
(2005) 08 AHC CK 0163

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 47073 of 2004

Chhotey Lal Arya

APPELLANT

Vs

The State of U.P. and Others

RESPONDENT

Date of Decision : 16-08-2005

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 — Section 3(D), 33A(1A)

Citation : (2005) 6 AWC 5885

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : A.K. Tiwari, for the Appellant; Amit Saxena, P.N. Saxena and M.C. Mishra, R.K. Ojha, S.C. and C.S.C., for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard Sri Arun Kumar Tiwari, learned counsel for the petitioner, and learned Standing Counsel. Sri P.N. Saxena, Senior Advocate appears for respondent No. 5, Sri R.K. Ojha appears for respondents 6,7 & 8.

2. The Jan Shikshan Intermediate College, Prem Pur, Badagoan , Kanpur Nagar was a Junior High School, which was up graded to the High School level in the year 1978. The petitioner was appointed in the institution on 1.2.1974, and claims to be promoted as a L.T. grade teacher in 40% promotion quota. By an order entered in his service book dated 15.2.1982 passed by the District Inspector of Schools he was given L.T. grade with effect from 15.2.1982. The U.P. Secondary Education Services Commission and Selection Board (Amendment) Act, 1991 introduced Section 33A(1A) in U.P. Act No. 5 of 1982, providing that all adhoc appointment in accordance with para 2 of U.P. Secondary Education Services Commission (Removal of Difficulties) Order, 1981 shall be deemed to be became substantive, from the date of commencement of the Amending Act. The petitioner was given the benefit of Section 33(1A) and came to hold the post in L.T. grade substantively with effect from 6.4.1991.

3. Sri Ayodhya Prasad Yadav, respondent No. 5 was directly appointed in the school in L.T. grade on 13.3.1986.

4. A dispute arose between the petitioner, respondent No. 5 and respondent Nos. 6,7 & 8 with regard to their seniority as L.T. Grade teachers. The Committee of Management found that the petitioner is a senior most teacher as he was substantively appointed in L.T. grade on 15.2.1982. The Joint Director of Education by the impugned order dated 26.10.2004 has allowed the representation of respondent No. 5, and has found that he is senior to the petitioner, and is the senior-most teacher in the institution in L.T. Grade, and that the petitioner is the sixth senior most teacher, after respondent Nos. 9,6,7 & 8, in that order.

5. Although, there is no discussion of facts, and reasons given in the order of the Joint Director of Education, who has straight way proceeded to decide the seniority of all the teachers in L. T. grade after narrating the facts of each claimants, since the parties are represented and have addressed the Court at length, I am proceeding to decide and settle the issue.

6. It is contended that the petitioner was substantively appointed in L.T. grade in 40% promotion quota and the order to this effect was passed by the District Inspector of Schools on 15.2.1982 and thus he is senior to respondent No. 5.

7. At the time when the petitioner was promoted in LT. Grade, the Secondary Education Services Commission was not constituted. An Ordinance was promulgated on 10.7.1981, which was enacted as U.P. Act No. 5 of 1982 and was published on 26.2.1982, but came into force with effect from the date of Ordinance. The State government issued Removal of Difficulties Orders, until the Commission is constituted. The First Removal of Difficulties Order 1981 provided for ad hoc appointments and promotions. Under Para 2 read with para 4 of this order of 1981, promotions were provided in the existing vacancies, from amongst the eligible teachers. Para 4 (3) provided that every vacancy in the post of teacher in the Trained Grade (L.T.) Grade shall be filled by promotion of the Senior-most teacher of the Institution in the C.T. Grade.

8. The C.T. grade was abolished in 1989, and every teacher after completing ten years in C.T. grade was provided to be placed in the L.T. grade. A "

9. Section 3(D) was introduced in the U.P. Act No. 5 of 1982 on 20.8.1998, by U.P. Act No. 25 of 1998 providing that every teacher who had completed ten years in C.T. grade after 1.1.1986, shall be deemed to be appointed in L.T. grade.

10. Sri P.N. Saxena contends that the petitioner was not in C.T. grade as the institution was a Junior High School prior to 1978 and that every ad hoc promotion made prior to the Amendment Act 1991 will be deemed to have become substantive only on 6.4.1991 when the amending Act came into force. In the circumstances, he submits that the respondent No. 5 appointed on substantive basis in L.T. Grade on 13.3.1986 is senior to the petitioner.

11. Learned counsel for the petitioner contends that the case is covered by the legal position explained in *Dr. (Km.) Archana Gupta Vs. Joint Director of Education, Bareilly and Others*, . In this case reliance was placed upon the judgment in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, . in which it was found that where the initial appointment is only ad hoc and not according to rules and made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. If the initial appointment is however made after following the procedure laid down by the Rules and the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted. The rest of the conclusion were with respect to appointment made from different sources.

12. In *Food Corporation of India Vs. Thaneswar Kalita and others*, following the judgment in the *direct Recruit Class II Engineer Officers' Association (supra)*, the Supreme Court held that if the appointments are made in accordance with the rules, though initially on ad hoc basis, and are continued for long time, or regularizing the service, the entire period of temporary service would be counted for seniority. If such appointment are in excess of quota, the officiating period would not be treated for seniority, as the appointments then become fortuitous, and the persons appointed in excess of the quota are not entitled to count the entire period of service for seniority.

13. In *V.K. Yadav and Ors. v. State of U.P. and Ors.*, (1990) 1 UPLBEC 409, cited by the petitioner for the proposition of principles of relating back, it was held, that relating back to the year of vacancy is a concept in service law associated with promotee who are promoted temporarily of an officiating or ad hoc basis subject to approval by the departmental selection committee or the Commission. Once they are approved, the appointment relates back to avoid any prejudice from different sources. Ignoring the services rendered by the incumbent is not just and fair as that will cause injustice to those who may suffer not for any fault of their own but because of the procedural delay either by the department or the authority empowered to grant approval. Following the decision in *O.P. Singla and Another Vs. Union of India (UOI) and Others*, , the Supreme Court held that decision about nature of appointment for determining whether it is made against an existing vacancy or not, or is limited to a fixed period of term or purpose by appointment order itself and is made subject to some procedural requirement prescribed by the rules for adjudicating suitability of the appointee for the post being cured at the time of regularization, has to be made on the basis of terms of initiating appointment. The deficiency in the procedural requirement laid down by the rules has to be cured, at the first available opportunity, without any fault of the employee, where the appointment continues in the post uninterruptedly till the regularization of his service in accordance with rules. In such case, the appointee is not to be blamed for the deficiency in procedural requirement under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular subject to the

remaining procedural requirement of the rules being fulfilled at the earliest.

14. In *Rudra Kumar Sain and Others Vs. Union of India and Others*, the Constitution Bench of Supreme Court held that the meaning of the term "stop gap" and "fortuitous" while interpreting the provisions of service rule, will depend on the provisions of that rule and the context in and the purposes for which the expression are used. Interpreting the Delhi Higher Judicial Service Rules, the Supreme Court held that for the purpose of interpreting the provisions of the Rules and the context in which and the purpose for which these expressions are used, will depend in which upon the facts and circumstances in which appointments have to be made. It will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency, and for a period specified in the said order, then the appointment to such post can be described as "ad hoc" or "stop gap arrangement". If the post is created to meet the situation which has suddenly arisen on account of happenings of some event of a temporary nature, then the appointment of such post can be described as "fortuitous" in nature. If the appointment is made to meet the contingency arisen on account of delay in completing the process of regular recruitment to the post due to any reason, and it is not possible to leave the post vacant till then, and to meet this contingency, an appointment is made, then it can appropriately be said as stop gap arrangement and appointment in the post as ad hoc appointment. It is not possible to lay down any straitjacket formula nor to give an exhaustive list of circumstances and situation in which the "ad hoc" "fortuitous" or "stop gap appointment" can be made. Supreme Court concluded that if the person who possessed requisite qualification for being appointed to a particular post, is appointed with consultation of appropriate authority and continues in the post for long period, then such appointment cannot be held to be "stop gap arrangement", and the " exclusion of such appointee, of their continuous length in seniority is erroneous.

15. It was held that where the appointment has been made on substantive vacancy in accordance with the prevalent rules, the subsequent regularization will not extend the date of substantive appointment. The continuous officiation of a eligible person will be in accordance with this prevalent rules, and the period cannot be curtailed by any subsequent facts of regularization, unless it is shown that the post was ad hoc for the arrangement of officiation only by way of staff gap arrangement.

16. In the present case the petitioner was given L.T. grade on a substantive post by an order of the District Inspector of Schools who was the competent authority on 15.2.1982, in pursuance the his appointment under First Removal of Difficulties Order, 1981. He will thus be entitled to substantive appointment in L.T. Grade w.e.f. 15.2.1982. The appointment even otherwise after regularisation, will relate back to 15.2.1982, as it was made by the competent

authority, under the then existing law (when the U.P. Secondary Education Service Commission was not established), and was not to be of a temporary or stop gap arrangement. He was qualified, eligible, and was validly given L.T. Grade after the school was upgraded. Such an upgradation even if recognised by the Amendment Act of 1991 to be substantive from the date of enforcement of the Amendment Act 1991, will relate back to the date when it became effective. Further I find that the petitioner was all along treated as senior, and that long standing seniority with legitimate expectations can not be disturbed by hypertechnical objections, by those who admittedly entered the institution, much after the petitioner was given and was drawing L.T. Grade.

17. The writ petition is allowed. The order of the Joint Director of Education dated 26.10.2004 is set aside. The petitioner shall be treated to be substantive appointee in L.T. grade with effect from 15.2.1982 . The seniority of respondent Nos. 6 to 9 will be consequently arranged, in accordance with the legal principles explained as above.