
(2007) 06 AHC CK 0060
In the Allahabad High Court

Madhu Sudan Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 15-06-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 9
Constitution of India, 1950 — Article 226, 227
Specific Relief Act, 1963 — Section 38, 41

Citation : (2007) 3 UPLBEC 115

Hon'ble Judges : V.K. Shukla, J

Bench : Single Bench

Final Decision : Allowed

Judgement

V.K. Shukla, J.—Petitioner Madhu Sudan Singh, Assistant Teacher in L.T. Grade in Ram Surat Singh Inter College, Tarighat, District Ghazipur, has approached "this Court for following relief:

- (a) Issue a writ, order or direction in the nature of mandamus directing the respondents to consider the promotion of the petitioner on the post of Lecturer in History without influencing order passed by Civil Judge, (S.D.) Ghazipur in Suit No. 349 of 1995.
- (b) Issue a writ, order or direction in the nature of mandamus directing the respondents not to allow the respondent No. 5 to continue on the post of Lecturer in History in the Institution.
- (c) Issue such other writ, order or direction which this Hon"ble Court deem fit and proper under the facts and circumstances of the case.
- (d) award cost of the writ petition to the petitioner.

2. Brief background of the facts giving rise to instant writ petition is that in the District of Ghazipur there is Ram Surat Singh Inter College, Tarighat, District Ghazipur. Said institution as its name suggests engaged in imparting education up

to Intermediat level. Affairs of the said institution is to be strictly managed in consonance of the provision of U.P. Act No. II of 1921. Said institution is in grant in aid list of the State Government and the provision of U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 are ah fully applicable to the said institution. After enforcement of U.R. Act No. V of 1982 selection and appointment on the post Principal, Lecturer and L.T. Grade teachers is to be made strict as per the provisions as contained in U.P. Act No. V of 1982 an the Rules framed thereunder as well as Removal of Difficulties Order, which were prevalent at the said point of time. In the institution concerned petitioner had been appointed as C.T. Grade teacher and thereafter was promoted as L.T. Grade teacher and since then petitioner has been performing and discharging duties as L.T. Grade teacher. Four posts of Lecturers have been sanctioned in the institution concerned on 08th September, 1983 by the order passed by Director of Education and while sanctioning aforesaid posts of Lecturer categorical mention was made by the Director of Education that post of Lecturer in English shall be filled up by way of direct recruitment and the post of Lecturer in History, Economics and Sociology shall be filled up by way of promotion from amongst teachers who had been in L.T. Grade. Out of four posts which were there, Committee of Management proceeded to fill up one post by promoting Sri Ram Srish Singh as Lecturer in History and Sri Ram Ji Prasad was promoted as Lecturer in Sociology. One Jitendra Singh was appointed by direct recruitment as Lecturer in English and Kanhaiya Dubey was appointed as Lecturer in Economics by way of promotion. District Inspector of Schools did not accord approval to the promotion of Ram Srish Singh as Lecturer in History on the pretext that post in question had already been lapsed and against the said Order 03.07.1992 passed by District Inspector of Schools Sri Ram Srish Singh preferred appeal before Deputy Director of Education, Varanasi which was entertained and order dated 17.03.1997 has been passed approving the promotion of Sri Ram Srish Singh and for making payment of salary. One Jwala Prasad who was also claiming promotion on the post of Lecturer in History challenged the said order dated 17.03.1997 by preferring Civil Misc. Writ Petition No. 1049 of 1997 wherein interim order was passed and operation of the order dated 17.03.1997 has been stayed. Said writ petition as on date stand dismissed. One Nagesh Kumar Singh Respondent No. 5 of present writ petition claims that vacancy of lecturer in History was published on 10.09.1992 and he applied and appeared before the Selection Committee and he was ultimately selected as Lecturer in History and he joined on 28.12.1992. Thereafter entire papers had been transmitted to District Inspector of Schools for according financial approval and repeated request was made but no order has been passed. As there was complete inaction on the part of the District Inspector of Schools, in this background Civil Suit No. 349 of 1995 was filed in the Court of Civil 3udge (Senior Division), Ghazipur. In the said suit after hearing the parties on 17.01.1997 injunction order was passed directing no interference in the functioning of Nagesh Kumar Singh as Lecturer in History and payment of salary. Against the said order of Civil Judge, Appeal No. 5 of 1997 was preferred and

therein no interim order was passed. Contempt proceedings under Order 39 Rule 2A were initiated and there after in the threat of action in contempt matter as per the opinion of D.G.C (Civil) Sri Haridwar Ram dated 12.12.2001. Thereafter matter has been referred to Director of Education (Madhymik) and thereafter to State Government and then on 06.08.2002 Special Secretary Education directed the Director of Education as well as District Inspector of Schools to make payment of salary as order of Court had been subsisting and thereafter salary was ensured to Nagesh Kumar Singh after financial approval was accorded on 13.11.2002. In this background Nagesh Kumar Singh has tried to submit that his appointment is valid and he has rightly been paid arrears of salary also from 29.03.1992 to 30.08.2002. Petitioner has contended that Sri Ram Shirsh Singh who was promoted as Lecturer in History was promoted as Adhoc Principal by virtue of being senior most teacher in the institution in the year 2001 and he retired on 20.06.2006 and thereafter Civil Misc. Writ Petition No. 14049 of 1997 has been dismissed as such post of Lecturer in History has substantively fallen vacant qua the same he is entitled for the promotion, as such his claim is liable to be considered but on account of passing of order of injunction passed in Civil Suit authorities are proceeding to adjust Nagesh Kumar Singh on the said post of Lecturer in History instead of considering the claim of the petitioner. At this juncture present writ petition has been filed.

3. On presentation of the present writ petition this Court passed following order:

Petitioner is directed to implead Civil Judge, Senior Division, Ghazipur as respondent No. 6 during the course of the day.

Learned Standing counsel represents respondent Nos. 1 to 3. A copy of the writ petition may be served upon Sri K.R. Sirohi, Advocate who represents newly added respondent No. 6 within two days.

Issue notice to respondent Nos. 4 and 5 fixing 23rd March, 2007 as the date for appearance.

Petitioner to take steps within a week.

All the respondents may file counter affidavit by the next date fixed.

List on the date fixed.

It is contended that Original Suit No. 349 of 1995 filed by Sri Nagesh Kumar Singh is legally not maintainable for following reasons:

(a) a decree of permanent injunction for being permitted to work as Lecturer in a recognized intermediate College and for no interference being placed in that regard, cannot be granted unless relief of declaration qua appointment being legal, valid and in accordance with law has been prayed for.

(b) Provisions of U.P. Intermediate Education Act, 1921 and U.P. Secondary Education Services Selection Board Act, 1982 are self contained and appropriate remedy is provided therein to the teachers qua grievance in respect of adhoc/

regular appointment on the post of Lecturer and therefore, suit is impliedly barred in view of Section 9 of the Code of Civil Procedure.

Learned Counsel for the petitioner submits that the temporary injunction granted by the Trial Court in the said suit is nullity being without jurisdiction and therefore, is liable to be ignored. It is further pointed out that the vacancy on the post of Lecturer (History) was caused in the institution on 30th June, 2006 with the retirement of Ram Shri Singh and therefore, the rights of the petitioner for being promoted against said vacancy caused in the year 2006 cannot be jeopardised in any manner by the injunction granted by the Trial Court in Original Suit No. 349 of 1995 on 17th January, 1997.

Learned Counsel for the petitioner on instructions received, lastly submits that because of such injunction the District Inspector of Schools, Ghazipur has released arrears of salary to the tune of Rs. 7,00,000 (rupees seven lacs only) in favour of respondent No. 5. In view of the said statement, an investigation is required to be made by this, inasmuch as public money cannot be permitted to be siphoned on the basis of injunction granted by the Trial Court which prima facie appears to be without jurisdiction.

Sri K.R. Sirohi, learned Counsel for respondent No. 6 may also file counter affidavit with regard to the maintainability of Original Suit No. 349 of 1995.

In the counter affidavit to be filed by the District Inspector of Schools, Ghazipur it shall be indicated as to how arrears of salary has been released in favour of the respondent No. 5 when there was only one post of Lecturer (History) created in the institution and one Sri Ram Shri Singh was already working against the said post, and was being paid salary admissible to the post of Lecturer.

Let the District Inspector of Schools, Ghazipur remain present before this Court with all original records pertaining to the payment of salary to the respondent No. 5 on the next date fixed.

It may also be clarified that in case the Court comes to the conclusion that payment of salary to two persons against one post of Lecturer (History) has been made by the District Inspector of Schools, Ghazipur the Court may proceed to direct that the double payment so made be recovered from the District Inspector of Schools through his personal assets.

In the totality of circumstances as noticed herein above, petitioner has made out a prima facie case for grant of an interim order.

Till the next date of listing respondent No. 5 shall not be paid salary without the leave of the Court.

4. Pursuant to directives issued by this Court, counter affidavit has been filed on behalf of District Inspector of Schools, and on behalf of contesting respondent No. 5. To both the counter affidavit, rejoinder affidavit has been filed. Apart from this original record of Original Suit No. 349 of 1995 has also been summoned

and concerned Civil judge Sri K.M.L. Srivastava, who had passed injunction order has also appeared in the person.

5. After pleadings mentioned above have been exchanged present writ petition has been taken up with the consent of the parties for final hearing and disposal.

6. Sri R.C. Dwivedi, learned Counsel for the petitioner contended with vehemence that Original Suit No. 349 of 1995 filed by Nagesh Kumar Singh for permanent injunction is not legally maintainable as decree of permanent injunction for being permitted to work as Lecturer in a recognized intermediate College and for no interference being placed in that regard, cannot be granted unless relief of declaration qua appointment being legal, valid and in accordance with law has been prayed for and further provisions of U.P. Intermediate Education Act, 1921 and U.P. Secondary Education Services Selection Board Act, 1982 are self contained and appropriate remedy is provided therein to the teachers qua grievance in respect of adhoc/regular appointment on the post of Lecturer and therefore, suit is impliedly barred and further temporary injunction was nullity being without jurisdiction and as such this Court in exercise of its power vested under Article 227 of the Constitution of India shall quash the entire proceedings as appointment of Nagesh Kumar Singh is void on the face of it. and directives be issued for recovery of the amount which has been illegally paid to Nagesh Kumar Singh respondent No. 5 and further respondents be directed to consider the claim of the petitioner for promotion strictly in consonance with the provisions of U.P. Secondary Education Services Selection Commission Rules 1998.

7. Sri Ashok Khare, Senior Advocate, assisted by Sri B.K. Singh Raghwanishi appearing for Nagesh Kumar Singh, respondent No. 5 on the other hand contended that Original Suit No. 349 of 1995 was fully competent and maintainable and further in the present case against the said order of grant of injunction Appeal has been filed wherein no order have been passed, as such there is no infirmity whatsoever in the proceedings undertaken and power under Article 227 of the Constitution of India cannot be exercised in the present case as appointment of Nagesh Kumar Singh is valid and as he has worked no directives for refund of amount be passed.

8. Sri K.R. Sirohi, appearing on behalf of concerned judicial Officer contended that this may be the case of an error in the judgment but same should not be necessarily understood to be exercised on extraneous consideration.

9. Learned Standing counsel on the other hand contended that in the present case that they have merely complied with the injunction order and as far as validity of the appointment is concerned at no point of time same has been examined, however in given fact has appointment is clearly dehors the provision.

10. After respective arguments have been advanced first question to be adverted to is as to whether on the date Committee of Management of the institution proceeded to make adhoc appointment of Nagesh Kumar Singh against the

substantive vacancy of Lecturer in History had it any authority to make appointment against substantive vacancies. Full Bench of this Court in the Case of Radha Raizada v. Committee of Management, V.D.G I. College, and Ors. reported in 1994 (3) UPLBEC 1551 has clearly dealt with power and procedure of ad-hoc appointment of teacher and Principal, either by promotion or by way of direct recruitment during the period beginning from 31.07.1981 to 13.07.1992, described as first stage in the said judgment. Second stage starting from July 14,1992 up to 06.08.1993. Third stage 07.08.1993 onwards. Qua first stage i.e. 31.07.1981 to 13.07.1992 in respect of substantive and short term vacancies have to be filled in by promotion. If it is not possible to fill the said vacancy by way of promotion, on account of non-availability of teacher possessing requisite qualification the same can be filled by direct recruitment in accordance with First Removal of Difficulties Order in the case of substantive vacancy and in accordance with second order in case of sort term vacancy. Qua second stage i.e. from 14.07.1992 to 07.08.1993, post of Principal and Headmaster has to be filled up by promotion only substantive vacancy on the post of teacher has to be filled in accordance with amended Section 18 and the short term vacancy in the same as in the first stage. Third stage 07.08.1993 onwards appointment on substantive vacancy can be made under First Removal of Difficulties Order, following the procedure prescribed for first stage short term vacancy can be filled in the same manner as in first stage. Relevant paragraphs 26 to 42, 47 to 52 which deals with ad-hoc appointment by promotion and ad-hoc appointment of teacher by direct recruitment, in respect of substantive vacancies, is being looked into.

26. As noticed earlier the Act which replaced the U.P. Ordinance 8 of 1981, came into force w. e f. 14-7-81. The object and purpose of Act is to provide teachers selected through the instrumentality of Commission on or the Board as the case may be in the institutions with a view to raised the standard of education. However Section 18 of the Act provides appointment of teachers in the institutions purely on ad hoc basis on certain condition which I shall notice at appropriate place. Since after coming into force of the Ordinance which was subsequently replaced by the Act, the Commission or the Board was not constituted, therefore, certain difficulties arose in providing teachers who were urgently required in the institutions and as such the State Government by a notification issued first oval of Difficulties Order by notification dated 31-7-81. This first Removal of Difficulties Order provides for ad hoc appointment of teachers either by direct recruitment or by promotion till the appointment of duly selected teachers or Principals by the Commission, By a notification dated 11-9-1981 the State Government issue a Second Removal of Difficulties order. This Second Removal of Difficulties Order provides for appointment against the short term vacancies. Subsequently, by a. notification dated 30-1-1982, Government issued Third Removal of Difficulties Order. By this order amendments were made in certain paragraphs of the First Removal of Difficulties Order.

27. In short it was made open to the management of the institutions make ad hoc appointment of teachers against substantive vacancies either promotion or by direct recruitment after following the procedure laid down in the Removal of Difficulties Order issued u/s 33 of the Act by the State Government. Subsequently by U.P. Act No. 24 of 1992, Section 18 of the Act was amended and was substituted by new Section 18. This amendment came into force on 14-7-1992. The substituted Section 18 provided the manner and method of ad hoc appointment of a teacher in the Institutions either by promotion or direct recruitment. A Selection Committee for selection of candidates for ad hoc appointment was required to be constituted consisting of District Inspector of Schools Basic Shiksha Adhikari and the District Inspectress of Girls Schools. In pith and substance the only departure from earlier procedure was that the ad hoc appointment direct recruitment was required to be done by a Selection Committee consisting of three officials. Thereafter U.P. legislature passed an Act known as U.P. Secondary Education Service Commission and Selection Board Amendment Act 1992 being U. P. Act No. 1 of 1993. This Act was published in the U.P. Gazette on 6th January 1993. Sub-section 2 of Section 1 of this Act provided that the Act shall come into force on such date as the State Government may by notification appoint in this behalf and different dates may be, appointed for different provisions. This amendment Act brought several amendments in the Principal Act. Since I am not concerned with all the provisions of this amendment Act, I will notice only those provisions which are relevant for the purpose of my answer to question referred. By Section II of U.P. Act No I of 1993 the reference of Section 18 occurring in Section 16 of the Act was omitted and Section 13 of the amending Act further provides that Section 18 of the Principal Act shall be omitted. The State Government by a notification dated 7-8-93 in exercise of its power under Sub-section (2) of Section 1 of U.P. Act No. 1 of 1993 appointed 7-8-93 as the date on which the said Act except Section 13 shall come into force. The result of this notification, is that although Section 18 is still continuing, Section 16 is not subject to the provision Section 18 of the Principal Act. Thus any appointment made u/s 18 is void under Sub-section (2) of Section 16 of the Act. Thus, no ad-hoc appointment can now be made u/s 18 of the Act which although omitted by U.P. Act No. 1 of 1993 but still continuing.

28. In view of these different legislative changes brought in the Act it is necessary to examine the power of ad hoc appointment or by promotion and the method and manner of such appointment at different point of legislative changes in the Act. This period can be split in three stages; (1) period beginning from 31 July, 1981 to 13-7-1992 after which date U.P. Act No. 24 of 1992 period beginning from 14-7-1992 to 6th of August, 1993 and (3) period beginning from 7th of August, 1993 when U.P. Act No 1 of 1993 was enforced uptill date (hereinafter referred to as first, second and third respectively)

FIRST STAGE:,

29. First, I will take up and consider the power and procedure of ad hoc appointment of teacher or Principal either by promotion or by direct recruitment during the period beginning from 31st July 1992 after which date U.P. Act No. 24 of 1992 came into force.

30. As stated earlier the purpose of the Act is to appoint teacher in the institutions to be selected by the Commission of the Board as the case may be. Section 16 of the Act provides that notwithstanding anything to the contrary contained in the Intermediate Education Act but subject to the provisions of Sections 18, 21-B, 21-C, 21-D, 33 and 33-A of the Act, every appointment of teacher shall on or after 10th July, 1991 be made by the management only on the recommendation of the Commission. Its Sub-section (2) further provides that every appointment of a teacher in contravention of the provisions of Sub-section (1) shall be void. However this Section 18 of the Act. Original Section 18 provided that where management has notified a vacancy to the Commission (a) the Commission has failed to recommended the name of any suitable candidate or (b) the post of 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 person possessing qualifications prescribed under Intermediate Education Act or the regulation made there-under. However, this Section 18 did not provide the procedure to be followed for appointment of ad hoc teacher either by promotion or by direct recruitment. Since the Commission or the Board was not constituted, therefore the difficulty arose in making available teachers in the institutions and as such the Government by notification dated 31-7-1991, 11th September, 1991 and 30th January 1992 issued separately, Removal of Difficulties Orders three Removal of Difficulties Orders know as First, Second and Third Removal of Difficulties Orders.

31. Paragraph 2 of the First Removal of Difficulties Order provides as follows

The Management of an institution may appoint by promotion or by direct recruitment a teacher on purely ad hoc basis in accordance with the provisions of this Order in the case of substantive vacancy caused by death, retirement, resignation or otherwise.

32. Paragraph 3 of the First Removal of Difficulties Order provides as

Every promotion of an ad hoc teacher under Para 2 shall cease to have effect when a candidate recommended by the Commission or the Board as the case may be joint the post.

33. Paragraph 4 of the First Removal of Difficulties Order provides;

Every vacancy in the post of head of institution may be filled by promotion (a) in the case of an Intermediate College by the senior most teacher of the institution in the lecturer's grade, (b) in the case of High Schools raised to the level of Intermediate College by the Head Master of such High School and (c) in the case

of Junior High School raised to the level of High School by the Head Master or such Junior High School

34. Sub-paragraph (2) of Paragraph 4 of the order further provides that every vacancy in the post of teacher in the lecturers grade may be filled by ion by the senior most teacher of the institution in the trained graduate (grade).

35. Sub-paragraphs (3) and (4) of paragraph 4 of the order are not relevant as we are informed that C.T. Grade has now been abolished.

36. Paragraph 5 of the First Removal of Difficulties Order provided where any vacancy cannot be filled by promotion under paragraph 4 of the order, same may be filled by direct recruitment in accordance with the procedure laid down in Clauses 2 to 5 of paragraph 5 of the order.

37. Second Removal of Difficulties Order provides for ad hoc appointment against the short term vacancy in the posts of teachers caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise. Thus, these provisions show that Section 18 and First Removal of Difficulties Order, both independently empowers the Management of institution to make ad-hoc appointment of teachers in the institution. But Section 18 does not provide the method and manner of such appointment. Whereas Removal of Difficulties orders while empowering the management of the institutions to appoint teachers on ad hoc basis further lay down the procedure of such ad hoc appointment of teachers. In fact Section 18 as well as First Removal of Difficulties Order operate in one field and are part of one integrated integrated Scheme namely for providing ad hoc teachers who are urgently required in the institution. Thus, ad hoc appointment of teacher either u/s 18 or under the provisions of First Removal of Difficulties Orders has to be done in the manner laid down in paragraphs 4 and 5 of the First of Difficulties Order, 1981.

38. Ad hoc appointment by promotion

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 posts 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 by direct recruitment in the institution. If the condition is absent such a power to appoint on ad hoc basis either by promotion or by direct recruitment is not available to the management of the institution. In case the pre-condition 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 teachers in the institution in the trained graduate. Similarly, "ever vacancy in the post of teacher in the trained graduate (grade) is to be filled by promotion by the senior most teacher of the institution from the trained undergraduate Grade C.T. (grade)(Now we are not concerned with its since it is reported abolished).

39. 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 restored 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 reasons 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 v. District Inspector of Schools* 1990 UPLBEC 160, 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. This according to me lays down the correct view of law. I am, therefore, of the view that the existing substantive vacancy which has been notified to the omission 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 teacher in next lower grade.

40. 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 approval 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 and Anr. v. District Inspector of Schools, Faizabad* and Ors. 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 College (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.

Ad hoc appointment of teachers by Direct Recruitment

41. It has already been noticed that Section 18 of the Principal Act provides for power to appoint a teacher purely on ad hoc basis either by promotion or by direct recruitment against the substantive vacancy in the institution when the condition precedent for exercise of powers exit namely that the Management has notified the said vacancy to the Commission in accordance with the provisions of the Act and the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher within one year from the date of such notification of the post of such teacher has actually remained vacant for more than two months. However, since the State Government was alive to the situation that the establishment of the Commission may taken long time and even after it is established, it may take long time to make available the required teacher in institution and as such issue three Removal of Difficulties Orders namely Removal of Difficulties Orders dated 11.9.81. Removal of Difficulties Order dated 30.1.82 and Removal of Difficulties Order dated 14.4.1982. In fact these Removal of Difficulties Orders were issued to remove the difficulties coming in the way of a Management in running the institution in absence of teachers. This power to appoint ad hoc teachers by direct recruitment thus, it available only when pre-conditions mentioned in Section 18 of the Act are satisfied, secondly, the vacancy is substantive vacancy and thirdly the vacancy could not be filled by promotion. Neither the Act nor the Removal of Difficulties Order defines vacancy. However the vacancy has been defined in Rule 2(11) of U.P. Secondary Education Services Commission Rules 1983 "vacancy" means a vacancy arising out as a result of death, retirement, resignation, termination, dismissal, creation of new post or appointment/promotion of the incumbent to any higher post in substantive capacity. Thus, both u/s 18 of the Act and under the Removal of Difficulties Order the Management of an institution is empowered to make ad hoc appointment by direct recruitment, in the manner laid down in paragraph 5 of the First Removal of Difficulties Order only when such vacancy cannot be filled by promotion and for a period till a candidate duly selected by the Commission joins the post. As noticed earlier both Section 18 of the Act and the provision of First Removal of Difficulties Order provide for ad hoc appointment of teacher in the institution, later further providing for method and manner of such appointments are part of one scheme. Scheme being provision for ad hoc appointment of teacher in the absence of duly selected teachers by the Commission. The provisions may be two but the power to appoint is one and the same and therefore, the provisions contained in Section 18 and Removal of Difficulties Orders are to harmonized. It is, therefore, not correct to say that appointment of a teacher on ad hoc basis is either u/s 18 of the Act or under the Removal of Difficulties Orders has to be followed. Paragraph 5 of the First Removal of Difficulties Order provides that the management shall, as soon as may be, inform the District Inspector of Schools shall invite application from the local Employment Exchange and also through public advertisement in at least

two news papers having adequate circulation in Uttar Pradesh. Sub paragraph (3) of Paragraph 5 further provides that every such application shall be addressed to the District Inspector of Schools, Sub paragraph (4) of paragraph 5 of the Removal of Difficulties Order provides that the District Inspector of Schools shall cause the best candidate selected on the basis of quality point specified in Appendix. The complication of quality point may be done by the Retired Government Gazetted Officer, in the personal supervision of the Inspector. Paragraph 6 of the First Removal of Difficulties Order further provides for appointment of such teacher under paragraph 5 who shall possess such essential qualification as laid down in Appendix A referred to in the Regulation 1 of Chapter II of the Regulations made in the Intermediate Education Act.

42. In view of these provisions the ad hoc appointment of a teacher by direct recruitment can be resorted to only when the condition precedent for exercise of such powers as stated in paragraph 18 of the Act are present and only in the manner provided for in paragraph 5 of the Removal of Difficulties Order. This view of mine finds support in a number of decisions namely Rang Bahadur Singh and Ors. v. District Inspector of Schools, Saharanpur 1991 (2) UPLBEC 1079 and Lalta Prasad Yadav and Ors. v. State of U.P. 1998 UPLBEC 345. When a teacher is appointed on ad hoc basis in accordance with the paragraph 5 of the First Removal of Difficulties Order there is further no requirement of approval or prior approval of the District Inspector of Schools for such appointment. However it goes without saying that if a management without following the procedure indicated above makes an ad hoc appointment the District Inspector of Schools possess general power under the Payment of salaries Act to stop payment of salary to such teacher.

47. The Method of Ad hoc Appointment during period between 14-7-1992 to 6-8-1993 of Teacher or Principal of an Institution

Second Stage:

By U.P. Act No 24 of 1992. new Section 18 was substituted in place Section 18 of the Principal Act which is reproduced below:

18. Ad hoc teacher - (I) Where the management vacancy has notified a vacancy to the Commission in accordance with the provision of this Act and the post of such teacher has actually remained vacant for more than two months, the management may appoint by direct recruitment or promotion a teacher, on purely adhoc basis, in the manner hereinafter provided in this Section.

(2) A teacher, other than a Principal or Headmaster." who is to be appointed by direct recruitment, may be appointed on the recommendation of the Selection Committee refer to Sub-section (9).

(3) A teacher, other than a Principal or Headmaster who is to be appointed by promotion, may in the manner prescribed be appointed by promoting the senior most teacher possessing prescribed qualifications-

(a) in the trained graduate's grade, as lecturer, in the case of a vacancy in lecturer's grade;

(b) in the Certificate of Teaching grade, as a teacher in trained graduate's grade, in the case of vacancy

(4) A vacancy in the post of a Principal may be filled by promoting the senior most teacher in the lecturer's grade.

(5) A vacancy in the post of a Headmaster may be filled by promoting the senior most teacher in the trained graduate's grade.

(6) For the purpose of making appointments under Sub-section 2 and (3). the Management shall determine the number of vacancies, as also the number of vacancies to be reserved for candidates belonging to the Scheduled Castes. Tribes and other categories in accordance with rules or the orders issued by the State Government in this behalf, if in determining the vacancies it is found that persons belonging such categories are not holding such number of posts as should have been held by them in accordance with such rules or orders then the vacancies shall be determined that first and every alternative vacancy shall be reserved for the persons of such categories until the required percentage of posts is held by them.

(7) After determining the number of vacancies as provided Sub-section (6) the Management shall within fifteen days from the date of the commencement of the Uttar Pradesh Secondary Education Service Commission and Selection Board (Second Amendment) Act 1992 intimate the vacancies to be filled by recruitment to the District Inspector of Schools. If the management fails to intimate such vacancies within the said of fifteen days the District Inspector of Schools may after verification from such institution or from his own record determine, such Vacancies himself.

(8) The District Inspector of Schools shall, on receipt of intimation of vacancies or as the case may be after determining the vacancies under Sub-section (7). invite applications, from the persons possessing qualifications prescribed under the Intermediate Education Act. 1921 or the regulations made thereunder for ad hoc appointment to the post of teachers, other than Principal or Headmasters in such manner as may be prescribed.

(9)(a) For each district, there shall be a Selection Committee for selection of candidates for adhoc appointment by direct recruitment comprising:

(i) District Inspector of Schools, who shall be the Chairman;

(ii) Basis Shiksha Adhikari;

(III) District Inspectress of Girl's Schools and where there is no such Inspectress, the Principal of the Government Girl's Intermediate College and where there are more than one such College, the senior most Principal of such Colleges and where there is no such College, the Principal of the Government

Girl's Intermediate College as nominated by the State Government.

(b) The Selection Committee constituted under Clause (a) shall make selection of the candidates, prepare a list of the selected candidates, allocate them to the institutions and recommend their names to the Management for appointment under Sub-section (2).

(c) The criteria and procedure for selection of candidates and the manner of preparation of list of selected candidates and their allocation to the institutions shall be such as may be prescribed.

(10) Every appointment of an ad hoc teacher under Sub-section (1), shall cease to have effect from the date when the candidate, recommended by the Commission or the Board wins the post.

(11) The provisions of Section 21-(d) shall, mutatis mutandis, apply to the teachers who are to be appointed under the provisions of this section.

A perusal of this new section would show that it is substantially the same provisions excepting the provision for constitution of Selection Committee selection of candidate for ad hoc appointment in place of giving quality point marks as contained in the First Removal of Difficulties Order. In fact what was contained in the First Removal of difficulties Order has not been brought in the Act, by this amending Act. Thus, the method of ad-hoc appointment by promotion of teacher remained the same as it was during the period 14-7-1981 to 13-7-1992. The method of ad hoc appointment of Principal and Head Master in the institution also remains the same as it was in the period 14-7-1981 to 13-7-1992 (first period). Similarly, the provision in respect of appointment against the short term vacancy also remains the as it was in 14-7-1981 to 13-7-1992. The only change that has been brought by the new Section 18 is in respect of method of ad hoc appointment by direct recruitment. Under Sub-section (8) of Section 18 the District Inspector of Schools on receipt of intimation of vacancy or the case may be after determining the vacancy in Sub-section (7) is required to invite application from the person possessing qualification prescribed in the Intermediate Education Act or the regulations framed thereunder ad hoc appointment to the must of teacher. Under Sub-section (9) of Section 18 a Selection Committee is to be constituted for selection of candidate for adhoc appointment by direct recruitment comprising of District Inspector of Schools as Chairman. Basic Shiksha Adhikari and District Inspectress of Girls Schools. The Section Section so constituted a farther required to make selection of the candidates and prepared a list of selected candidate and allocate them to the institution and recommend their name to the Management for appointment. This K brief the procedure which is required to be undergone where the ad hoc appointment is to be made by the direct recruitment if the ad hoc, appointment by direct recruitment is made under Sub-section (9) of Section 18, no further approval of District Inspector of Schools for such appointment is required.

The method of ad hoc appointment during period beginning from 7-8-93 uptill

date of teachers or Principal in the institution

Third Stage

48. The U.P. Legislature passed the Act known as U.P. Secondary Education Service Commission and Selection Board Amendment Act 1992 being U.P. Act No. 1 of 1993. Sub-section (2) or Section (1) of this Amendment Act provides that Act shall come into force on such date as the State Government may, by notification appoint in his behalf or different dates may be appointed for different provisions. This amendment Act brought several amendments in Principal Act, I am concerned with all the amendments but shall notice only those provisions which are very material for me to the question. Section 16 of the Principal Act provided that subject to the provision of Sections 18, 21-B, 21-C, 21-D, 33, 33-A and 33-B every appointment of a teacher on order after commencement of the Act shall be made by the management only on the recommendation of the Board. Sub-section (2) thereof further provided that any appointment made in contravention of the provisions of Sub-section (1) shall be void. Since Section 16 was subject to Section 18 of the Act, ad-hoc appointment could validly be made u/s 18 of the Act and such appointment would not be void within the meaning of sub-section of the Act. By Section 11 of U. P. Act No. 1 of 1993 new Section 16 has been substituted for Section 16 of the Principal Act. The substituted Section 16 runs as under:

16. Appointment to be made only on the recommendation of the Board: (1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulation made thereunder but subject to the provision of Sections 21-C, 21-D, 33, 33-A and 33-B, every appointment of a teacher shall, on or after the date of commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Act, 1992, be made by the management only on the recommendation of the Board:

Provided that in respect of retrenched, employees, the provisions of Section 16-EE of the Intermediate Education 1921 mutatis mutandis apply:

Provided further that the appointment of a teacher by transfer from the Institution of another, may be made in accordance with the regulations made under Clause (C) of Sub-section (2) of Section 16-G of the Intermediate Education Act, 1921.

(2) Any appointment made in contravention of the provisions Sub-section (1) shall be void.

It is interesting to note that reference of Section 18 in Sub-section (1) of Section 16 has been omitted with the result that Section 16 is no longer subject to Section 18 of the Act. By Section 13 of U.P. Act No. 1 of 1993, Section 18 of Principal Act has been omitted. In exercise of the powers under Sub-section (2) of Section 1 of U.P. Secondary Education Service Commission and Selection Board

(Amendment) Act. 1992 being U.P. Act No. 1 of 1993, the Governor of Uttar Pradesh pleased to appoint 7th August, 1993, as the date on which the said Act except Section 13 thereof shall come into force. The notification dated 7-8-1993 is reproduced below:

In exercise of the powers under Sub-section (2) of Section 1 of the Uttar Pradesh Secondary Education Service Commission and Selection Boards (Amendment) Act. 1992 (U. P. Act No. 1 of 1993) the Governor is pleased to appoint 7th August, 1993 as the date on which the said Act, except Section 13 thereof, shall come into force.

After enforcement of U.P. Act No. 1 of 1993 except Section 13 thereof the situation that emerges is that by new Section 11 of Amendment Act which substituted Section 16 of the Principal Act, has come into force whereas omission of Section 18 from the Principal Act by Section 13 of this amending Act has not been enforced which means Section 18 still continues in the Principal Act. In view of this legislative development a peculiar situation has arisen that new Section 16 which has come into force is no longer subject to Section 18 of the Act which, means that no appointment on adhoc basis can be made u/s 18 of the Act. New Section 16 begins a non-obstanre clause which means in spite of other provision no appointment shall be made except on the recommendation of the Board, where a section begins with a non-obstante clause, it indicates that the provision should prevail despite anything to the contrary in the provisions in the Act. Thus after omission of Section 18 from Section 16 no ad hoc appointment is permissible u/s 18 and if made, would be void Sub-section (2) of Section 16 of the Act. It has not been brought to my notice that First Removal of Difficulties Order 1981 issued by the State Government has either been revoked or rescinded. On the contrary, it was asserted that the said Removal of Difficulties Order is continuing.

49. Now the question for consideration is that if no ad hoc appointment of teacher or Principal can be made u/s 18 of the Act, whether it is permissible to appoint a teacher or Principal on ad hoc basis under the First Removal of Difficulties Order? A perusal of Section 16 would show that Section 16 is still subject to Section 33 of the Act which empowers the State Government to issue Removal of Difficulties Order. Since Removal of Difficulties Orders have been issue under Section-33 of Act, an ad hoc appointment either by direct recruitment or by promotion under the Removal of Difficulties Order would be a valid appointment. While answering question No. (b) I have already held that it is open to State Government to issue Removal of Difficulties Order providing for ad hoc appointment either by promotion or by direct recruitment as this adhoc appointment is not a permanent appointment but a short term appointment which does not confer any right on a teacher or the Principal so appointed. I have further held that the Removal of Difficulties Order which empower for ad hoc appointment either by promotion by direct recruitment does not violate the essential feature of the Act as it only thinkers or smoothen the edges of the Act.

In view this adhoc appointment of teacher or Principal can be made either by promotion or by direct recruitment under the Removal of Difficulties Order issued u/s 33 of the Act. Omission of Section 18 has not yet been enforced with a result the Conditions precedent namely notification of substantive vacancy to the Commission and further the post has remained vacant for more than two months are still there and if these two condition are fulfilled, it only then the management can appoint ad hoc teacher either by promotion or by direct recruitment in accordance with the procedure laid down in the First Removal of Difficulties Order.

50. To sum up the method and procedure of adhoc appointment of teacher either by promotion or by direct recruitment the adhoc appointment or Principal in the institution and the short term vacancy remains the same as it was during the period beginning from commencement of the Act till 13th July, 1992.

51. My answer to the questions framed by us are these:

Answer to Question No (a)

Answer to Question No. (a) so far as it relates to Sub-section (1) and (2) of the Act is in the negative. So far as Sub-section 3 to Section 33 of the Act is concerned, it is in affirmative but not struck down for the reasons given above. Answer to Question No. (b):

Answer to Question No. (b) is in the negative.

Answer to Question No. (c) and (d):

First Stage:

The substantive vacancy in the post of teacher is firstly to be filled by promotion if not available, then by direct recruitment in the manner laid down in paragraph 5 of the First Removal of Difficulties Order. Shortterm appointments are to be made in accordance with the provision of Second Removal of Difficulties Order only after advertising the vacancy in the manner laid down under Sub-paragraph (2) of Paragraph 5 of the First Removal of Difficulties Order in addition to notifying the short term vacancy on the notice board of the institution. Ad-hoc appointment of Head of the institution is to be made by promotion on the basis of seniority subject to rejection of the unfit.

Second Stage:

The method of ad hoc appointment of teacher. Principal against the short term vacancy remains the same as it was in the first stage. The direct recruitment of adhoc teacher is required to be done in accordance with the procedure laid down in Section 18 of the Act.

Third Stage:

Ad hoc appointment of teacher/Principal either by promotion or by direct recruitment is permissible under the First Removal of Difficulties Order and the

procedure of such appointment remains the same as it was during the first stage. Ad hoc appointment against the short term vacancy remains the same as it was in the first stage. The adhoc appointment of Principal is required to be done under paragraph 4 of the First Removal of Difficulties order on the basis of seniority subject to rejection of the unfit

52. Let the papers these cases be laid before the learned single Judge or the appropriate Division Bench dealing with the special as the case may be which this opinion and answer.

11. Appointment of Nagesh Kumar Singh is clearly in teeth of Full Bench Judgment of this Court. In the body of writ petition, date of advertisement has been described as 10.09.1992, and even name of the newspaper has not been disclosed. In the plaint most surprisingly, date of Advertisement has been described as 14.12.1992 and therein also name of the newspaper has not all been disclosed. This particular selection is covered by the period termed as second stage, i.e. period commencing from 14.07.1992 up to 06.08.1993. During this period, against substantive vacancy, Managing Committee has no authority to make any selection and appointment, by way of direct recruitment. Management merely has to determine the vacancies, thereafter rest of the action is to be taken by District Inspector of Schools by inviting application, and thereafter Selection Committee has to be there with District Inspector of Schools as Chairman, Basic Shiksha Adhikari, as one of the Member and District Inspector of Girls Schools also as one of the Member and in case no such Inspectress was there then Principal of Government Girls Inter College. Selection Committee thereafter has to make selection and thereafter appointment has to be offered. Here no such provision has been followed and straightaway Management claims to have appointed Nagesh Kumar Singh, by following its own self made/proclaimed procedure. Sri Ashok Khare, Senior Advocate has been confronted by this Court to justify the validity of appointment of Nagesh Kumar Singh. It has been submitted by him that in the interest of students appointment has been made. Appointment made is void on the face of it, as it is clearly dehors the statutory provisions. The procedure prescribed in Removal of Difficulties Order and U.P. Secondary Education Services Selection Board Act, 1982 and the effect of its infraction came up for consideration before the Apex Court in Prabhat Kumar Sharma and others Vs. State of U.P. and others, and the Apex Court considering the procedure under First Order observed as under:

Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees.

Again in para 11 of the judgment the Court held as under : "Any appointment in violation thereof is void. As seen prior to the Amendment Act of 1982 the First 1981 Order envisages recruitment as per the procedure prescribed in para 5 thereof. It is an in-built procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any posts in aided institution.

12. Said provisions have been re-considered by a Division Bench of this Court in Special Appeal No. 331 of 1992, District Inspector of Schools v. Naresh Chandra decided on 20.3.2006 wherein it was held:

Thus when the law requires some thing to be done in a particular manner no other way is permissible and any action not in accordance with such procedure would be void and illegal. The provision of statute and the rigor of statutory procedure cannot be diluted by holding the same to be mere irregularity, since it would be very difficult in such case to restrict or define the extent of such irregularity. For illustration, in one case, the management, who has made appointment after 58 days instead of 60 days may claim it to be a mere irregularity and in another matter the management after making appointment even within a week instead of waiting for 60 years may claim the similar protection. Such interpretation would result in making the period prescribed u/s 18 to be ununiform, illusory and virtually redundant. A statutory provision cannot be read in a manner, which will bring redundancy to any part of the statutory provision. In this view of the matter, we are clearly of the view that any infraction of the procedure prescribed u/s 18 of the Act would vitiate the appointment being void and illegal and such deviation cannot be said to be a mere irregularity.

13. Here appointment of Nagesh Kumar Singh is void on the face of it. Apart from this, as per the term and condition of creation of post dated 08.09.1983, post of Lecturer in History was to be filled up by way of promotion, and in fact same had been filled by way of promotion of Ram Shrish Singh as ad-hoc Lecturer in History. District Inspector of Schools on 03.07. 1992 had passed order holding that post of Lecturer in History has lapsed. Once order dated 03.07.1992 was in existence then by no stretch of imagination said post could be filled up by way of direct recruitment. Reason for filling up the post is obvious as Nagesh Kumar Singh is the real cousin brother of the Manager who has made appointment. Ram Shrish Singh had challenged validity of order dated 03.07.1992, before Deputy Director of Education and said claim had been accepted on 17.03.1997, against which writ petition No. 1049 of 1997 had been filed, wherein interim order was passed. In this background, appointment of Nagesh Kumar Singh even otherwise was not at all feasible, on the post of Lecturer in History. Facts mentioned by Nagesh Kumar Singh itself speaks for itself, that appointment is an act of manipulation, as therein date of Advertisement has been mentioned as 10.09.1992 even without disclosing the name of newspaper, whereas in the suit date of Advertisement has been mentioned as 14.12.1992 and therein also name of newspaper is conspicuously missing. Equally vague and evasive statement of fact has been mentioned qua constitution of Selection Committee and the number of candidates appeared. Written statement of Management has been perused. Manager has also given date of Advertisement as 14.12.1992 without disclosing name of the newspapers. No Selection Committee has been constituted is reflected from paragraph 14 wherein it has been mentioned that applications were invited,

checked and thereafter selections proceedings in the present case were made. Selection is merely paper work.

14. Next question now being adverted to is as to whether Civil Suit is maintainable in the Civil Court or not and as to whether in the fact and circumstances of the present case court below was justified in granting injunction order in favour of Nagesh Kumar Singh or not. Original Suit No. 349 of 1995 has been filed by Nagesh Kumar Singh claiming therein that pursuant to the advertisement dated 14.12.1992 he applied and was interviewed on 25.12.1992 and was selected and thereafter was appointed on adhoc basis on 27.12.1992 and joined in the institution on 28.12.1992 and has been performing and discharging duties and various reminders have been sent, but no salary has been ensured. Prayer made in the suit is that mandatory injunction be issued for ensuring payment from 28.12.1992 onwards till date and thereafter also further salary be ensured regularly and continuously and further not to interfere with the peaceful functioning of the petitioner.

15. This Court in case of Padam Singh Verma v. District Inspector of Schools, Etah and Ors. reported in 1994 AWC 1452 in context of the provisions of U.P. Act No. V of 1982 and in context of U.P. Act No. 24 of 1971 has already taken the view that civil suit claiming mandatory injunction for a direction to make payment of salary to the plaintiff on the basis of his alleged appointment on adhoc basis in the High School and Intermediate College is impliedly barred and the civil court has no jurisdiction to entertain such suit and when permanent relief cannot be accorded then temporary relief can also be not accorded. Relevant paragraphs 13 to 36 are being quoted below:

13. A preliminary objection has been raised by the counsel for the respondent No. 3 that the present writ petition is not maintainable, as the petitioner has an alternative remedy of filing appeal under Order 43 of the Code of Civil Procedure, as under Order 43, Rule 1, Sub-rule (r) an order passed under Rule-1, Rule 2, 2-A and Rule 4 of Order, 39 are appealable. The present petitioner was admittedly not impleaded as a party in the suit filed by respondent No. 3. The question whether a person who is not a party to a suit, has a right to file appeal, came up for consideration before the Hon'ble Supreme Court in State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another, In the said elaborate judgment Hon'ble Mr. Justice Krishna Iyer held that a person, who is not a party to a suit, has no right to file appeal as a matter of right. The relevant portion of the judgment is extracted as Under:

An order like Annexure "A" ordinarily binds the parties only and here the State which is the appellant is seriously prejudiced by that order but is not a party to it. Therefore, it cannot bind the State proprio vigore. It was argued by Shri Dhingra that the State could have moved by way of appeal or review and got the order set aside if there was ground and that not having done so it was bound by the order. As a matter of fact, the State, which is not a party to the proceedings, does not have a right of appeal. The ordinary rule is that only a party to a suit

adversely affected by the decree or any of his representatives-in-interest may file an appeal. Under such circumstances a person who is not a party may prefer an appeal with the leave of the appellate court "if he would be prejudicially affected by the judgment and if it would be binding on him as res judicata under Explanation 6 to Section 11." (see Nulla CPC 18th edn., vol. 1, p. 421). Section 82 of the Punjab Tenancy Act, 1887, which may perhaps be invoked by a party even under the Act, also speaks of applications by any party interested. Thus, no right of review or of appeal u/s 18 can be availed of by the state as of right.

14. The learned Counsel for the respondent No. 3 has, however, placed reliance on a minority view in the same judgment, wherein Hon"ble Mr. Justice Sarkaria held that a person affected by the order can prefer an appeal to the court. As a rule leave to appeal will not refused to a person who is prejudicially affected by the orde.

15. In view of the majority decision, it is clear that the petitioner could not have filed an appeal against the order of injunction passed in suit No. 118 of 1992 filed in the court of Civil Judge, Etah as a matter of right. Even otherwise it is settled by the Judicial decision that merely an existence of alternative remedy is not a bar to the exercise of the jurisdiction by the High Court. It is in the discretion of the High Court to refuse to grant relief to a person on the ground that an alternative remedy is available to the petitioner See State of U.P. v. Mohd. Nooh AIR 1958 S.C. 86.

16. Primarily three questions requires consideration in the present matter:

(i) Whether in view of the State Amendment in Order-39, Rule 2, Sub-rule (2) of CPC the Court was competent to issue an interim injunction in the present matter?

(ii) Whether the suit filed by the respondent no, 3 is impliedly barred by the provisions of U.P. Secondary Education Services Commission (Removal of Difficulties) Order 1981 as amended from time to time the provisions of U.P. High School and Intermediate Colleges (Payment of Salary to teachers and other employees) Act 1971?

(iii) Whether the suit for permanent injunction filed by the respondent No. 3 is maintainable in view of the provisions of Section 38 and 41 of the Specific Relief Act?

17. The question which requires consideration is question No. (ii).

18. The State Government promulgated U.P. Secondary Education Services Commission and Selection Board Ordinance, 1981 (Ordinance No. 8 of 1981) which was later on substituted by U.P. Act No. 5 of 1982. In exercise of powers u/s 33 of U.P. Ordinance No. 8 of 1981, the Governor issued U.P. Secondary Education Services Commission(Removal of Difficulties) Order, 1981, generally referred to as "First Removal of Difficulties Order". The aforesaid Removal of Difficulties Order, 1981 prescribed a complete code of making adhoc appointment

of the Principal and Head Master of High School and Intermediate Colleges and also for adhoc appointment of teaches and Lecturers in Intermediate Colleges and the High Schools. Initially the First Removal of Difficulties Order contemplated that the duration of the adhoc appointment will be valid only till the candidate recommended by the Commission or the Board joins the post or when the period of six months from the date of such adhoc appointment expires. Subsequently, by issuing Removal of Difficulties Third Order, 1982 the second condition was done away with and the adhoc appointment made under the Removal of Difficulties Orders were to continue till a candidate recommended by the Commission or Board joins the post. Para 4 of the First Removal of Difficulties Order provided the procedure for making adhoc appointment by promotion. Para-5 of the said Removal of Difficulties Order provided that where any vacancy cannot be filled by promotion the same may be filled by direct recruitment. Para-5(4) provided that best candidate shall be selected on the basis of the quality point marks specified in the appendix prescribing the quality point marks on the basis of the academic qualifications and the divisions obtained in different examinations by the candidates. Para 6 of the said Removal of Difficulties Order provided the eligibility condition for appointment of teachers under Removal of Difficulties Order. Para-7 as amended by Removal of Difficulties Order(forth) 1982 (contemplated that the dispute connected with the promotion or direct recruitment under this Order shall be referred to the Deputy Director of the Region concerned and his decision will be appealable to Director, whose decision shall be final. Sub-clause (7) of Para-7 provided that without prejudice to the generality of clause (1) the Director shall have the power to look into the complaint, if any, regarding the award of the quality points mentioned in the appendix or the validity of the propriety of any promotion or direct recruitment in accordance with this order and to cancel any promotion, recruitment or appointment made in continuation of such order.

19. The scheme of Removal Difficulties Orders clearly contemplate a procedure and exhaustive code in the matter of adhoc appointment of teachers in High School and Intermediate Colleges, after promulgation of U.P. Ordinance No. 8 of 1981, substituted by U.P. Act No. 5 of 1982.

20. In the aforesaid background the averments made by the respondent No. 3 in the suit are to be examined. The narration of the facts in the plaint state that one Ram Veer Singh, Assistant Teacher in C.T. Grade was promoted on adhoc basis to L.T. Grade but as dispute arose in regard to his appointment, consequent thereto, the promotion of Sri Ram Veer Singh was cancelled and the post on which Ram Veer Singh was promoted, having fell vacant, was advertised by the Committee of Management and the applicants were called for interview and the plaintiff was selected on the aforesaid post and was appointed on 26.08.1991. It is further stated that due to retirement of Sri Brij Raj Singh, the Principal of the College, Sri Raj Veer Singh was given the charge of the Principal of the College. The requisition was sent for filling up the post of Principal of the College under the provisions of U.P. Secondary Education Services Commission and Selection

Board Act 1982 (U.P. Act No. V of 1982) and the said promotion was duly approved by the District Inspector of Schools. The said post of Sri Raj Veer Singh fell vacant on which the plaintiff was appointed. It was further stated that since the plaintiff has been working from the date of his appointment, he is entitled to get salary on the said post. On the basis of the aforesaid facts, the reliefs claimed in the plaint, are quoted earlier in this judgment. A perusal of the narration of the facts shows that the plaintiff claims his appointment on adhoc basis in the institution. Under Section-18 of U.P. Act No. V of 1982 the adhoc appointments are contemplated. A detailed procedure is provided under various Removal of Difficulties Order referred earlier for making adhoc appointment in substantive vacancies as well as in short term vacancies. The question, as to whether the plaintiff was rightfully appointed on adhoc basis under Removal of Difficulties Order could have been decided under the provisions of Removal of Difficulties Orders and as noticed earlier in case of dispute the matter could have been referred to the Deputy Director of Education and the aggrieved person could have filed appeal against the order of the Deputy Director of Education to the Director of Education.

21. Likewise, another aspect of the matter is that in the plaint the plaintiff was claiming a direction by the court that the defendants in the suit namely the District Inspector of Schools the Accounts Officer in the office of District Inspector of Schools and the State of U.P. should be directed to make payment of salary to the plaintiff.

22. The institution in the present case was within the purview of U.P. Act No. 24 of 1971, Section 10 of the aforesaid Act contemplates that the State Government is liable for the payment of salary of the teachers and the employees of every institution due in respect of any period on March 31, 1971 U.P. Act No. 24 of 1971 is a complete code in itself and the provisions of the Act are self contained. The State Government have statutory obligation to ensure that a teacher, who is entitled to get his salary under the provisions of the aforesaid Act should be paid his salary in accordance with the provisions of the aforesaid Act every month of the date prescribed for payment of salary. In case where the teacher is not getting his due salary, which he otherwise is entitled under the provisions of the said Act, the teacher can approach the District Inspector of Schools for payment of his salary under the procedure prescribed by Section-3 of Act No. 24 of 1971 and the District Inspector of Schools will ensure payment of salary to the teacher, who is entitled for salary under the provisions of the Act.

23. In Mahipal Singh Pawar v. State of U.P. 1992(2) UPLBEC 1947 a Division Bench of this Court held:

In our opinion, Act No. 24 of 1971 is self contained exhaustive and is a complete code in itself, as far as payment of salary to a teacher by the State Government is concerned and in view of the Provisions contained in Act No. 24 of 1971, we are of the considered opinion that the petitioners have statutory, efficacious alternative remedy of making representation before the District Inspector of

Schools and as such the petitions Filed by the petitioners without exhausting the remedy under Act No. 24 of 1971, deserves to be dismissal on the ground of alternative remedy.

24. Section-12 of U.P. Act No. 24 of 1971 makes it clear that an order passed by the authorities under the Act shall not be called in question in any court. This gives finality to the orders of the District Inspector of Schools passed under the Act. Section-12 of the Act is reproduced below:

Section-12 : No order made or direction given by the State Government the Director, the Regional Deputy Director of Education or the Inspector or other officer in exercise of any power conferred by or under this Act shall be called in question in Court.

25. In the aforesaid background the question which requires consideration is whether in view of the provisions of the Removal of Difficulties Orders referred earlier and the provisions of the U.P. act No. 24 of 1971 a civil suit claiming relief for issuing mandatory injunction to the defendants for a direction to pay to the plaintiff is cognizable by a civil court u/s 9 of the Code of Civil Procedure?

26. In Union Co-operative Insurance Society Ltd., Bombay Vs. Commissioner of Income Tax, Bombay, the Hon. Supreme Court held as under:

(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do, what the civil courts would normally do in a suit. Such provision, however, does not exclude those case where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry maybe decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

27. In Raja Ram Kumar Bhargava (Dead) by Lrs. Vs. Union of India (UOI), the Hon"ble Supreme Court held

The question turns on the scope of the exclusionary clause in the statute. The effect of clauses excluding the civil courts' jurisdiction are considered in several pronouncements of the Judicial Committee and of this Court (See AIR 1940 105 (Privy Council) K.S. Venkataraman and Co. Vs. State of Madras, Dhulabhai and

Others Vs. The State of Madhya Pradesh and Another, The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others, Generally speaking, the broad guiding considerations are that wherever a right, not preexisting in common-law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil courts' jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil courts' jurisdiction, then both the common-law and the statutory remedies might become concurrent remedies leaving open an element of election to the persons of inheritance. To what extent, and on what areas and under what circumstances and conditions, the civil courts' jurisdiction is preserved even where there is an express clause excluding their jurisdiction, are considered in Dhulabhai's case.

28. In Jitendra Nath Biswas Vs. M/s. Empire of India and Ceylon Tea Co. and Another, the Hon'ble Supreme Court held:

It is therefore clear that this Act i.e. Industrial Disputes Act not only confers the right on a worker for reinstatement and backwages if the order of termination or dismissal is not in accordance with the Standing Orders but also provides a detailed procedure and machinery for getting this relief. Under these circumstances therefore there is an apparent implied exclusion of the jurisdiction of the civil Court. In Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, a five Judges Bench of this Court considered the language of Section 9 and the scope thereof in respect of exclusion of jurisdiction and it was observed (at p. 89 of A.I.R.).....:

It is therefore clear that the scheme of the Industrial Disputes Act clearly excludes the, jurisdiction of the civil Court by implication in respect of remedies which are available under this Act and for which a complete procedure and machinery has been provided in this Act.

29. An analysis of the provisions of Removal Of Difficulties Orders, referred earlier, read with the provisions of U.P. Act No. 24 of 1971 shows that a complete code of procedure has been prescribed for determining the dispute regard to the matter of adhoc appointments in High School and Intermediate Colleges recognised under U.P. Intermediate Education Act. The right of the plaintiff for a direction to get salary from the defendants is not a common law right but is a creation of statute i.e. U.P. Act No. 24 of 1971 and a complete code is provided for payment of salary to such teachers under the said statute. A civil suit claiming mandatory injunction for a direction to make payment of salary to the plaintiff on the basis of his alleged appointment on adhoc basis in the High School and Intermediate College is impliedly barred and the civil court has no Jurisdiction to entertain such suit.

30. Question Nos. (i) and (ii) can be examined together-

31. The relevant portion of State Amendment made in Order 39, Rule 2, Sub Rule (2) adding the proviso is under:

Provided that no such injunction shall be granted (a) where no perpetual injunction could be granted in view of the provision of Section 38 and 41 of the Specific Relief Act, 1963...and any order for injunction granted in contravention of these provisions shall be void.

32. Sections 38 and 41 of the Specific Relief Act are also being quoted below:

Section 38 : Perpetual injunction when granted

(1) Subject to the other provisions contained in or referred by this chapter a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiffs rights to, or enjoyment of property the court may grant a perpetual injunction in the following cases, namely:

(a) Where the defendant is trustee of the property for the plaintiff;

(b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion.

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonable clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.

33. Section 38(3)(b) of the Specific Relief Act contemplates a situation that the court may grant a perpetual injunction where there exists no standard for ascertaining actual damage caused or likely to be caused. Likewise Section 41(h) of the Specific Relief Act mandates that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of

proceeding except in case of breach of trust.

34. There is another aspect of the matter that the suit of the plaintiff respondent No. 3 was essentially for payment of salary for a particular period and for future. A suit for perpetual injunction for payment of salary is barred actual damage caused or likely to be caused can be ascertained. It is not the case where damage is of such a nature that they cannot be ascertained. The relief in the suit to the extent it seeks a direction by perpetual injunction to make payment of salary which became due to the plaintiff, is barred by the provisions of Section 38(31)(b) of the Specific Relief Act and since the plaintiff had equally efficacious remedy under the provisions of U.P. Act No. 24 of 1971", the suit of the plaintiff for permanent injunction was barred by Section 41(h) of the Specific Relief Act. Since the plaintiff was not entitled to get perpetual injunction in view of the provisions of Section 38 and 41 of the Specific Relief Act, no temporary injunction could have been granted to the plaintiff in view of the State Amendment in Order 39 Rule 2 Sub-rule (2) proviso (a).

35. In view of the above discussion, I am satisfied that the interim injunction passed in favour of the respondent No. 3 by the Civil Judge, Etah on 30.05.1992 in Original Suit No. 118 of 1992 filed as Annexure-9 to the present writ petition, was in the teeth of the provisions of Order 39, Rule-2 Sub-rule (2), proviso (a) as amended by the State of U.P. so the order of injunction is void. A writ of certiorari is issued quashing the order, aforesaid of Civil Judge, Etah dated 30.05.1992, filed as Annexure-9 to the writ petition.

36. I am also satisfied that the suit for mandatory injunction filed by the plaintiff respondent No. 3. being Suit No. 118 of 1992 Rai Bahadur Singh v. D.I.O.S. Etah is also barred by the provisions of Section 41(IV) of the Specific Relief Act and the Plaint as such is not maintainable.

16. Complete answer thus has been given to the issue raised. On the basis of dictum noted above suit filed by Nagesh Kumar Singh is of is clearly barred as here also prayer is for mandatory injunction to make payment of arrears of salary and future salary which became due, which is clearly barred by the provisions of Section 38(3)(b) of Specific Relief Act, and Section 41(h) of Specific Relief Act, as damage are assesable and claim could have been examined under U.P. Act No. 24 of 1971. Nagesh Kumar Singh is not at all entitled for perpetual injunction in view of Section 38 and 41 of Specific Relief Act, as perpetual injunction may be granted to the plaintiff to prevent breach of an obligation existing in his favour, whether expressly or by Implication. Here there is no obligation existing in favour of plaintiff either expressly or by implication, his appointment being void on the face of it, consequently no temporary injunction was permissible in view of the State Amendment In order 39 Rule 2, Sub-rule 2 proviso and that too without there being prayer for declaration that appointment of Nagesh Kumar Singh was valid.

17. In spite of the fact that Civil Suit was not maintainable, injunction has been

prayed for and Civil Judge (Senior Division) ignoring mandate of the Full Bench of this Court which was placed before him and referred to above by placing reliance on Judgment which were not at all applicable or attracted in the facts of the present case in respect of deemed approval, proceeded to pass order of injunction. Said injunction could not have been passed on any count. Assuming for a moment that Civil Judge had authority to pass order of injunction then in that event bounden duty was cast upon him to see as to whether appointment which has been made is valid or not i.e. as per the provisions of U.P. Act No. V of 1982. Civil Judge (Senior Division) has proceeded on presumption that there is inaction on the part of the District Inspector of Schools as such everything is correct and valid and he has authority to issue mandatory injunction for giving direction for payment of salary. Civil Judge (Senior Division) in the fact and circumstances of the present case has totally transgressed and overstepped jurisdiction by giving directions for making payment of salary and not adverting on this aspect of the matter as to whether appointment which has been made by the Committee of Management of the institution on the substantive post of the Lecturer in History was void on the face of it, or not inasmuch as on the said date the Committee of Management has no authority to make appointment. Injunction order passed was clearly unsustainable and based on totally erroneous ground. Once appointment is void on the face of it then by no stretch of imagination prayer which has been made in the suit can be accorded even ultimately, as such suit in question as it has been framed and drawn is clearly held not to be maintainable and injunction which has been accorded could not at all have been accorded.

18. Sri Ashok Khare, Senior Advocate next contended that order of injunction passed by the Trial Court and the proceedings in Original Suit be permitted to go to its logical end and as same are not subject matter of challenge as such said proceedings be not quashed as per the Judgment of this Court in the case of Swetambar Sthanakwasi Jain Samiti and another Vs. The Alleged Committee of Management, Sri R.J.I. College, Agra and others, and the remedy which has been provided for under CPC be perused.

19. Sri R.C. Dwivedi, Advocate, on the other hand contended that when illegality is apparent on the face of it and perpetuation of the same is misuser of the judicial proceedings then this Court in exercise of power vested under Article 227 of the Constitution of India can quash the entire proceedings of the Suit and order of injunction, for which he has placed reliance on the judgment in the case of Surya Devi Rai v. Ram Chander Rai and Ors. reported in 2003(52) A.L.R. 707 and in the case of Smt. Shail Vs. Shri Manoj Kumar and Others,

20. Hon''ble Apex Court in the case of Swetambar Sthanakwasi Jain Samiti (Supra) has taken the view qua authority under Article 226 of the Constitution of India which confers upon High Court extra ordinary jurisdiction, that High Court will not permit this extraordinary jurisdiction to be converted into a civil Court under the ordinary law. When a suit is pending between the two parties the

interim and miscellaneous orders passed by the trial court against which the remedy of appeal or revision is available the same should be invoked. In the said case suit has been held to be maintainable. This is glaring case where suit is not at all maintainable and incumbent whose appointment is void on the strength of illegal injunction order is trying to perpetuate himself. High Court not only exercises its jurisdiction under Article 226 of the Constitution of India but exercises authority under Article 227 of the Constitution of India wherein High Court has been vested with the authority of power of superintendence also and said power is to be exercised with care and caution. Said power under Article 227 can even be exercised even suo motu as has been held in the case of *Surya Devi Rai v. Ram Chander Rai and Ors.* reported in 2003 (52) A.L.R. 707 and in the case of *Smt. Shail Vs. Shri Manoj Kumar and Others*,

21. Here in the present case appointment of petitioner is void. Suit is not maintainable and injunction by no stretch of imagination could have been accorded. Injunction is never granted to flout the law. When appointment is void then continuance of judicial proceedings would be nothing but misuser of judicial proceedings and even ultimately the suit has to fail in this background as extraordinary situation requires extraordinary remedial measures also as such this Court proceeds to exercise its authority vested under Article 227 of the Constitution of India, by quashing the entire proceedings of suit and consequential action.

22. In the present case Committee of Management has proceeded to promote the Ram Srish Singh and said promotion was not accepted by the District Inspector of Schools on the ground that post in question has become dead post on 03.07.1992. Against the said order Ram Srish Singh represented time and again and ultimately Deputy Director of Education on 17th March 1997 recorded finding of fact that action of the District Inspector of Schools in declaring the post dead was unjustifiable exercise and promotion. Ram Srish Singh has been accepted by the Regional Joint Director of Education. On account of seniority dispute said order was challenged before this Court wherein initially interim order was passed and subsequent to the same writ petition which has been filed before this Court has been dismissed and net consequence of the same that after attaining the age of superannuation by Ram Srish Singh said post of lecturer in History shall be treated as having fallen vacant. Petitioner has given specific details that there are total four posts on which there is no dispute and out of which three posts of Lecturers in the institution have been filled up by way of direct recruitment and thus, post of lecturer in History is liable to be filled up by way of promotion.

23. In these circumstances respondents are directed to take forthwith action as provided under Rules 14 of 1998 Rules for filling up the post of Lecturer in History, within next three months. Appointment of Nagesh Kumar Singh, respondent No. 5 has been declared void and he has succeeded on the strength of totally illegal order of injunction in procuring salary as well as arrears of

salary, in this background question of refund of the amount is being adverted to. In the present case a totally void appointee on the strength of totally unwarranted injunction order has succeeded in procuring public money. Injunction order has been passed on 17.01.1997 directing for payment of salary during pendency of suit. The authority concerned has made entire payment to Nagesh Kumar Singh respondent No. 5 from the date when he had been appointed. This clearly shows that Nagesh Kumar Singh in collusion the authorities has succeeded in siphoning the amount. In the injunction order it has been mentioned that during the pendency of the suit regular payment be made and the authority as evident from the record have ensured payment of salary to respondent No. 5 from 28.12.1992 R.e. the date of appointment of Nagesh Kumar Singh. The appointment of Nagesh Kumar Singh is void and an outcome of fraud and manipulation and the injunction order which had been passed being nullity then by no stretch of imagination public money can be permitted to be laundered as has been sought to be done in the present case. The petitioner has been put to notice, on this front but except for the statement that he has been validly appointed, and he has worked no other fact is being narrated by him. This Court is of the considered opinion as inception of petitioner is void and outcome of manipulation and manoeuvring and by misusing judicial proceedings salary has been withdrawn, from the State Exchequer in this background, allowing him to retain, salary would be sending wrong signal and giving premium to manipulator.

24. Consequently Nagesh Kumar Singh, respondent No. 5 is directed to return entire amount paid to him through State Exchequer within three months from the date of delivery of judgment failing which entire amount be recovered as arrears of land revenue, and he is not to be treated as Lecturer in History in the institution.

25. Subject to observations and directions made above present writ petition is allowed.

26. No orders as to cost.