

(1992) 07 AHC CK 0076

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 25255 of 1992

Dr. Siya Ram Singh

APPELLANT

Vs

Director of Higher Education and Others

RESPONDENT

Date of Decision : 13-07-1992

Acts Referred:

Uttar Pradesh Higher Education Services Commission (Amendment) Act, 1985 — Section 31B, 31C

Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983 — Regulation 4, 5, 6

Uttar Pradesh Higher Education Services Commission Act, 1980 — Section 12, 12(1), 12(2), 13, 14

Citation : (1992) 3 AWC 1811 : (1992) 2 UPLBEC 1120

Hon'ble Judges : M.P. Singh, J

Bench : Single Bench

Advocate : V.B. Singh, for the Appellant;

Final Decision : Allowed

Judgement

M.P. Singh, J.—Adhocism is nothing but a sophisticated expression for the arbitrary policy of "Hiring and Firing." It was introduced as an emergency measure Due to misuse of power it has grown into a cancer. In the interest of educational institutions it has to be removed as soon as possible.

2. Poor teachers who constitute bulk of educated unemployed are compelled to accept adhoc appointments with miserable conditions of service. Sometime they are paid less than a daily wager. The danger of termination Terrains handing over their heads The Government appears to be exploiting the helplessness of these teachers.

3. In large number of cases is has come to the notice of this Court that the appointments are made for a short periods ranging from 3 to 6 months. Then there is an artificial break of a day or so. They are again re-appoinnted. Why so? They are being treated as seasonal workers. What contribution can the

society expect from them under these circumstances?.

4. In no way adhocism can be said to be a sound policy of our welfare State is it not going to have serious repurcussion on the educational system and ultimately affecting students studying in the, institutions?. The consistent view of the Supreme Court and this Court had been to discourage the same.

5. This bunch of cases can be disposed of by a common judgment. Point involved in all the cases is whether the services of the Petitioners, who are adhoc appointees, could be regularised or not.

6. Civil Misc Writ No. Nil of 1992 Dr. Siya Ram Singh v. Director, Higher Education, U.P. Allsbabad is being taken up as a leading case.

7. The learned standing counsel was granted a week's time and no more to seek instructions from the Government, as the fate of hundreds of teachers were involved in this bunch. Sri M.C. Dwivedi, learned standing counsel, has stated today that he has not been able to get any instruction inspite of due information to the authorities. Since there is no factual dispute, the counter affidavit is not actually needed. Accordingly, the entire bunch is being disposed of finally purely on the question of law.

8. The facts of individual cases need not be discussed. Suffice it to say that all the Petitioners have been appointed as adhoc teachers u/s 16 of U.P. Higher Education Service Commission Act, 1980 (in short "the Act") between January 1984 and 30-6-91 Their regularisation is dependant upon the interpretation of certain provisions of the Act and U.P. Higher Education Service Commission (Amendment) Ordinance, 1991 (U.P. Ordinance 43 of 1991) promulgated on 22-11-1991.

9. The U.P. Higher Education Services Commission Act, 1980 was enacted to improve the working of the affiliated colleges. The object of the Act was to establish a service commission for selection of teachers for appointment to the colleges affiliated to or recognised by the University and for matters connected there with or incidental thereto.

10. The main functions of the Commission so established are-(1) to prepare guidelines on matters relating to the method of recruitment of teachers, (2) to conduct examination and hold interviews for selection (3) to select and invite experts and appointing examiners, and (4) to make recommendation to the management for appointment of selected candidates.

11. Before proceeding further, the relevant statutory provisions of the Act are to be looked into.

Statutory Frame work

12. Section 12 provides that after the Commission is established u/s 3(1), all the appointments of teachers of degree colleges shall be made only in accordance with the Act. The application of U.P. State Universities Act, 1973 or Statutes

framed thereunder has been excluded.

13. In order to make the appointments, the management shall first notify the vacancy to the Commission. The manner of selection is determined by Regulations known as U.P. Higher Education Service Commission (Procedure and conduct of business) Regulations, 1983. Regulations 4, 5 and 6 deal with the procedure to be adopted by the Commission.

14. After the vacancy is notified by the Committee of Management to the Commission, with a view to inviting talented persons, the Commission gives wide publicity in the State to the vacancies thus notified.

15. According to Section 13 of the Act, the Commission shall as soon as after the notification of the vacancy under Sub-section (2) of Section 12, hold interview, with or without examination, of the candidates and recommend their names, not more than three candidates, for appointment to every post of teacher. This recommendation remains valid for the period of one year.

16. Section 14 of the Act makes it obligatory on the part of the management to issue appointment letters within one month from the date of receipt of the recommendation. In case, if the management does not issue appointment letter to the candidate so recommended by the Commission, then the Director can intervene and make enquiries and may require the management to appoint the applicant as a teacher forthwith and to pay him salary from the date specified in the order.

17. Now comes the most notorious provision of the Act, giving rise to this bunch of cases. It is Section 16 of the Act. It runs as follows:

16. Appointment of adhoc teachers.- (1) Where the management has notified a vacancy to the Commission in accordance with Sub-section (2) of Section 12, and the Commission fails to recommend the names of suitable candidate in accordance with Sub-section (1) of that section within three months from the date of such notification the management may appoint a teacher on purely adhoc basis from amongst the persons holding qualification prescribed therefor.

(2) Every appointment of an adhoc teacher under Sub-section (1) shall cease with effect from the earliest of the following dates, namely

(a) when the candidate recommended by the Commission joins the post.

(b) where the period of two months from the date of receipt of the recommendation of the Commission under Sub-section (1) of Section 12 expires.

(c) thirtieth day of June following the date of such adhoc appointment.

18. A fair reading of this section shows that after the management has notified the vacancy to the Commission but the Commission failed to recommend the names of suitable candidates in accordance with the provisions of Section 12 the management gets a right to make adhoc appointments amongst persons holding

the minimum requisite qualifications.

19. The provision of Sub-section 2 has received attention of this Court in a case *Anil Kumar Pandey v. Vice Chancellor Rohilkhand University* 1990 (2) UP LB EC 1228, in which it was held that this appointment will come to an end only when the candidate recommended by the Commission joins the post and not otherwise.

20. All the Petitioners have been given adhoc appointment u/s 6 of the Act. In some cases the appointments have been made by the Committee of Management after notifying the vacancy, whereas in some cases the vacancy were notified subsequent to the appointment. Before the appointment orders were issued the application form of each Petitioner was thoroughly examined particularly with regard to the minimum requisite qualifications in some cases the appointment orders were issued after granting relaxation in accordance with the Statutes of the relevant University

Approval of Vice Chancellor not required

21. Practically in every case adhoc appointment made by the Committee of Management has been approved by the Vice Chancellor after carefully scrutinising the record; though the Vice Chancellor has no role to play under the Act. No approval is required. *Km Madhu Chauhan v. District Inspector of Schools* 1988 U.P. LB EC 397 and *Anil Kumar Pandey v. Vice Chancellor, Rohilkhand University* 1990 (2) UP LB EC 1228.

22. The action of the Committee of Management in obtaining approval shows that the adhoc appointments so made were all bonafide and in accordance with the relevant University Statutes. They did not suffer from any legal or procedural infirmity because the Vice Chancellor has also applied his mind in each case and granted approval. This further proves that the Petitioners did possess the minimum requisite qualification on the date of the appointment or were granted exemption in accordance with the Statute. Thus in every case there was scrutiny about the minimum requisite qualification of the candidates at two stages, one at the time of making the adhoc appointment by the committee of management and second, by the Vice Chancellor when he granted the approval.

23. The Petitioners continued in service for several years as adhoc appointees with a hope of being regularised.

Provision for Regularisation

24. When U.P. Act No. 16 of 1980 was enacted, it made a provision for adhoc appointment u/s 16 of the Act but there was no provision of their regularisation. For that purpose U.P. Higher Education Service Commission (Amendment) Act, 1985 was enacted by means of which Section 31-B was inserted in the Statute But it had a limited scope.

25. According to Section 31-B every teacher other than the Principal, directly appointed on or before January 3, 1984 on adhoc basis against substantive

vacancy in accordance with the provisions of the U.P. Higher Education Service Commission "(Removal of Difficulties) Order, 1982 or subsequent similar Order of 1983, who possessed the prescribed qualifications, or was exempted from such qualification in accordance with the provisions of the concerned Statute" could be appointed in a substantive, capacity after the enforcement of the said Act. Though this Amending Act of 1985 came into force on 22-6-1985 but there was no provision for the reclamation of the adhoc appointees appointed after 3-1-1984. Their future remained uncertain though the adhoc appointments were continuously being made even thereafter.

26. The State Government thought it proper to make suitable laws for their regularisation too. For this purpose U.P. Higher Education Service Commission (Amendment) Ordinance, 1991 (U.P. Ordinance 43 of 1991) was promulgated on 22-11-1991. It has two salient features (1) Section 16 of the Principal Act, which provided for adhoc appointment, has been omitted, and (2) has inserted Section 31-C in the Statute. It covers the cases of adhoc appointment made after January 3, 1984 but not later than 30-6-1991. Only those persons who were appointed between 3-1-1984 and 30-6-1991 would be entitled for the benefit of this provision.

27. Before coming to the conclusion whether the Petitioners are entitled to be regularised u/s 31-C, the following relevant points are to be considered

Provision for adhoc appointment whether mandatory or directory

28. The consistent view of the Supreme Court has been that this depends upon the intention of the Legislature and not upon the language in which the intent is clothed. The intention of the Legislature is to be ascertained not only from the phraseology or the provision but also by considering its nature, its design and consequences which would follow from construing it one way or the other. *State of U.P. Vs. Manbodhan Lal Srivastava*, *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, *State of Mysore and Others Vs. V.K. Kangan and Others*, *Ganesh Prasad Sah Kesari and Another Vs. Lakshmi Narayan Gupta*, *B.P. Khemka Pvt. Ltd. Vs. Birendra Kumar Bhowmick and Another*, and *Owners and Parties interested in Owners and Parties interested in M.V. "Vali Pero" Vs. Fernando Lopez and Others*, and *Sharif-ud-din Vs. Abdul Gani Lone*, .

Gani Lone.

29. If by holding it mandatory serious general inconvenience will be caused to innocent persons the object of the enactment is frustrated, the same should be construed as directory, *Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur*, .

30. The directory requirements fall under two heads (1) those which should be substantially complied with to make the act valid; and (2) these which even not complied with have no effect on the Act.

31. Section 16 of the Act does not use prohibitive or negative words which is a salient feature of a mandatory provision. The use of the word "shall" normally

raises n. presumption that a particular provision is imperative but this prima facie inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction.

32. The aim and object of the Act was that the regular appointment should be made by the U.P. Higher Education Service Commission but in certain contingency the power has been granted to the management to make adhoc appointment, in case the Commission has not been able to make the regular appointment expeditiously. The object of Section 16 was that the teaching of the college may not suffer. So immediate appointment could be made having consideration of the minimum requisite qualification. It was sort of emergency provision.

33. In those cases where the appointments have been made before the vacancy was notified and the Commission did not raise any objection about the procedure so adopted, the irregularity, if any, will be deemed to be cured in the eyes of law. The management did so, as there was urgency.

34. Since I find no prohibitive words in Section 16 there is no difficulty in my way in holding that the provisions are directory and not mandatory. According to the aims and object of the Act there should be a substantial compliance. So procedural irregularity will not make the appointment invalid.

Principle of Natural Justice

35. The law is well settled that in the case of adhoc appointees before passing an order of termination no opportunity is needed. The principle of natural justice has got no role to play. In the case *Dr. Mrs. Sumati P. Shere v. Union of India* AIR 1989 SC 1432, adhoc appointee was removed, as the employer was not satisfied with his performance. The court took the view:

In the relationship of master and servant there is a moral obligation to act fairly. An informal, if not formal, give-and-take, on the assessment of work of the employee should be there. The employee should be made aware of the defects in his work and the deficiency in his performance. Defects or deficiencies; indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, it would be arbitrary to give a movement order to the employee on the ground of unsuitability.

But in paragraph 7 of the judgment it has been made clear that

We are not laying down the rule that there should be regular enquiry in this case. All that we wish to state in this case is that if she is to be discontinued it is proper and necessary that she should be told in advance that her work and performance are not upto the mark.

36. Thus the Supreme Court has not laid down any law that opportunity in such

matter is a must. That case was decided on its own facts.

37. In the instant bunch of cases the regularisation has been refused on the ground either the Petitioner did not possess the requisite minimum qualification on the date of the appointment or the exemptions had wrongly been granted or the vacancy was not notified by the management before the appointment was made. In substance such orders amount to cancelling the adhoc appointment on the grounds mentioned therein.

38. If Petitioners were given opportunity to explain whether they did possess the minimum requisite qualification or whether there was any relaxation or whether the committee of management has notified the vacancy or not, probably the result might have been otherwise.

39. So in this group of cases I am of the view that due enquiry should have been made by giving opportunity to Petitioners by the Director before passing the impugned orders, they cast stigma on the Petitioners that they were not qualified to be appointed as lecturers. They did not possess the requisite qualification and the appointments were illegally obtained by them without any notification of vacancy by the management.

40. This observation of mine may not be misunderstood as laying down a law that in the case of adhoc appointees the opportunity of hearing is a must. Simple order of termination can always be passed.

Promissory Estoppel

41. There is reason to believe that while making the adhoc appointment by the committee of management, the application forms and the requisite qualification must have been thoroughly examined. If there was some lacuna, relaxation has also been granted. It was approved by the Vice Chancellor even.

42. Section 15 of the Act gives power to the Director to make enquiries in case the management does not act in the accordance with law. He has implicit power to make enquiries whether the appointment was in accordance with law or not. The State Government has been paying salary to the petitioners for the last so many years without raising any objection about the validity of the appointment. There is good reason to believe that the Petitioners were led to believe that their appointment was valid.

43. The principle of promissory estoppel will come into play. The authorities cannot be permitted to raise any objection with regard to the defect in the procedure or want of minimum requisite qualification after seven years or more. The principle of law enunciated by the Supreme Court in the case *Shri Krishnan Vs. The Kurukshetra University, Kurukshetra*, becomes applicable in the instant case.

44. The doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity if the larger public interest so requires. This doctrine has

been reiterated by the Supreme Court in the case *State of Bihar v. Usha Martin Industries Ltd.* 1987 (65) STC 430 , and *Assistant Commissioner of Commercial Taxes (Asst.) Dharwar and Others Vs. Dharmendra Trading Company and Others*, . The rule of promissory estoppel is not founded upon any right, statutory or contractual but it is founded upon the equity Since I atn of the view that the provisions are only directory and not mandatory, the proposition of law that there is no estoppel against Statute, is not attracted.

Non-Speaking Orders

45. The orders passed against the Petitioners are all cyclostyled. A reading of the same indicates that there was no application of mind. Individual cases were not examined. They are non-speaking orders. The Director should have given some reasons. In the case *S.N. Mukherjee Vs. Union of India*, it has been held that even administrative orders must be supported by reasons. The recording of reasons by administrative authorities serves a good purpose, namely, it excludes the chance of arbitrariness.

46. Fairness in public dealings is the core of our jurisprudence. It is a substantive principls the breach or violation of which furnishes cause of action to the aggrieved.

47. Procrastination or delay on the part of those who under rules were obliged to take.action could not recoil on the Petitioner. No action have been taken for years together.

48. In the case *Mahesh Chandra v. Regional Manager U.P. Finance Corporation* JT1992 (2) 325, it has been held that even the administrative orders must satisfy the test of fairness and reasonableness The impugned orders do not meet the requirement as indicated in the judgment and, therefore, liable to be struck down.

Effect of Producedural Irregularity

49. Even if there was some procedural irregularity in notifying the vacancy and the order of appointment was made by the Committee of Management u/s 16 and the Petitioners possessed minimum requisite qualification or there was an exemption granted, can they be refused regula-risation on this ground after so many years. Why should the Petitioner suffer for the wrong or Comission on the part of the Committee of Management. Petitioners joined service several years back believing their appointments to be valid. They continued in Service with a hope to be regularised. It is not open to the Respondents not to refuse regularisation. If technicalities in procedural matter are permitted to have an upper hand it may frustrate the object of the Act. This will amount to grave injustice to Petitioners. *Munish Kumar Sharma v. District Inspector of Schools, Denradun* 1990 (1) U.P. LB EC 223 , *Bhagwan Swaroop and Others Vs. Mool Chand and Others*, and *Rafiq and Another Vs. Munshilal and Another*, .

50. This leads to a logical conclusion that the minimum educational qualifications

are required to be looked into at the time of initial appointment. Subsequent changes in the Statute will not affect the appointment so made as held by Supreme Court in the case Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, . This Court followed the same view in the case Smt. Phoola Devi v. Superintendent, Central Jail, Naini, Allahabad 1990 (2) AWC 890.p> Malady of Adhocism

51. The Supreme Court in a recent judgment Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, , has disapproved the system of adhoc appointment by saying:

Adhoc appointments, a convenient way of entry usually from backdoor at time even in disregard of rules and regulations, are comparatively recent innovations to the service jurisprudence. They are individual problem to begin with, become a family problem with passage of time and and with human problem in court of law It is unjust and unfair to those who are lesser fortunate in society with little or no approach even though better qualified more meritorious and well Reserving. The infection is widespread in Government or semi-Government-departments or State financed institutions. It arises either because the appointing authority resorts to it deliberately as a favour or to accommodate some one or for any extraneous person ignoring the regular procedure provided for recruitment as a pretext under emergency measure or to avoid less of work etc Or the rules or circulars issued by the department itself empower the authority to do so as a stop gap arrangement. The former is an abuse of power. It is unpardonable. Even if it is found to have been resorted to as a genuine emergency measure the courts should be reluctant to grant indulgence. Latter gives rise to equities which have bothered courts ever now and then Malady appears to be widespread in educational institutions as provisions for temporary or adhoc appointments have been exploited by the managements of private aided college to their advantage by filling it, on one hand, with persons of own choice, at times without following the procedure, and keeping the teachers exposed to threat of termination, on the other, with all evil consequences Slowing out of it.

This very view has been followed in other cases by this Court as well. They need not be cited as an authority.

Anomaly in Section 31-C of the Ordinance

52. The opening words of this section are "any teacher, other than a Principal, who was appointed on adhoc basis after January 3, 1984 but not later than 30-6-1991, may be given substantive appointment by the management of the college. If any substantive vacancy of the same cadre and grade is available."

53. This shows that the framer of the Ordinance was alive to the situation that the appointments made only during this period will be taken into consideration for regularisation. In some cases of this bunch it has been stated that after their appointment and before the Promulgation of the Ordinance there have been

some change in required minimum educational qualification But it is wholly irrelevant for considering it for regularisation of those persons who possessed the minimum required qualification on the date of their appointment. As held, earlier the relevant date for possessing the minimum requisite qualification is only the date of appointment and no other date.

54. Sub-section (c) of Section 31-C provides that these teachers must possess the qualification required for regular appointment to the post on the date of the commencement of the Ordinance. Thus Sub-section (a) and (c) do not see eye to eye. They are self-contradictory.

55. There is difference between an Act and an Ordinance. The Act is a legislation which after having been passed by the Parliament or other competent legislative body which has received the assent of the Constitutional Head. The Ordinance is a legislation made by the constitutional head himself.

56. A reading of Sub-section (a) and (c) at the first blush would indicate that the phraseology are wholly inconsistent. A closer examination would, however, reveal that the words "commencement of the Ordinance" may be read as "date of appointment." Courts have to interpret the Act or the Ordinance in order to make it workable and to avoid injustice. The intention in the instant case was to regularise all those persons who have been appointed between 3-1-1984 to 30-6-1991 if they possessed the requisite minimum qualification on the date of their appointment.

57. Thus I am of the view that while considering the question of regularisation of adhoc appointees, they should have possessed the minimum requisite qualification on the date of their appointment and not on the date of commencement of the Ordinance.

Direction for Regularisation

58. Since I am holding that the impugned orders refusing regularisation are bad in law and suffer from errors apparent on the face of the record and they are wholly arbitrary, the next question which comes for consideration is whether this Court should issue direction to the Respondents to pass an order of regularisation or leave it open to be considered by the authority concerned.

59. In normal course I would have left it open to be decided by the appropriate authority but since the Petitioners have been dragged to this Court for no fault of theirs and each one of them must have spent at least two or three months' salary during these hard days, no useful purpose would be served by sending them again to the Respondents.

60. In the case *Bhagwati Prasad v. Delhi State Mineral Development Corporation* JT1989 (4) 541, the Supreme Court has issued direction for regularisation of 40 senior-most workmen with immediate effect. This Court in the case *Bhullar Nath Yadav v. Mayo Hall Complex* 1990 (61) FIR 68 has issued similar direction.

61. In a recent judgment of the Supreme Court Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, a direction was issued for regularising the temporary appointed teachers. The policy of making adhoc appointment has also not been approved So in this bunch also direction should be issued.

62. For the reasons given, I am of the view that all the writ petitions must succeed.

63. The writ petitions are allowed with costs, which I assess as Rs. 1000/- to be paid to each Petitioner. The Respondents are directed to regularise the services of the Petitioners within a period of one month from the date of filing of a certified copy of this order before them. Artificial breaks given to them on 30-6-1992 will be ignored and they will be deemed to have been in continuous, service. They will be entitled for their salary as well.