
(2002) 09 AHC CK 0078
In the Allahabad High Court
Case No : Special Appeal No. 32 of 1998

Laxmi Shanker Misra

APPELLANT

Vs

District Inspector of Schools and Others

RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 — Section 18
Uttar Pradesh Secondary Education Services Commission Regulations, 1995 — Regulation 5
Uttar Pradesh Secondary Education Services Commission Rules, 1983 — Rule 9

Citation : (2002) 5 AWC 4349

Hon'ble Judges : S.K. Sen, C.J; Ashok Bhushan, J

Bench : Division Bench

Advocate : N.A. Khan and M.K. Tewari, for the Appellant; Ranvijai Singh, A.K. Mishra, D.N. Mishra, S.N. Mishra and S.C., for the Respondent

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Heard Chaudhary N. A. Khan, advocate appearing for the Appellant and Sri Ranvijai Singh, learned standing counsel appearing for Respondent No. 1.

2. This special appeal has been filed by the Appellant against the judgment and order dated 16th December, 1997 passed by learned single Judge in Writ Petition No. 15741 of 1988, Laxmi Shanker Mishra v. District Inspector of Schools, Allahabad and Ors. by which judgment, the writ petition filed by the Appellant was dismissed.

3. Facts of the case giving rise to this special appeal, briefly stated, are ; Lal Bahadur Shastri Inter College, Dharwara, Allahabad (hereinafter referred to as institution) is a recognised institution under the U.P. Intermediate Education Act, 1921, receiving aid from the State Government. The institution is also governed by U.P. Secondary Education Service Selection Board Act, 1982 (hereinafter

referred to as 1982 Act). Aditya Prasad Nautiyal, who was working as Lecturer, Sanskrit, retired on 30th June, 1983, causing a substantive vacancy on the post of lecturer, Sanskrit. The Appellant was working as confirmed L.T. grade teacher in the institution appointed with effect from 8th July, 1968. The Appellant who is Master of Art with Sanskrit claimed promotion on the post of lecturer caused due to retirement of Aditya Prasad Nautiyal. The Committee of Management passed a resolution on 4th September, 1983, promoting the Appellant as lecturer, Sanskrit. The resolution was also passed to the effect that approval of ad hoc promotion of the Petitioner be obtained from District Inspector of Schools in accordance with the provisions of Removal of Difficulties Order. It appears that resolution was forwarded to the District Inspector of Schools. The District Inspector of Schools did not grant any approval to said promotion but raised an objection vide letter dated 14th May, 1987, to the effect that according to Rule, promotion is made under 40% quota. It was stated that the resolution of the Committee of Management for filling the post by promotion appears to be in excess of 40% promotion quota. The details were asked by the District Inspector of Schools as to which lecturers are working under promotion quota and which lecturers are working under direct recruitment. The Committee of Management in between passed a resolution for giving ad hoc appointment to Respondent No. 4, Shyam Narain Pandey, as Lecturer, Sanskrit on 24th January, 1987. The information of ad hoc direct recruitment of Respondent No. 4 was sent to the District Inspector of Schools vide letter dated 24th January, 1987, intimating that ad hoc appointment of Respondent No. 3 has been made u/s 18 of U.P. Act No. 5 of 1982 who has already been appointed on 1st November, 1986 which may be approved. The District Inspector of Schools by an order dated 24th May, 1988, approved the ad hoc appointment of Respondent No. 4 u/s 18 of U.P. Act No. 5 of 1982 for the current academic session upto 20th May, 1988. The Appellant filed a writ petition giving rise to this special appeal challenging the order dated 24th May, 1988, passed by District Inspector of Schools. In the writ petition, the Appellant prayed for a writ of mandamus directing the Respondents not to interfere with the working of the Appellant as lecturer, Sanskrit and also a mandamus for payment of salary. By prayer No. iv it was claimed that mandamus be issued to Secondary Education Service Commission, Allahabad to promote the Petitioner-Appellant on the post of Lecturer in Sanskrit on regular basis under 40% quota. In the aforesaid writ petition, counter-affidavit was filed by the Management as well as Respondent No. 4, Shyam Narain Pandey including supplementary counter-affidavits and supplementary rejoinder-affidavits. The writ petition was dismissed by learned single Judge vide its judgment and order dated 16th December, 1997, against which the present special appeal has been filed.

4. Learned single Judge, while dismissing the writ petition of the Appellant, recorded following findings :

(i) 40% promotion quota in the institution was already complete and the post which fell vacant due to retirement of Aditya Prasad Nautiyal on 30th June, 1983

was not under 40% promotion quota, hence the Appellant could not have been promoted as Lecturer Sanskrit.

(ii) There is nothing on the record to indicate that the resolution dated 4th September, 1983, was adopted after complying with the mandatory requirement of notifying the substantive vacancy to the Commission. The first intimation to the District Inspector of Schools appears to have been made on 20th March, 1987. The Petitioner was never appointed even on ad hoc basis as lecturer on the vacancy caused due to retirement of Aditya Prasad Nautiyal. He was simply deputed to take up the Sanskrit subject in Classes XI and XII prior to 15th June, 1987.

5. The counsel for the Appellant challenging the judgment of learned single Judge raised following submissions in support of this appeal :

(i) For ad hoc promotion as lecturer Sanskrit 40% quota was not to be looked into and all the posts in the institution including the post of lecturer Sanskrit was to be filled up only by ad hoc promotion as required by provisions of U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1981 and the issue is fully covered by the Full Bench judgment of this Court in *Km. Radha Raizada and Ors. v. Committee of Management Vidyawati Darbari Girls Inter College and Ors.* 1994 ALJ 1077.

(ii) The ad hoc appointment of Respondent No. 4 which was made by direct recruitment was void and contrary to the law laid down by Full Bench in *Km. Radha Raizada's* case (*supra*).

(iii) The Appellant having already given promotion by resolution dated 4th September, 1983, the post was not vacant to make any ad hoc appointment by direct recruitment.

6. Sri Ranvijai Singh, learned standing counsel, opposing the above submissions of counsel for the Appellant, has submitted that promotion could only be made against 40% vacancies of lecturer. 40% promotion quota in the lecturer grade being already filled up, Appellant has no right to be promoted. Learned standing counsel submitted that in view of the fact that promotion quota being already filled up no error was committed by the Respondents in making ad hoc appointment of Respondent No. 4 by direct recruitment.

7. We have heard the submissions of both the counsel and perused the records including the record of the writ petition. There is no dispute of facts between the parties. The submissions raised by counsel for the Appellant being interrelated are being considered together.

8. Before proceeding to consider relevant submissions of counsel for the parties, it is appropriate to look into the pleading and foundation which has been laid by the Appellant in the writ petition for his claim. It was stated in paragraph 4 of the writ petition that Petitioner was appointed as L.T. grade teacher on 8th July, 1968 and was confirmed on 8th July, 1969. In paragraph 5 of the writ petition, it was

claimed that Petitioner is senior most Assistant Teacher in L.T. grade with M.A. Sanskrit. The seniority list was enclosed as Annexure-1 to the writ petition which shows that the name of Petitioner is at Serial No. 2, however, the person at Serial No. 1 is M.A. in Hindi and hence, the Petitioner was senior most L.T. grade teacher with M.A. in Sanskrit. In paragraphs 6 and 7 of the petition, it was stated that there were six posts of lecturers in the institution and two posts of lecturer come under 40% quota and are to be filled up by promotion. In paragraph 10 of the writ petition, it was stated that resolution was passed by Committee of Management on 4th September, 1983, promoting the Petitioner on the post of lecturer in Sanskrit under Removal of Difficulties Order, 1981-82. It was stated that Committee of Management authorised the Manager to obtain approval of District Inspector of Schools, Allahabad. It was stated that with effect from 4th September, 1983, the Petitioner was working as lecturer in Sanskrit. It was claimed in paragraphs 13 and 14 of the writ petition that Manager sent reminders dated 19th March, 1987 and 15th June, 1987 to the U.P. Secondary Education Service Commission, U.P., Allahabad through the District Inspector of Schools. In paragraph 17 of the writ petition, it was stated that post of lecturer in Sanskrit has been filled up by promotion of the Petitioner under Removal of Difficulties Order, 1981-82. The approval order dated 24th May, 1988, giving approval to ad hoc appointment of Respondent No. 4 was challenged in the writ petition. Copy of the resolution of Committee of Management dated 4th September, 1983, was enclosed as Annexure-2 to the writ petition. The said resolution unanimously resolved that Manager may send all relevant papers to the District Inspector of Schools, Allahabad for approval of ad hoc promotion of the Petitioner under Removal of Difficulties Order within one week. Annexure-3 to the writ petition is claimed to be letter by Manager to the U.P. Secondary Education Service Commission for approving promotion of the Petitioner under 40% quota.

9. In the counter-affidavit filed by the Manager, Kedar Nath Tripathi, it was admitted that resolution was passed on 4th September, 1983, for promotion of the Petitioner on the post of lecturer Sanskrit but it was claimed in paragraph 13 of the counter-affidavit that said resolution was by mistake since vacant post was not a post within 40% promotion quota. It was stated that 40% promotion quota was already filled up since Radhey Krishan Pandey and Shyam Bihari Sharma have already been promoted under 40% quota. Letters dated 19th March, 1987 and 15th June, 1987, alleged to be written by Manager was denied. The resolution dated 24th January, 1987 and the letter dated 24th January, 1987, were claimed to have been sent by the Manager and it was stated that Respondent No. 4 has also worked as lecturer, Sanskrit. The order of District Inspector of Schools dated 24th May, 1988, was defended. It has been stated that Committee of Management has further passed resolutions on 15th May, 1988 and 31st July, 1988 continuing Respondent No. 4 as ad hoc lecturer in Sanskrit.

10. From the findings recorded by learned single Judge as extracted above, it is

clear that learned single Judge has held that 40% promotion quota has been filled up since two lecturers, namely, Radhey Krishna Pandey and Sri Shyam Bihari Sharma are already working under promotion quota. Learned single Judge, while recording the aforesaid finding, has considered the relevant materials on the record. The said finding having been recorded after considering the materials on the record, we do not find any error in the said finding. According to Uttar Pradesh Secondary Education Service Commission Rules, 1983, where any vacancy is to be filled up by promotion, all teachers working in L.T. or C.T. grade, who possess the minimum qualifications shall be considered for promotion to the lecturer or L.T. grade. Under Chapter II Regulation 5, as it existed at the relevant time, 40% posts of lecturer were required to be filled up by promotion. In view of the finding that 40% quota was filled up, the Appellant has no claim for substantive promotion as lecturer, Sanskrit. In view of the aforesaid, the prayer No. iv of the Appellant praying mandamus to Secondary Education Services Commission, Allahabad to promote the Petitioner on the post of lecturer in Sanskrit on regular basis under 40% quota has rightly been refused by learned single Judge.

11. The submission of counsel for the Appellant is to the effect that for ad hoc promotion of the Petitioner as lecturer, Sanskrit, 40% quota was not required to be adhered to and every vacancy in the lecturer grade has to be filled up by ad hoc promotion first and only thereafter, the post can be filled up by direct recruitment. The provisions of U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1981 in paragraph 4 (2) provides as under : "4 (2). Every vacancy in the post of a teacher in lecturer grade may be filled by promotion by the senior-most teacher of the institution in the trained graduate (L.T.) grade."

12. Paragraph 5 sub-para (1) of the said Order, 1981, provides as under : "5 (1) Where any vacancy cannot be filled by promotion under Paragraph 4, the same may be filled by direct recruitment in accordance with Clauses (2) to (5)."

13. The Full Bench in Km. Radha Raizada's case (supra), after considering the provisions of U.P. Act No. 5 of 1982 and the Removal of Difficulties Orders, had laid down that every vacancy in the post of teacher in lecturer grade shall be filled up by promotion of senior most teacher and where any vacancy cannot be filled up by promotion, only then ad hoc appointment by direct recruitment can be resorted to. The Full Bench approved the earlier Division Bench of this Court in Charu Chandra Tiwari Vs. District Inspector of Schools and Others, . Paragraphs 37 and 38 of the Full Bench judgment in Km. Radha Raizada's case (supra) are extracted below :

"37. When a substantive vacancy has been notified to the Commission and duly selected teacher is not available for appointment, controversy has arisen as to whether the management is required to appoint teacher either by direct recruitment or by promotion. The power of ad hoc appointment either by direct recruitment or by promotion can be exercised only when the management has

notified the substantive vacancy to the Commission and the Commission has failed to recommend the name of suitable candidate within one year from the date of such notification or the post of teacher has actually remained vacant for more than two months. Thus, one of the two conditions is sine qua non for enabling the management to exercise the power to appoint a teacher on ad hoc basis, either by promotion or direct recruitment in the institution. If the condition is absent, such power to appoint on ad hoc basis either by promotion or direct recruitment is not available to the Management of the institution. In case the precondition is found to be present, the management is first required to fill up the substantive vacancy by promotion on ad hoc basis from amongst the senior most teachers of the institution. Paragraph 4 of the First Removal of Difficulties Order provides that every vacancy in the posts of teacher in lecturer grade shall be filled up by promotion of the senior-most teacher in the institution in the trained graduate. Similarly, every vacancy in the post of in the trained graduate (grade) is to be filled by promotion by the senior-most teacher of the institution from the trained under-graduate grade (C.T. grade) (now we are not concerned with it since it is reported abolished).

38. Paragraph 5 of the First Removal of Difficulties Order provides that where any vacancy cannot be filled by promotion under paragraph 4 of the Order, same may be filled by direct recruitment. Thus, it is mandatory on the part of the Management to first fill up the vacancy by promotion on the basis of seniority alone. This method has to be resorted to as the teachers are available in the institution and any other method of recruitment may cause disturbance in teaching of the institution which may affect the career of students. Another reason why the vacancy has to be filled by ad hoc appointment by promotion is that it is a short term appointment in the sense that shortly a duly selected teacher would be available for appointment against the said vacancy. So long the posts can be filled under paragraph 4 of the Order by promotion, it is not open to the Management to take resort to the power to appoint ad hoc teacher by direct recruitment under paragraph 5 of the First Removal of Difficulties Order. In *Charu Chandra Tiwari Vs. District Inspector of Schools and Others*, , it was held that the management has to fill the vacancy by ad hoc promotion of a senior-most teacher of the same institution qualified for such appointment and ad hoc appointment through direct recruitment is permissible only in case no such teacher in the institution is available. I am, therefore, of the view that the existing substantive vacancy which has been notified to the Commission and the condition provided u/s 18 of the Act is present, the vacancy has to be filled up firstly by promotion from amongst senior-most of teachers in next lower grade."

14. From the pleadings in the writ petition, as noted above, and the content of the resolution dated 4th September, 1983, it is clear that management has resolved to seek approval of the Petitioner's promotion on ad hoc basis from District Inspector of Schools. Furthermore, the District Inspector of Schools in his letter dated 14th May, 1987, had observed that promotion of the Petitioner appears to be beyond 40% quota of promotion. Rule 9 of U.P. Secondary

Education Service Commission Rules, 1983, which existed at the relevant time provided approval by the Commission of substantive promotion. It is further to be noted that Full Bench in the aforesaid judgment of Km. Radha Raizada's case (supra) had also held that for ad hoc promotion, no approval is required by District Inspector of Schools. The Full Bench held that in case senior-most teacher has not been promoted, adequate power is given to the District Inspector of Schools under the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 to make enquiry in this respect and stop salary. Paragraph 39 of the Full Bench in Km. Radha Raizada's case (supra) is extracted below : "39. There is another aspect of the matter as to whether any approval or prior approval of the District Inspector of Schools is required for ad hoc appointment by promotion or not. Neither the Act nor the provisions of Removal of Difficulties Order provide for such prior approval or approval by the District Inspector of Schools in case of such ad hoc appointment by promotion. There is another reason for not taking approval of the District Inspector of Schools of such appointment because teacher working in the institution is already approved and thus no further or subsequent approved is needed for it and only intimation to the District Inspector of Schools is required to be given regarding such appointment. See Ram Kripal Pandey v. District Inspector of Schools, Faizabad (1989) 2 UPLBEC 98. However, if it is found that senior-most teacher has not been promoted, adequate power is given to the District Inspector of Schools under the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (hereinafter referred to as Payment of Salary Act) to make enquiry in this respect. If found illegal, it goes without saying that he can stop payment of salary to such promotee."

15. From the material on the record, it appears that District Inspector of Schools was under misconception that for ad hoc promotion also, 40% quota has to be looked into and since 40% quota was filled up, there is no occasion for approval of ad hoc promotion of the Petitioner Appellant. Learned single Judge in his judgment has also held that since 40% promotion quota was already filled up, the Petitioner-Appellant was not entitled for appointment as lecturer in Sanskrit on ad hoc basis. Last paragraph of the judgment of learned single Judge clearly suggests that learned single Judge considered and rejected the claim of the Petitioner for promotion on ad hoc basis. Last paragraph of the judgment of learned single Judge impugned in this special appeal is extracted below : "In conclusion, I find that the Petitioner was never appointed and could not have been appointed as a lecturer in Sanskrit on ad hoc basis against the vacancy caused on account of retirement of Aditya Prasad Nautiyal on 30th June, 1983. The Petitioner, therefore, is not entitled to any reliefs claimed by him. The petition is devoid of any merit and substance and is accordingly dismissed. Interim order passed in the present petition stands vacated."

16. In view of the law laid down by Full Bench of this Court in Km. Radha Raizada's case (supra), if a qualified teacher is available for promotion, the post

cannot be filled up by direct recruitment on ad hoc basis. It is not suggested that Petitioner was not qualified for promotion rather his claim was resisted on the ground that 40% quota being filled up, the Petitioner is not entitled for promotion and on that basis Management proceeded to make ad hoc appointment. Management's clear stand in its counter-affidavit to the writ petition was that resolution passed in favour of the Petitioner-Appellant on 4th September, 1983, giving him promotion as lecturer in Sanskrit was under mistake since 40% promotion quota was already filled up. In view of the aforesaid, the ad hoc appointment of Respondent No. 4 by direct recruitment was void and contrary to provisions of Removal of Difficulties Order, 1981 and the law laid down by Full Bench in *Km. Radha Raizada's case* (supra). The District Inspector of Schools who was requested to approve Appellant's promotion on ad hoc basis was under misconception that approval cannot be granted since 40% promotion quota has been filled and in that premises, he proceeded to fill the post by direct recruitment. The order of District Inspector of Schools dated 24th May, 1988, approving the appointment by direct recruitment of Respondent No. 4 cannot be sustained and is hereby quashed.

17. The next question which is to be considered is that in view of the facts of the present case, to what relief the Appellant is entitled. As noted above, ad hoc promotion of the Petitioner did not require any prior approval of the District Inspector of Schools. Learned single Judge has also recorded a finding in the order that there is nothing on the record to prove that requisition was sent to the District Inspector of Schools before 4th September, 1983, on which date resolution was passed in favour of the Appellant. Learned single Judge has found that for the first time, intimation to the District Inspector of Schools was sent on 20th March, 1987. In view of the aforesaid, it will be appropriate that Petitioner will be held entitled for ad hoc promotion from the date when the District Inspector of Schools approved the ad hoc appointment of Respondent No. 4, i.e., 24th May, 1988. In view of the fact that there is dispute of fact as to who functioned during the period as lecturer, it is appropriate that Petitioner-Appellant be treated to be ad hoc lecturer in Sanskrit with effect from 24th May, 1988 but there being dispute regarding working on the post, it is appropriate to direct that Petitioner-Appellant's salary may be fixed in lecturer grade giving benefit of proforma fixation and salary already paid to Respondent No. 4 during the period he worked should also not be recovered from Respondent No. 4 or from the Petitioner-Appellant if he has been paid any salary in lecturer grade. Salary of Appellant in lecturer grade be fixed within a period of one month from the date of receipt of this order and Appellant be paid salary in lecturer's grade from the date of this order.

18. In view of the foregoing discussions, this appeal is partly allowed to the extent as indicated above. Parties shall bear their own costs.