
(2017) 01 AHC CK 0212
In the Allahabad High Court
Case No : Special Appeal No. 40 of 2013

Jagdish Prasad Tiwari

APPELLANT

Vs

Joint Director of Education

RESPONDENT

Date of Decision : 03-01-2017

Acts Referred:

Uttar Pradesh Intermediate Education Act, 1921 — Section 15, Section 16-G

Citation : (2017) 2 AILLJ 559 : (2017) LIC 1754

Hon'ble Judges : V.K. Shukla and Mrs. Sangeeta Chandra, JJ.

Bench : Division Bench

Advocate : G.K. Singh and V.K. Singh, Advocates, for the Appellant in Special Appeal No. 40 of 2013; C.S.C., I.R. Dube, I.R. Singh, Rajesh Kumar Singh, U.S. Mishra and Vivek Pandey, Advocates, for the Respondents in Special Appeal No. 40 of 2013; G.K. Singh and V.K. Singh, Advocates, for the Appellant in Special Appeal No. 39 of 2013; C.S.C., D.S.M. Tripathi, Pankaj Kumar Misrha, R.K. Singh, S.R. Singh and Vivek Pandey, Advocates, for the Respondents in Special Appeal No. 39 of 2013

Final Decision : Allowed

Judgement

Special Appeal No. 40 of 2013 is directed against the order dated 5th February, 2007 passed by learned Single Judge in Writ Petition No. 8056 of 2005 (Jagdish Prasad Tiwari v. Joint Director of Education), wherein the learned Single Judge has refused to interfere and set aside the selection and appointment of Paresh Kumar Gupta as Lecturer in History by U.P. Secondary Education Service Selection Board.

2. Special Appeal No. 39 of 2013 is directed against the judgement and order dated 1st June, 2012 passed in Writ Petition No. 54799 of 2008 (Paresh Kumar Gupta v. State of U.P. and others), wherein the writ petition in question has been allowed wherein the order impugned has been set aside holding that the post in question is a promotional quota post and respondents have been directed to reinstate the petitioner and allow him to join in the institution with all consequential benefits.

3. The brief background of the case leading to preference of both the Special Appeals are that Jagdish Prasad Tiwari, the appellant, was initially appointed as Assistant Teacher in C.T. Grade in the year 1995 and thereafter, as C.T. Grade was declared a dying cadre, he was upgraded as L.T. Grade Teacher and has been performing and discharging his duties in the said capacity. On 30th June, 1997, the Principal of the institution retired and the senior most teacher, one Shesh Mani Tripathi, a Lecturer in History, was appointed as an Adhoc Principal of the institution and thus giving rise to a short-term vacancy on the post of Lecturer in History. Jagdish Prasad Tiwari claims that the Committee of Management passed a resolution on 8.10.1997 to promote him as a Lecturer on ad hoc basis and papers were transmitted to District Inspector of Schools, Jaunpur and the District Inspector of Schools, in his turn, on 22nd December, 1998, accorded approval to the same. One Dharm Raj Yadav had preferred an appeal against the same and same was allowed by an order dated 29th April, 1999, and thereafter the petitioner has preferred Writ Petition No. 30222 of 1999. On the said post of Lecturer in History, Paresh Kumar Gupta was recommended as a Lecturer in History by U.P. Secondary Education Service Selection Board pursuant to which the District Inspector of Schools asked the Management to issue an appointment letter to Paresh Kumar Gupta. Petitioner appellant at this juncture, preferred Writ Petition No. 8056 of 2005. The said writ petition in question has been dismissed vide order dated 5th February, 2007 and therein liberty was given while upholding the appointment of Paresh Kumar Gupta that the petitioner can move the application before the Regional Director of Education for his promotion and then the issue of number of vacancies would be considered and dealt with.

4. Pursuant to the liberty accorded by this Court, the claim of the petitioner appellant has been considered and it was found that petitioner appellant's claim was liable to be considered for promotion and then Paresh Kumar Gupta filed Writ Petition no. 54799 of 2008 (Paresh Kumar Gupta v. State of U.P. and others) and the said writ petition in question has been allowed resulting in filing of the present Special Appeals and, accordingly, both the special appeals have been clubbed together and are being decided together.

5. Sri G.K. Singh, Senior Advocate submitted with vehemence that, in the present case, by no stretch of imagination Paresh Kumar Gupta could have been appointed against unadvertised vacancy and against such illegal adjustment, the legitimate right of petitioner-appellant to be considered for promotion could not have been defeated and as such, the learned Single Judge has erred in law at the point of time when writ petition in question preferred on behalf of petitioner-appellant Jagdish Prasad Tiwari has been dismissed and writ petition preferred on behalf of Paresh Kumar Gupta has been allowed, in view of this, both the Appeals deserve to be allowed.

6. The claim in question has been countered by Sri P.N. Saxena, Senior Advocate by contending that the appointment of Paresh Kumar Gupta cannot be permitted

to be challenged collaterally and further, at the point of time, when recommendation has been made in favour of Paresh Kumar Gupta, the same was based on the judgement of this Court in the case of Smt. Savita Gupta v. State of U.P. and others, 2004 (5) ESC 1264, and it may be true that the judgement in the case of Savita Gupta (supra) has been over-ruled by the Division Bench of this Court in the case of Satish Kumar v. State of U.P., 2006 (4) ESC 2786 (All) (DB), but the action already taken could not be set at naught merely because the judgement has been over-ruled and, in view of this, the learned Single Judge is absolutely right when he has chosen not to interfere with the recommendation made in favour of Paresh Kumar Gupta and, as such, no interference is warranted in the facts of the case, as it would tantamount to reopening of the closed chapters.

7. After respective arguments have been advanced, the factual situation on which there is no dispute that selection and appointment on the post of Principal/ Head Master/Lecturer/LT Grade Teacher is to be made in consonance with the provisions as contained under U.P. Secondary Education Service Selection Board Act, 1982 and the Rules framed thereunder known as U.P. Secondary Education Service Selection Board Rules, 1998. In the present case accepted position is that in the institution concerned, a post of Lecturer in History fell vacant and petitioner appellant Jagdish Prasad Tiwari by virtue of being senior most LT Grade Teacher has been claiming promotion against the said post in question on the premises that there are seven posts of Lecturer in the institution and 50% of the post are required to be filled up by way of promotion as contemplated under Regulation 5 of Chapter II of the Regulations framed under the Intermediate Education Act, read with Rule 10(b) of the U.P. Secondary Education Service Selection Board Rules, 1998 and accordingly four posts were required to be filled up by way of promotion and out of which only one post had been filled by way of promotion, in view of this backdrop, petitioner averred that his claim for being promoted for the post of Lecturer in History under the relevant Rules, he ought to have been considered and ought to have been accorded promotion and the rights of the petitioner-appellant cannot be permitted to be defeated on the recommendation made by the District Inspector of Schools recommending name of Paresh Kumar Gupta.

8. Accepted position is that as far as Paresh Kumar Gupta is concerned, his appointment in question has been made as lecturer in History. Pursuant to Advertisement No. 202/2001, Paresh Kumar Gupta had been selected and his selection was shown as Lecturer in History (SC Category) in select list dated 5.3.2003 at Rashtriya Inter College, Kamalpur, District Chandauli. He was not provided appointment in the said institution and the District Inspector of Schools informed Selection Board vide letter dated 17.04.2004 that he be adjusted to some other institution. Selection Board thereafter, in spite of the fact that vacancy of Lecturer in History at Gangadin Ram Kumar Inter College, Ramgarh, Barwan, District Jaunpur came into existence on 1.7.2003 on account of attaining age of superannuation of Sri Shesh Mani Tripathi, the Selection Board on

11.9.2014 asked District Inspector of School, Jaunpur for adjustment of Paresh Kumar Gupta in the institution and the District Inspector of School on 25.1.2005 directed the Managing Committee readily proceeded to oblige and Managing Committee readily proceeded to oblige Paresh Kumar Gupta, by issuing appointment letter on 31.1.2005. The fact of the matter is that the said post in question has never been advertised as per the Proviso to Rule 10 of 1998 Rules, and this is also accepted position that Paresh Kumar Gupta was selected candidate in the recruitment that has taken place in the year 2001, and at no point of time, the post of Lecturer in History had ever been notified/advertised, even then recommendation in question has been made for being offered appointment as Lecturer in History in the institution and the said recommendation/appointment in favour of Paresh Kumar Gupta has been made on account of the judgement of this Court in the case of Savita Gupta (supra).

9. The law on the subject is clear that once the vacancy in question has not at all been advertised, then U.P. Secondary Education Service Selection Board is not at all competent to make recommendation/adjustment against vacancies that remain unadvertised and the reason is simple that if such an exercise is subscribed, same would be clearly violative of Articles 14 and 16 of the Constitution of India inasmuch as it will tantamount to deny equal opportunity to further incumbents, who can also apply for being recruited/appointed as Lecturer in History. The law laid down by this Court in the case of Savita Gupta (supra) gave handle to the authorities to make recommendation not subscribed by law by any means and the fact of the matter is that it was a void law, the Division Bench of this Court in the case of Satish Kumar v. State of U.P. 2006 (4) ESC 2786 has proceeded to non-suit the said legal position and has proceeded to clarify the position that subordinate legislation cannot override the statutory rules nor can it curtail the content and scope of the substantive provision for or under which it has been made and for the reasons conclusion has been drawn that an unadvertised vacancy cannot be filled up from amongst the candidate who has been selected in any previous selections. The Division Bench of this Court has found the view taken in the case of Savita Gupta (supra) to be in the teeth of the dictum of Apex Court as noted in the judgement and ultimately has concluded as follows:-

1. "An unadvertised vacancy cannot be filled from amongst the candidate who has been selected in any previous selections and to that extent we declare that the pronouncement of learned Single Judge in the case of Savita Gupta v. State of U.P. 2004 (2) UPLBEC 2739, does not lay down the law correctly and is hereby over-ruled."

2. "The U.P. Secondary Education Service Selection Board constituted under U.P. Act No. V of 1982 cannot, with the aid of Government Order dated 12.3.2001, order any adjustment in respect of vacancy, which has been intimated and notified but not advertised."

10. Accepted position is that Paresh Kumar Gupta has been adjusted against

unadvertised vacancy, whereas the said post was liable to be filled by way of promotion, in this backdrop once right of Jagdish Kumari Tewari to be considered for promotion was being defeated in the garb of said recommendation, then it may be true that recommendation has been made by the Selection Board in pursuance of the judgement of this Court, but once there has been a lis vis-a-vis the right of the petitioner-appellant and the right of Paresh Kumar Gupta to continue in institution as Lecturer in History, then the learned Single Judge ought to have decided the dispute as per the prevailing law instead of proceeding to close the lis on the premises prospective overruling.

11. The Division Bench of this Court in the case of Om Prakash Awasthi v. State of U.P. and others [2009 (4) ESC 2629 (All)(DB)] has clearly proceeded to make a mention that the Division Bench in the case of Satish Kumar (supra), did not even whisper that the enunciation of law made will apply prospectively and also clearly proceeded to make a mention that the Division Bench has its own reservation policy as to whether this Court, while rendering a decision, can declare that the decision will operate prospectively. The Division Bench of this Court, keeping in view the pronouncement of the Constitution Bench of the Apex Court in the case of Himachal Pradesh and others v. Nurple Private Bus Operators Union and others AIR 1999 SC 3880 has held that the recourse to the principle of prospective overruling is not ordinarily to be resorted. The view taken by learned Single Judge that it will operate prospectively, after due consideration of law and facts in paragraphs 13, 14, 16, 18, 19, 20, 21, 23 has held that the principle laid down in the case of Satish Kumar would apply in the case of Satish Kumar would apply prospectively and the view of learned Single Judge in Jagdish Prasad Tewari, petitioner-appellant's case has been specifically over-ruled.

12. The Division Bench of our Court has taken the view that when the Court decides that the interpretation of the provision as given earlier was not legal, it in effect declares that the law as enunciated stood from the beginning and that it was never the law otherwise.

13. On these parameters, once the appointment of Paresh Kumar Gupta was coming in the way of the petitioner-appellant, then he had every right to question the legality/illegality of the recommendation made in favour of Paresh Kumar Gupta and the learned Single Judge was duty bound to answer the questions as per the prevailing law instead of proceeding to close the lis on the premises of prospective overruling and on the premises that there is no challenge whereas the petitioner-appellant had challenged the recommendation made by the District Inspector of Schools. Learned Single Judge has proceeded to make a mention that District Inspector of School acts as a postman and is not an independent authority in the matter of appointment without the challenge made to the recommendation made by Selection Board, no relief could have been accorded.

14. Learned Single Judge has made such observation ignoring the scheme of things provided for and specially Rule 13 of 1998 Rules and the law declared by

Full Bench of this Court in the case of Prashant Kumar Kaliyar v. State of U.P. 2013 (1) ESC 221, wherein view has been taken that the function of Selection Board stands terminated after it has selected, empanelled and placed the candidate in a college of his choice. Thereafter, the process of formal appointment is taken over by educational authorities and the Management Selection Board also cannot be allowed to alter empanelments for the convenience of candidates as it would be then an unruly horse giving discretion even after selections have been finalized.

15. Once totally void/illegal recommendation is made by Selection Board and the said order is being implemented on the spot by educational authorities and then challenge is made that based on void action rights are being sought to be defeated, then such a challenge should be entertained as void actions cannot be enforced by educational authorities, as such learned Single Judge sought to have entered into the merits of the matter. In view of this, once on its face value the appointment of Paresh Kumar Gupta in the institution concerned was void as it had been made against the post of Lecturer in History which had never been advertised and was meant to be filled by way of promotion, then learned Single Judge ought to have set it aside instead of proceeding to save the same in the guise of prospective over-ruling.

16. Accordingly, the order passed by learned Single Judge dated 5th February, 2007 is hereby quashed and set aside.

17. The order passed by learned Single Judge dated 1st June, 2012 is also based on the order dated 5th February, 2007 and the fact that once the said order stands then appointment of Paresh Kumar Gupta has to be accepted as legal and same cannot be accordingly non-suited on account of promotional exercise. Learned Single Judge has also mentioned that post in question belonged to promotion quota but that has to be filled by SC category candidate and since no SC category candidate in promotion quota was available as such rightly appointment has been made of SC category candidate.

18. Categorical finding has been returned by the educational authorities that post of Lecturer in History was required to be filled up by way of promotional quota and the fact that appointment of Paresh Kumar Gupta in the institution has been found to be void is an established fact and learned Single Judge has proceeded to make a mention that since there is no person available from the Scheduled Caste Category for being accorded promotion applying proviso to Rule 10 of 1998 Rules appointment from the direct recruitment is permissible. Such observation made are contextually off the mark as accepted position is that there were seven sanctioned post in the college, out of those seven post four will fall in promotion quota and three would fall in direct recruitment quota. In such a situation, if rule of reservation is applied no post would be available, inasmuch as, 21% of four posts would be less than one. View to the said effect has been taken by a Co-ordinate Bench of this Court in the case of Phoolpali Devi v. Asha Jaiswal 2009 (2) ADJ 90, the same reads as follows:-

"In the case in hand, there were only seven sanctioned posts of Lecturers wherein 50% were to be filled in by direct recruitment and 50% by promotion. Therefore, at the best four posts would have been available for one source of recruitment, i.e., direct recruitment or promotion. The reservation for scheduled castes is 21%. If we treat one of the vacancies in either of the source of recruitment in the institution as reserved for scheduled caste, it would be more than 21%. The Apex Court in *R.S. Garg v. State of U.P. and Ors.*, 2006 AIR (SC) 2912, has held as under:

40. We are not concerned with the reasonableness or otherwise of the percentage of reservation. 21% of the posts have been reserved for Scheduled Tribe candidates by the State itself. It, thus, cannot exceed the quota. It is not disputed that in the event of any conflict between the percentage of reservation and the roster, the former shall prevail. Thus, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, after every four posts, in our considered opinion, does not meet the constitutional requirements."

19. In view of this, the order dated 1st June, 2012 is also not being approved of. Both the Special Appeals are allowed and the order passed by learned Single Judge are quashed and set aside. The respondents are directed to consider the claim of petitioner-appellant for promotion on the post of lecturer in History, preferably within next three months from the date of certified copy of the order passed by this Court and as far as Paresh Kumar Gupta is considered, we proceed to pass an order that in case any post of lecturer in History pursuant to Advertisement No. 202/2001 is vacant, then his claim be considered for appointment as per law.