
(1997) 09 AHC CK 0094
In the Allahabad High Court
Case No : C.M.W.P. No. 8203 of 1994

Praveen Misra

APPELLANT

Vs

District Inspector of Schools, Allahabad and another

RESPONDENT

Date of Decision : 02-09-1997

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 18, 18(2), 18(9), 33

Uttar Pradesh Secondary Education Services Commission Rules, 1983 — Rule 9A, 9B

Citation : (1998) 1 AWC 271 : (1998) 1 UPLBEC 629

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : R.R. Shukla, for the Appellant;

Final Decision : Disposed Of

Judgement

D.K. Seth, J.—In the post of L.T. Grade teacher, a vacancy arose on 31.3.1991 in Keshav Shiksha Sadan Uchcharat Madhyamik Vidyalyaya, Saldabad, District Allahabad. The vacancy was notified to the Service Commission by the Management on 27.6.1991. Pursuant to an advertisement, the Committee of Management selected the petitioner against the said vacancy by resolution dated 25.10.1992. The petitioner was issued appointment letter dated 26.10.1992. Pursuant to which the petitioner Joined on 1.11.1992. The Management by letter dated 10.11.1992 informed the District inspector of Schools about the ad hoc appointment of the petitioner but the District Inspector of Schools did not take any step to approve the ad hoc appointment of the petitioner due to which the petitioner is not being paid salary though he had been working in the school since 1.11.1992. Aggrieved, the petitioner has preferred this writ petition.

2. By way of an application for amendment, the petitioner has sought to incorporate certain grounds by which he had attacked various provisions of the U. P. Intermediate Education Act. The said application for amendment was allowed and the grounds taken have been treated to be grounds of the writ

petition by consent of the learned standing counsel inasmuch as those grounds are only legal submissions on the basis of the facts already on record.

3. In the counter-affidavit, it has been pointed out that after the creation of new posts in L.T. Grade Science and Maths, a notification was given by the Committee of Management on 27.6.1991 to the Commission, that the Management was empowered to appoint a teacher after expiry of two months, namely, after 27.8.91. On the contrary it is alleged that the Management had appointed the petitioner on 1.11.1992 though in the meantime Ordinance No. 21 of 1992 had been promulgated seeking to substitute Section 18 of the U. P. Secondary Education Services Commission and Selection Boards Act, 1982 (hereinafter referred to as the said "Act") with effect from 14.7.1992. It is also alleged that the selection has not been made in compliance of Section 18 as substituted by the said ordinance since been replaced by the Act No. 24 of 1992 and that no advertisement was issued, in two newspapers having circulation in the State of U. P. Therefore, no approval could be given to the appointment of the petitioner.

Learned counsel for the petitioner elaborates his argument pointing out that certain issues relating to ad hoc appointment was not considered in the case of Radha Raizada and others v. Committee of Management and others 1994 (3) UPLBEC 1551, by the Full Bench and that the Removal of Difficulties Order stand superseded by reason of the introduction of Rules 9A and 9B w.e.f. 16.7.92 published on 4.9.92 by means of amendment in the U. P. Secondary Education Services Commission Rules, 1983. He contends that the Removal of Difficulties Order cannot eclipse Section 18 of the said Act. If there is any contradiction between the Removal of Difficulties Order and Section 18. Section 18 would prevail. The vacancy having accrued prior to Ordinance No. 21 of 1992, the right accrued to the Managing Committee to appoint is not affected by reason of subsequent legislation, namely, Ordinance No. 21 of 1992. He had raised many other interesting points with regard to his assertion that the field is not covered by the Full Bench, therefore, a fresh look is to be given to the points raised by him. True that the points raised by him are very interesting, and the learned counsel for the petitioner had argued with great perseverance and clarity of thought but to my mind. It is not necessary to deal all the points raised in the present case on account of the facts and circumstances of the present case which does not permit such an exercise.

4. The entire issue hinges on the question as to whether the appointment would be made u/s 18 of the Act as it stood prior to Ordinance No. 21 of 1992 or on the basis of Section 18 as substituted by the said Ordinance. The crucial date is 14.7.1992 when the substitution in Section 18 came into force. If the right to appoint by the Management had accrued prior 14.7.92, then it was open to the Management to give appointment u/s 18 of the Act as it stood prior to its substitution by the said Ordinance. If the right to appoint accrues after 14.7.92, then it is to be done in terms of Section 18 as substituted. Though it was sought to be argued that the date of occurrence of vacancy is the crucial date and not

otherwise. But such submission does not appear to be sound. It is the right that is enforceable. The vacancy might have accrued earlier than 14.7.1992 but determining question is the date when the right had accrued, inasmuch as subsequent legislation cannot take away the right which has accrued prior to the legislation. Therefore, it is the accrual of right which is the consideration. Only when a right accrues, then the same cannot be taken away. If the right accrues after the legislation, then the same is very much covered within the legislation. The occurrence of the vacancy does not create any right inasmuch as the right accrues only when two months expire after the vacancy is notified to the Commission. The accrual of right is dependent first on the notification of the vacancy to the Commission and then on the expiry of two months from the date of such notification. Unless these two conditions are satisfied, the right does not accrue.

5. In the present case, admittedly, the notification was issued on 27.6.1991, after the vacancy having accrued on 31.3.1991. Therefore, the right to appoint by the Committee of Management accrued on the expiry of two months from the date of notification, namely, on 27.6.1991. The Ordinance No. 21 of 1992 came into force on 14.7.1992. Thus, the right to fill up the post had accrued before Section 18 was substituted by the said Ordinance. Therefore, the said vacancy is to be filled up according to the law as applicable on 27.8.1991. Though, however, the date of initiation of the selection process has not been mentioned but the fact remains that the resolution for appointment and the appointment letter was issued on 25.10.1992.

6. From Annexure 4 to the writ petition, it appears that the process for recruitment was carried on since after 27.8.1991 which is apparent from the correspondence made between the school authority and the District Inspector of Schools who by his letter dated 2.1.1992 had informed the school authority for carrying on such recruitment. Thus, it appears that the school authority had been seeking enforcement of their right even before they were denuded of such right by virtue of Ordinance No. 21 of 1992 with effect from 14.7.1992.

7. Thus in view of the provisions of law, the right to fill up such post does not accrue for the Management simply on the basis of the occurrence of the vacancy. It is dependent on certain conditions as it appears from the relevant provisions of law discussed hereinafter.

8. A perusal of Section 18 of 1982 Act and as substituted by Act No. 24 of 1992 indicates that originally the Management had been conferred power to make appointment purely on ad hoc basis from amongst persons possessing requisite qualifications subject to the condition that such appointment would cease on the joining of the post by candidates recommended by the Commission in two circumstances (a) if the Commission failed to recommend the name of any suitable candidate within one year, (b) if the post remains vacant for more than two months. By Ordinance No. 21 of 1992 replaced by Act No. 24 of 1992 new Section 18 was substituted. Under the substituted section, the Management is

authorised to make appointment purely on ad hoc basis if the post had remained vacant for more than two months where the Management had notified vacancy to the Commission in accordance with the provision of the Act, in the manner prescribed in the said substituted Section 18. The manner that has been provided in Section 18 specified in sub-section (2) that such appointment is to be made on the recommendation of the Selection Committee referred to subsection (9) by direct recruitment. Sub-section (9) provides for constitution of a Selection Committee for each District comprising of the District Inspector of Schools (Chairman). Basic Shiksha Adhikari and the District Inspectress of Girls' Schools. The criteria and procedure for selection of the candidate and the manner of preparation of selected candidates should be such as may be prescribed.

9. The very framing of Section 18 indicates that the right accrues to the Management on the primary condition that the vacancy is notified to the Commission. Only when the primary condition is fulfilled, then on two conditions. Section 18 can be invoked first where the Commission had failed to recommend a suitable candidate within one year after it is notified or where the post remains vacant for more than two months after the Management notifies the vacancy. Therefore, both these conditions are dependent on the act of notification by the Management. Unless the act of notification is undertaken, the question of satisfaction of other two conditions does not come into play. A right which remained dormant does not spring to life unless the life is put into it. The right u/s 18 vested in the Management accrues only upon the notification of vacancy to the Commission. It may be right in the form of a seed. Unless the seed is planted, the right cannot sprout. Unless the right sprouts, the right does not exist.

10. In the present case as discussed above, the vacancy was required to be filled up on the basis of law as existed on the date when the right to fill up the vacancy accrued and pursuant to such right, procedure for recruitment has been initiated. The recruitment having been done pursuant to such initiation of recruitment even after 14.7.1992 does not alter the situation. What would have been the effect if despite such right having been accrued prior to 14.7.1992 but the procedure for recruitment if initiated after 14.7.1992 does not call for determination in the present case, in the facts and circumstances on which the question is founded.

11. In the given situation as obtaining in the present one when the vacancy had occurred and the procedure for selection had been taken, it was old Section 18 that was governing the field. Substituted Section 18 having not been given retrospective effect could not have any impact thereon. The question of filling up of such vacancy how are to be governed, came up for consideration in the case of State of Andhra Pradesh and others v. J. Sreenivasa Rao and others. (1983) 3 SCC 285 . In the said case, it was held that it is the rule which held the field when vacancy had occurred that would govern the question of recruitment for filling up such vacancy even after occurrence of such vacancy there is a change in rule or law and the recruitment is sought to be made even thereafter. In

paragraph 9 at page 289 of the said judgment, it was observed that "the vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules..... But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the post which fell vacant prior to the amended rule would be governed by the old rules and not by the new rules". Following the said decision in the case of State of Andhra Pradesh and others, the Apex Court in the case of P. Ganeshwar Rao and Others Vs. State of Andhra Pradesh and Others, had held that the amended rules apply only to those vacancy which came into existence subsequent to the date of amendment, The subsequent amendment unless by express provision or by necessary implication provides otherwise the vacancies arising prior to the amendment ought to be governed by the rules as existed before such amendment.

12. Now Section 18 as it stood empowered the Management to make such recruitment. But the procedure that is to be followed was provided in the U. P. Secondary Education Service Commission (Removal of Difficulties) Order, 1981 (hereinafter called as the First Order, 1981).

13. Learned counsel for the petitioner sought to urge that the First Order, 1981 stood repealed by incorporation of Rules 9A and 9B in the U. P. Secondary Education Service Commission Rules, 1983 but the said submission in the facts and circumstances of the case appears to be wholly misconceived in view of the fact that Rules 9A and 9B were introduced by notification dated 16.7.1992 published in the U. P. Gazette dated 4.9.1993. Therefore, without adverting to the date of operation of Rules 9A and 9B and its impact, it is clear that the same had no manner of existence as on the date with which the question is concerned.

14. Mr. Tripathi, learned counsel for the petitioner further contended that Section 18 would override the First Order, 1981. Inasmuch as if there is any inconsistency between the First Order, 1981 and the section itself, the section would prevail. Such contention also appears to be wholly misconceived in view of the fact that Section 33 of the 1982 Act which provided for making such removal of difficulties orders. Section 18 has provided power to recruit, the same does not provide any procedure. The procedure is found in First Order, 1981. Therefore, First Order, 1981 is to be accepted as supplementing or supplanting Section 18. A plain reading of the two provisions does not reflect any contradiction between each other. There is no inconsistency between the two provisions. On the other hand, when section had provided the power without providing the procedure for exercising of the power, then by reason of Section 33 of 1982 Act, the State Government having been empowered to provide such provisions to remove the difficulties, the First Order, 1981 having been promulgated, in exercise thereof. surely supplant and supplement the difficulties created by reason of Section 16 sought to be relaxed by Section 18 without prescribing any procedures, therefore, the said two provisions have to be read together. The Apex Court has held that First Order, 1981 supplements Section

18. In view of the said decision, the citation made by the learned counsel for the petitioner at the bar with regard to the case reported in 1987 UPLBEC 415, does not seem to help the petitioner.

15. The petitioner has not shown as to how he was recruited upon the compliance of sub-paras (2) to (5) of para 5 of the said First Order, 1981. Unless the appointment is made in terms of para 5 of the First Order, 1981, even in exercise of power conferred by Section 18 as stood prior to 14.7.1992, the appointment cannot be held to be valid. If the appointment is made in contravention paras 5 (2) to (5) of the First Order. 1981, in that event, the petitioner cannot be said to have acquired any legal right to establish his right through invocation of writ jurisdiction. No material has been disclosed to show that paragraph 5 of the First Order, 1981 has been complied with. The case that has been made out in the writ petition is that the Management had appointed the petitioner by resolution dated 25.10.1992 though no pleading is present in the writ petition to the extent that paragraph 5 was complied while making the appointment.

16. In that view of the matter, in the absence of any such material, it is not possible for this Court to decide as to whether the petitioner had been validly appointed or not in terms of provisions contained in paragraph 5 of the First Order, 1981. This is a question of fact which can be gone into only on the basis of the relevant material. Therefore, it would be open to the petitioner if he is so recruited in compliance of paragraph 5 of the First Order, 1981 to approach the District Inspector of Schools by means of a representation upon intimation thereof to the Committee of Management. The Committee of Management when intimated may produce relevant records before the District Inspector of Schools within a period of four weeks when such communication is conveyed to it by the petitioner. It would be open to the District Inspector of Schools to decide the question in accordance with law on the basis of the relevant material placed before him in the light of the observation made above.

17. In that view of the findings recorded as above, it is not necessary to deal with the other contentions of the learned counsel for the petitioner and learned standing counsel.

18. For all these reasons, the writ petition succeeds in part to the extent indicated above and is accordingly disposed of in terms of the observation made above.

19. There will, however, be no order as to costs.