as an Assistant Teacher in Mathematics. Parties to bear their own costs in both the petitions.