

(1991) 09 AHC CK 0057

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 22185 of 1990

Kailash Nath Shukla

APPELLANT

Vs

Director of Education and Others

RESPONDENT

Date of Decision : 09-09-1991

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 10, 16, 16(1), 16(2), 18

Citation : (1991) 2 AWC 476

Hon'ble Judges : Om Prakash, J

Bench : Single Bench

Advocate : H.S. Nigam, for the Appellant;

Final Decision : Partly Allowed

Judgement

Om Prakash, J.—Petitioner seeks quashing of the order dated 18th July, 1990 passed by the Deputy Direction of Education, Respondent No. 2 (Annexure 6 to the petition) and also a writ in the nature of mandamus directing the Respondents to pay his salary.

2. The back drop of the case is that in the relevant college, namely, Nagrik Intermediate College, Janghai, District Jaunpur imparting education up to XII class, two posts of L.T. Grade teachers fell vacant on 30-6-1989; one on account of retirement of Sri Chandra Shekhar Misra and the other on account of promotion of Sri Rama Kant to the lecturer grade. The Committee of Management of the aforesaid college (briefly, the Management) made an advertisement on 1-6-1989 to fill up both the posts on ad hoc basis by pasting a notice on the notice-board as well as publication in the newspaper. Interviews were held on 25-6-1989. The two vacancies in L.T. Grade arose for the subject of Sanskrit and general subjects. The Management at the time of interview awarded quality point marks and split up the merit list subject-wise instead of making a consolidated merit list. In the subject-wise merit list the position for Sanskrit and general subjects was as follows:

Sanskrit. Marks. 1. Rakesh Kumar Pandey 23 2. Nitya Nand Shukla 22 3. Indramani Pandey 18 4. Shanker Giri 19 General Subjects. Marks. 1 Kailash Nath Shukla 18 2 Vinod Kumar Misra 17 3 Ajb Narain Tcwari 17 4. Satish Chandra Upadhyaya 16.

3. On the aforesaid merit lists, Sri Rakesh Kumar Pandey for Sanskrit and Sri Kailash Nath Shukla (the Petitioner) for general subjects were selected and their names were sent to the District Inspector of Schools for seeking approval. He made queries from the Management vide letter dated 26th September, 1989, Annexure 3 to the petition; one of the queries being if both the vacancies were duly notified to the Commission before making ad hoc appointments in accordance with the law and the other query being when a consolidated advertisement was made then why at the time of interview, two separate lists were prepared on the basis of quality point marks? Without replying the queries, the Management cancelled the selection dated 25th June, 1989 on 26th September, 1989. In the mean time, a writ petition No. 24536 of 1989 was filed by the selected candidates and they also made a representation to the Respondent No. 3, but the said writ petition was got dismissed as withdrawn on 11th April, 1990. The Management readvertised the vacancies on 25-4-1991 by pasting the notice on the notice-board. Interviews were held on 20th May, 1990 in which Sri Rakesh Kumar Pandey who was also selected earlier for Sanskrit subject and the Petitioner were selected. It is averred by the Petitioner that on the basis of the selection dated 20th May, 1990, the appointment letter was issued to him and since then he has been working.

4. Before the first selection was cancelled by the Management on 26-9-1989, Sri Nitya Nand Shukla, Respondent No. 5 also filed a writ petition on 9th May, 1990 and he also made a representation to the Respondent No. 2 that preparation of merit lists subject-wise was bad in law and that on consolidated merit list he stood second in the merit list and, therefore, he is entitled to be appointed. By the order dated 9th May, 1990, this Court disposed of his writ petition finally directing the Deputy Director of Education, Varanasi to decide his representation within two months from the date a certified copy of the order was served upon him. In compliance with that order the Respondent No. 2. passed the impugned order dated 18th July, 1990, Annexure 6 to the petition directing the Management to appoint Sri Rakesh Kumar Pandey and the Respondent No. 5 who stood 1 & II in the first interview on the basis of quality point marks in the two vacancies. Aggrieved by this order, the Petitioner has filed the instant writ petition. Counter affidavits have been filed by all the Respondents. In the counter affidavit filed for the Respondents Nos. 1 to 3, it is averred that no right was vested in the Management to cancel the earlier selection and make a fresh advertisement. Also it is said that the writ petition is not maintainable, inasmuch as, the impugned order, Annexure 6 to the petition can be agitated in appeal before the Director in view of the amendment made in para 7 by para 3 of the U.P. Secondary Education Services Commission (Removal of Difficulties)(Fourth) Order, 1982.

5. The question for consideration is whether the impugned order dated 18th July, 1990, Annexure 6 to the petition, passed by the Respondent No. 2 is sustainable in law, and whether the Petitioner is entitled to salary as claimed. Upon perusal of the said order, it appears that the Respondent No. 2 concluded that the Management was not right in awarding quality point marks subject-wise and that a consolidated merit list for both the vacancies should have been prepared. He did not consider the question; whether the Management was at all competent to make ad hoc appointments without complying with the mandatory provisions of the U.P. Secondary Education services Commission and Selection Board Act, 1982 (for short, the Act, 1982). This Act was enacted to establish Secondary Education Services Commission and Selection Boards for the selection of teachers in institutions, recognised under the Education Act, 1921 (for brevity sake, the Act, 1921) Section 3 of the Act 1982 says that there shall be established a Commission for making recruitment of teaching staff with effect from such date as State Government may by notification appoint in this behalf. Section 9 of the Act, 1982 enumerates the powers and duties of the Commission, one of the duties being to conduct examinations, hold interviews and make selection of candidates for being appointed as teachers as are specified in the Schedule, appended to the Act, 1982. Section 10 of this Act mandates that for purposes of making appointment of a teacher, specified in the Schedule to the Management shall notify the vacancy to the Commission in such manner and through such officer or authority as may be prescribed, (emphasis supplied) It is not disputed that category of teachers for which the vacancies arose on 30th June, 1989, is enumerated in the Schedule, appended to the Act. Section 16 Clause (a) says that every appointment of a teacher specified in Schedule shall on or after July 10, 1981 be made by the Management only on the recommendation of the Commission. Sub-section (2) of Section 16 declared that every appointment of a teacher in contravention of the Sub-section (1) shall be void. From the scheme of the Act, 1982, it is, therefore, clear that after enforcement of the Act, no appointment of a teacher in the Intermediate College could be made by the Management except on the recommendation of the Commission. This rule was subject to the exceptions carved out in the Sub-section (1) of Section 16, beginning with the non obstante clause which refers to Section 18 inter alia. Section 18 Sub-section (1) states:

Where the management has notified a vacancy to the Commission in accordance with the provisions of this Act, and

(a) the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher specified in the Schedule within one year from the date of such notification; or

(b) the post of such teacher has actually remained vacant for more than two months, then, the management may appoint, by direct recruitment or promotion, a teacher on purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Intermediate Education Act, 1921,

or the regulations made thereunder.

6. Section 18 has to be read with Section 10 and Section 16. Where as Section 10 enjoins upon the Management to notify the vacancy to the Commission in the manner prescribed, SECTION 16(1)(a) mandates that an appointment of a teacher specified in the Schedule shall be made by the Management only on the recommendation of the Commission, unless it is covered by the provisions, enumerated in Sub-Section (1) of Section 16. Sub-section (2) declares every appointment of a teacher made in contravention of the provisions of Sub-section (1) as void. The Petitioner claim that his selection and the selection of Sri Rakesh Kumar Pandey were ad hoc in nature. The question is whether his appointment comes within the exception carved out of Sub-section (1) of Section 16. There is no need to refer to other provisions except Section 18, as they have no application in this case. Sri Radhey Shyam, learned Counsel for the Petitioner candidly stated that the appointment of the Petitioner was not u/s 18, but he urged that the appointment of the Petitioner was made under the U P Secondary Education Services Commission (Removal of Difficulties)(Second) Order, 1981 (hereinafter referred to as the Second Order, 1981. The Legislature visualized that setting up of the Commission might take some time and even when it is constituted it might take some time and even when for starting actual function and, therefore, Section 33 was enacted saving that the State Government may for the purposes of removing any difficulty by a notified order, direct that the provisions of this Act shall, during such period, as may be specified in the order have effect subject to adaptations whether by way of modification, addition or omission, as it may be deemed to be necessary or expedient. It was provided that no such order shall be made after two years from the date of commencement of the Act. The limit of two years was put because the Legislature thought that things will be stabilised within a period of two years. Sub-section (2) of Section 33 says that every order made under Sub-section (1) shall be laid before both the houses of State Legislature. It is, therefore, clear that the difficulties Removal Order passed u/s 33 will have the force of law and that would be read as a parallel legislation to the main Act subject to adaptations by way of modification, addition or omission. No doubt, if the appointments of the Petitioner and of the Respondent No. 5 are covered by the aforesaid order, then they will be deemed to have been made under the Act, 1982 and could not be said to be void u/s 16(2).

7. But then the question is whether any appointment could have been made under the Second Order of 1981 on ad hoc basis without notifying the vacancies to the Commission, which, admittedly, have not been notified. Section 2 Clause (1) of Second Order, 1981 states that if short term vacancy in the post of a teacher caused by grant of leave to him or on account of such suspension duly approved by the District Inspector of Schools or otherwise, shall be filled in by the Management by promotion of the permanent senior most teacher of the institution in the next lower grade. Clause (2) of Section 2 says that where any vacancy referred to in Clause (1) cannot be filled in by promotion due to non-

availability of a teacher in the next lower grade in the institution, it shall be filled in by direct recruitment in the manner laid down in Clause (3). It is manifest from Section 2 Clause (3) that Second Order, 1981 refers to an appointment against a short term vacancy in the post of a teacher caused by grant of leave or on account of suspension or otherwise. The question is that meaning can be assigned to the word "otherwise" occurring in Clause (1) of Section 2. Does it refer to the vacancies caused on account of retirement and promotion of an L.T. Grade teacher to the post of lecturer, which are of permanent nature or the substantive vacancies in contradistinction to a short term vacancy arising by grant of leave or on account of suspension of a teacher.? The term "otherwise" occurring in Clause (1) will take its colour from the preceding words which denote the vacancies of temporary character. Applying the principle of ejusdem generis, Clause (1) can be construed that it applies only to the vacancies of temporary nature and not to the vacancies of permanent character. The word "otherwise" cannot be given widest amplitude embracing within it the vacancies of permanent substantive character. As it will take its shade from the preceding words, it has to be read in the narrowest sense that it refers to the vacancies only of temporary nature arising in the manner either than by grant of leave or suspension. In no case, can it refer to the vacancies arising on account of retirement and promotions of L.T. Grade teachers which being substantive or permanent in character, are outside the scope of Clause (1) of Section 2 of the Second Order, 1981 and, therefore, in no case can the appointment of the Petitioner against a substantive vacancy be said to have been made under the Second Order, 1981. His appointment not being covered by the Second Order, 1981 and that having not been, admittedly made u/s 18 of the Act 1982, is clearly hit by the revisions of Section 16 as it was not made on the recommendation of the Commission and is, therefore, void under Sub-section (2) of Section 16. He, therefore, is not entitled to a writ in the nature of mandamus directing the Respondents to pay his salary. His appointment being void, there is no obligation on the authorities to pay the salary to him under the law.

8. Sri Radhey Shyam, counsel for the Petitioner relying on the case of Kumari Nishi Bhargava v. Deputy Director of Education Agra Region, Agra 1987 UP LB EC 415, argued that the difficulties Removal order continued to be parallel legislation to the Act, 1982 and that it was for the Management either to notify the vacancy to the Commission and there by attracting the application of Section 18 of the Act or make an ad hoc appointment without notifying the vacancy to the Commission, under the Difficulties Removal Order. From the aforementioned scheme of the Act, 1982, it is reiterated that the Second Order 1981 though continued to operate in the area not covered by the Act, 1982 yet no appointment could have been made thereunder against the substantive vacancies under Clause (1) of Section 2 which refers to the filling up of short term vacancies only. The ratio of Kumari Nishi Bhargava's case is entirely different and that does not lay down a rule that under Second order, 1981 the Management is free to make ad hoc appointment against substantive vacancies

without notifying them to the Commission. The question in Kumari Nishi Bhargava's case for consideration before a Bench of this Court was whether an ad hoc teacher appointed after November, 1982 and before January, 1985 is entitled to the benefit of regularisation u/s 33-A? A class of ad hoc teachers appointed after November, 1982 but before June, 1985 claimed the benefit of regularisation and it was claimed in the counter affidavit that such appointments be deemed to be ad hoc appointments u/s 18. Rejecting such contention, this Court said that Section 18(1) could operate only if the vacancy had been notified and that in absence of notification of the vacancy or of a provision providing for deeming a vacancy to be notified on ad hoc appointment could be deemed to be u/s 18(1)(a). Eventually, this Court held:

Therefore, the argument that the appointments under Orders should be deemed to have been made u/s 18, does not appear to be correct.

Ratio of Kumari Nishi Bhargava's case is that unless the vacancy is notified to the commission, Section 18 will not come into operation. This ratio cannot be doubted but following it, it has to be held that the appointment of the Petitioner or the case of the Respondent No. 5 was not covered by Section 18, inasmuch as the vacancy was not notified by the Management to the Commission. Without notifying the vacancy to the Commission, no right was vested in the Management to make selections of the teachers either in the first instance or on the second occasion. This aspect of the law was completely overlooked by the Respondent No. 2 while upholding the contention of the Respondent No. 5 by the impugned order, Annexure 6 to the petition. Applying the same reasoning to both the Petitioner as well as the Respondent No. 5, it has to be held that neither having been selected in accordance with the law was entitled to be appointed and, therefore, the Respondent No. 2 was not right in directing the Respondent No. 4 by the impugned order to appoint the Respondent No. 5.

9. This is a singular case where the Management in complete defiance of law made selection twice of L.T. Grade teachers. It is not understandable as to why second attempt was made by the Management without bringing any improvement in the legal position or without complying with the mandatory provisions of law before making selection on the second occasion. Second selection equally suffered from legal infirmities as the first one, inasmuch as the management was wholly incompetent to make any ad hoc appointment against substantive vacancies without notifying them to the Commission.

10. In the result, the writ petition is allowed in part; the impugned order dated 18th July, 1990 Annexure 6 to the petition, passed by the Respondent No. 2 is quashed and the writ petition fails, in so far as it relates to the second prayer of the Petitioner. No order as to costs.