
(2015) 12 AHC CK 0103
In the Allahabad High Court
Case No : Special Appeal No. 488 of 2004

Prem Nath Tripathi

APPELLANT

Vs

Sate of U.P.

RESPONDENT

Date of Decision : 08-12-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 1 ADJ 160

Hon'ble Judges : Amreshwar Pratap Sahi and Attau Rahman Masoodi, JJ.

Bench : Division Bench

Advocate : Ramesh Pandey, C.B. Pandey and Vivek Tripathi, for the Appellant;
Akhilesh Kalra, Diwakar Singh Kaushik, L.P. Mishra and S.P. Shukla, for the
Respondent

Final Decision : Disposed Off

Judgement

1. This special appeal arises out of the judgment of a learned Single Judge dated 17.11.2004 where by four writ petitions were simultaneously disposed off dismissing the claim of the appellant Prem Nath Tripathi and the relief prayed for by the respondent No. 8 was accepted.

2. The dispute is in relation to the appointment on ad-hoc basis against the post of Demonstrator in Science (Chemistry) for teaching Secondary School Classes in A.H. Inter College, Musafirkhana, District Sultanpur, which institution is recognized and governed by the provisions of the U.P. Intermediate Education Act, 1921 read with the rules and regulations framed thereunder, and in matters in relation to appointment of Teachers including Demonstrators, is governed by the provisions of the U.P. Secondary Education Services Commission and Selection Board Act, 1982 read with the regulations, orders and rules framed thereunder. As a consequence of this ad hoc appointment the appellant's claim is also one of having acquired a right of regularisation under the 1982 Act, but essentially the basic appointment on which the rival contenders are claiming rights is a pure ad hoc appointment.

3. The post of Demonstrator in the Institution fell vacant substantively on account of the death of Ram Kumar Singh who was occupying the said post on 14.8.1989. The same was advertised on 4.12.1990. The qualification referred to in the advertisement and in accordance with Appendix A of Chapter II of the 1921 Act was B.Sc., with training, as a desirable qualification.

4. The dispute began on allegations in relation to the procedure followed by the Management to appoint the appellant thereafter. The Management is stated to have processed the applications in accordance with the Quality Point Marks that were allocated to the candidates.

5. At this stage and at the very outset it would be appropriate to refer to the procedure for such ad-hoc appointments as was existing in the year 1990 when the said dispute began. Section 18 of the 1982 Act made a provision for ad hoc appointments. The aforesaid section recites that such appointment can be resorted to where the Management has notified the vacancy to the Commission. No procedure was laid down under the Act and, therefore, the State came up with the promulgation of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981. The State had issued the said order in the background that the Secondary Education Services Selection Board which had been constituted under an ordinance earlier, and later on converted into the 1982 Act, had not been set up and thus in order to provide a procedure for facilitating appointments the aforesaid order had been introduced.

6. A question arose that after the coming into force of the 1982 Act what procedure would be followed for making ad-hoc appointments under Section 18 . The same is no longer res-integra as a full bench of this Court in the case of Kumari Radha Raizada Vs. Committee of Management, Vidyawati Darbari Girls Inter College and Others, laid down that the procedure in relation to substantive vacancies would continue to be governed by the First Removal of Difficulties Orders dated 31.7.1981, and against short-term vacancies the procedure prescribed in the Second Removal of Difficulties Order dated 11.9.1981 would be applicable. We may put on record that the present dispute is clearly of an appointment against a substantive vacancy that was caused on account of the death of earlier incumbent. The said judgment of the full bench of our court came up for consideration before the Apex Court in the case of Prabhat Kumar Sharma and others Vs. State of U.P. and others, and the same was upheld.

7. The Management of the Institution had published the advertisement in a local daily Amar Bharat Times dated 4.12.1990. According to the Management itself eight applications had been received including that of the appellant, the respondent Krishna Kant and six others.

8. The Quality Point Marks as envisaged under the Removal of Difficulties Order, 1981 as per Clause 5 thereof is stated to have been prepared and admittedly appellant was awarded 13 Quality Point Marks as against 32 that was awarded to

the respondent Krishna Kant.

9. The dispute began here when the Management alleges that it had issued letters to the candidates requiring them to appear in the interview on 28.11.1990 and submit the original and certified copies of the mark-sheets etc. to verify the same. According to the respondent - Krishna Kant no such letter was sent to him nor received and as a matter of fact the Management had already made up its mind in a pre-determined way to appoint the appellant, and consequently came up with an excuse that the respondent had voluntarily not forwarded certified copies of the mark-sheets etc. for verification. According to the Management since the respondent - Krishna Kant failed to provide the said documents the Committee had resolved to appoint the appellant who was qualified and eligible.

10. The resolution of consideration dated 30.12.1990 has been relied upon by all the parties, namely, the appellant, the respondent and the Committee of Management. The Management appears to have forwarded the said resolution for financial concurrence to the District Inspector of Schools for the payment of salary to the appellant as it is a State Aided Institution. A letter of appointment is stated to have been issued to the appellant on 6.2.1991.

11. Vide order dated 30.3.1991 instead of approving the appointment of the appellant the District Inspector of Schools added a third dimension to the dispute directing approval for appointment of one Ram Das who had not participated in the selection proceedings. This approval was granted taking support of a ground that the post was to be offered to a reserved category candidate of the scheduled caste.

12. This order dated 30.3.1991 came for consideration in Writ Petition No. 2957 of 1991 which has also been disposed of simultaneously under the impugned judgment. The High Court passed an interim order on 11.7.1991 to the effect that if the appellant was working in the Institution salary should be paid to him. Consequently, the District Inspector of Schools vide order dated 22.7.1991 complied with the said directions and called upon the Management to submit the salary bill of the appellant. It may also be put on record that the respondent-Krishna Kant had not been made a party in the aforesaid writ petition and therefore respondent No. 8 - Krishna Kant also filed Writ Petition No. 4433 of 1991 challenging the order dated 30.3.1991 as well as the resolution dated 30.12.1990, 6.2.1991 and the order dated 26.3.1991 passed in favour of the appellant extending him the benefit of salary.

13. On 10.11.1994 an order was passed by the officer who was holding charge as District Inspector of Schools of District Sultanpur who revoked the order dated 30.3.1991 in favour of Mr. Ram Das and simultaneously approved payment of salary to the appellant Ram Nath Tripathi for the month of November and December, 1994.

14. The respondent - Krishna Kant preferred a representation before the Deputy Director of Education contending that the appellant's appointment and payment

of salary should be set aside and further directions be issued to appoint the respondent as a Demonstrator. This representation was filed before the Deputy Director of Education who was the Appellate Authority under Clause 7 in relation to any such dispute under the Removal of Difficulties Order, 1981. The Deputy Director of Education on 17.12.1994 passed an order staying the payment of salary to the appellant and a consequential order was passed by the District Inspector of Schools on 29.12.1994.

15. Since the salary of the appellant had been stopped he filed Contempt Application No. 2368 of 1991 in which a counter affidavit was filed by the District Inspector of Schools bringing on record the order of the Deputy Director of Education dated 17.12.1994 being the reason for not paying the salary, as a result whereof the contempt application was dismissed on 31.1.1995.

16. The appellant Prem Nath Tripathi represented before the Deputy Director of Education contending that the order dated 17.12.1994 was ex parte to him and after notices that were issued the Deputy Director passed an order holding that the appellant was not qualified for the post of Demonstrator as he was not a trained graduate and secondly for the reason he had been awarded lesser quality point marks as against the respondent - Krishna Kant. The appellant alleges that the said order was passed without giving any adjournment which has been sought and the said order was also ex parte. This was rejected on 8.8.1995.

17. The Management of the Institution and the appellant both represented the matter before the Joint Director of Education. The District Inspector of Schools also sent his comments forwarding the said representations for taking appropriate action. The matter was placed before the Deputy Director of Education, Faizabad who vide order dated 9.2.1996 refused to entertain the said request of the Management and the appellant. These orders were not challenged before the High Court.

18. The respondent No. 8 - Krishna Kant then moved an application in his Writ Petition No. 4433 of 1991 and an interim order was passed on 1.4.1996 either to allow him to work as Demonstrator and pay salary, but the same was vacated on 18.4.1996 on the ground that both the writ petitions filed by the appellant and the respondent should be heard together.

19. The appellant on 2.9.1996 filed the third writ petition being Writ Petition No. 5479 of 1996 challenging the order dated 8.8.1995 referred to hereinabove and also prayed for a mandamus for his payment of salary. The District Inspector of Schools on 10.12.1996 issued a letter to the Management not to allow the appellant to function or receive salary in view of the orders dated 8.8.1995 and 9.2.1996.

20. In this interregnum period the respondent - Krishna Kant moved an application before the Director that since he had been awarded the highest Quality Point Marks he should be allowed to work upon which the Director called for a report from the District Inspector of Schools which was submitted on

28.5.1997. The District Inspector of Schools called upon the Management to allow the respondent - Krishna Kant to work in the Institution and also submitted a report on 26.12.1997 to the Deputy Director of Education intimating as to why the appellant was not being paid salary and also indicating that Krishna Kant had not been appointed inspite of having received the highest Quality Point Marks.

21. The appellant appears to have moved some representation before the State Government on 18.12.1997 on which the State Government directed the District Inspector of Schools to take an effective action in the matter vide order dated 19.1.1998. The District Inspector of Schools on 25.4.1998 passed an order for payment of salary to the appellant and also mentioned therein that the respondent - Krishna Kant was not entitled to either be appointed or receive salary as he had not appeared in the selection nor had he submitted his documents as demanded by the Management when the appointment was being processed.

22. The respondent No. 8 moved a representation before the Director of Education who passed order on 2.7.1998 not to make payment of salary to the appellant. The District Inspector of Schools also submitted a report on 21.7.1998 indicating that the order dated 25.4.1998 for payment of salary to the appellant had been made ignoring the material facts and consequently on 24.8.1998 he passed an order stopping the payment of salary to the appellant. The Director of Education on 26.10.1998 sent an order to the District Inspector of Schools for setting aside the order dated 25.4.1998 which order was an outcome of concealment. On this the order dated 29.12.1998 was communicated stopping salary of appellant.

23. The appellant aggrieved by the aforesaid orders against him filed Writ Petition No. 1178 of 1999 which is the third writ petition in which an interim order was passed staying the operation of the order dated 29.12.1998 whereby the appellant's salary had been stopped. An interim order was passed on 26.3.1999 which was made absolute on 18.5.1999. The District Inspector of Schools consequently issued orders for payment of salary to the appellant that was being paid w.e.f. 1.4.2000. Recommendations were made also for payment of arrears, but that was subject to the outcome of the writ petition. The fact remains that the appellant received salary without arrears till the disposal of the writ petitions whereby his claim was dismissed.

24. The learned Single Judge found favour with the respondent on the ground that he had been awarded higher Quality Point Marks and that the appellant was not trained with graduation to his credit. Consequently the writ petitions filed by the appellant were dismissed and the writ petition filed by the respondent No. 8- Krishna Kant was allowed with a direction to the Management to allow the respondent to work on the post of Science Demonstrator and pay him regular salary.

25. The appellant filed the present appeal questioning the correctness of the

judgement and on 7.1.2005 the appeal was entertained and the respondent No. 8 Krishna Kant was restrained from joining by way of an interim order. As a result of the said interim order, even though certain others orders were passed in the meantime, the respondent No. 8 admittedly could not join in the Institution and has not functioned. Equally the appellant did not receive any salary after the dismissal of his writ petition.

26. The matter was heard by us and Sri Ramesh Pandey, learned counsel for the appellant, has advanced his submissions with the help of the written notes handed over by him. The respondent No. 8 is represented by Dr. L.P. Mishra, who had vehemently opposed the appeal and has urged that this Court may dismiss the appeal and uphold the extension of the benefit under the judgment to the respondent No. 8.

27. Sri H.G.S. Parihar, learned senior counsel has appeared for the Management and he has supported the cause of the appellant. He also submitted that in the absence of letter of appointment by the Committee of Management to the respondent No. 8 and in the absence of any evidence that the respondent No. 8 had produced his originals and certified copies of mark-sheets, this Court was not justified in accepting his stand. In essence the argument is that the High Court could not have issued a direct appointment order to the respondent No. 8, moreso when the respondent No. 8 had neither been appointed nor approved by the competent authority. If the Committee had not passed any resolution to appoint him nor had issued any letter of appointment then the court could not have issued the directions, hence the appeal deserves to be allowed.

28. The learned Standing Counsel has appeared on behalf of the State and it has been urged that the Management deliberately appears to have avoided appointment to the respondent No. 8 and, therefore, the authorities had rightly passed orders rejecting the claim of the appellant and issued directions for appointing the respondent No. 8 on the post in question.

29. Sri Ramesh Pandey, learned counsel for the appellant, contends that firstly the learned Single Judge has committed an error by misreading the provisions of qualification which requires Training as a desirable qualification. It is only preferential and not compulsory. He then urges that the conclusion drawn that since the respondent No. 8 had received higher Quality Point Marks, therefore, he deserved appointment is also incorrect as admittedly according to the appellant the respondent No. 8 never appeared before the Committee on the date fixed for interview nor did he submit the certified copies of the mark-sheets as was desired for verification and consequently the Committee did not commit any error in denying him appointment under the impugned resolution. This aspect according to Sri Pandey has completely been overlooked by the learned Single Judge. He then submits that in the absence of any resolution or letter of appointment in favour of the respondent No. 8 by the Committee of Management the respondent No. 8 could not have claimed any right of appointment and the orders passed by the Deputy Director of Education in his favour on 30.8.1995

and 9.2.1996 were orders not in accordance with law. He submits that the report of the District Inspector of Schools made in this regard and which was on record were overlooked by the authorities wherein it was clearly stated that the respondent No. 8 had not submitted his documents nor was there any resolution in his favour for appointment. He further submits that once the appellant had been appointed and his salary was paid then in view of the provisions of Section 33-B there is a vested right by operation of law created in favour of the appellant extending him the benefit of regular appointment. This right could not have been divested by the learned Single Judge and which aspect was completely overlooked. He, therefore, submits that the impugned order deserves to be set aside on all the aforesaid scores.

30. Sri H.G.S. Parihar, learned senior counsel for the Management, has supported the claim of the appellant and the decision in the case of Surendra Narain Pandey Vs. State of U.P. and Others, has been relied on to urge that the respondent No. 8 in the absence of any resolution or appointment cannot be extended any benefit. The learned Single Judge erred by substituting the same through a mandamus.

31. The appeal has been opposed vehemently by Dr. L.P. Mishra, learned counsel for the respondent No. 8, who urges that it is now established on record that the resolution passed by the Committee of Management on 30.12.1990 narrated an incorrect fact about non-production of documents by the respondent No. 8 inasmuch as firstly there was no such intimation and secondly the respondent No. 8 was always available and he could have tendered all his documents if at all it had been demanded from him as he was seeking employment. Thus, the said assumption of the Committee that the respondent No. 8 had failed to appear for interview and submit his documents is without foundation. He further submits that there is no requirement of any interview for such appointment under the Removal of Difficulties Order or Section 18 of the 1982 Act and as a matter of fact no interview was held of any candidate. Thus, this excuse of interview taken up by the Management and reflected in the report of District Inspector of Schools was without any basis and was an evidence sought to be created to defeat the claim of the respondent No. 8. Admittedly, according to the same resolution the respondent No. 8 had received the highest Quality Point Marks and, therefore, there was no reason to eliminate the respondent No. 8. The only malafide reason was that the Management somehow the other wanted to accommodate the appellant and, therefore, the resolution being malafide and illegal, ignoring the claim of the respondent No. 8 on unjustifiable ground, was rightly held to be an unlawful act by the authorities who had ultimately arrived at the conclusion that the respondent No. 8 was entitled for being appointed. Consequently, the conclusion drawn by the learned Single Judge does not suffer from any infirmity.

32. Dr. L.P. Mishra submits that even otherwise the appellant was not qualified, as a desirable qualification is an indispensable qualification. It is not preferential and is essential. He, therefore, submits that the appellant was not qualified and

admittedly having received lesser Quality Point Marks could not have been selected or appointed by the Management. In this background he contends that the directions issued by the Authorities and the orders that were challenged by the appellant were without any substance. He also urges that as a matter of fact the appellant having failed to challenge the orders dated 8.8.1995 and 9.2.1996 could not have attempted any further representations inasmuch as the Deputy Director of Education being the competent authority under Clause 7 of the First Removal of Difficulties Order had finally rejected the claim of the appellant and had allowed the claim of respondent No. 8 for appointment and continuance. He submits that neither the State Government nor any other Authority could have issued directions and the matter could not have been reopened through an indirect method resulting in the passing of the subsequent orders which also ultimately upheld the claim of the respondent No. 8. He, therefore, submits that all intervening orders ultimately came to the right conclusion and, therefore, the learned Single Judge in his conclusion was also correct in granting the relief to the respondent No. 8.

33. When the matter was being heard, it was pointed out to the learned counsel for the respondent Dr. L.P. Mishra that as on date once there was an interim order restraining the respondent No. 8 from joining in the Institution and the matter related only to an ad-hoc appointment, what possible relief could be granted to the respondent No. 8 keeping in view the fact that the very provision of Section 18 has been repealed and no such provision exists as on date for making ad-hoc appointment under the statute. In such a situation Dr. Mishra was called upon to assist the Court as to whether in a matter relating to purely ad-hoc appointment can such a relief now be extended to the respondent No. 8. Dr. L.P. Mishra, in response thereto submitted that if a wrong has been committed then the remedy cannot be denied as every wrong has a remedy and secondly it is now established that the Management had deliberately avoided the candidature of the respondent No. 8 and, therefore, had the respondent No. 8 been allowed to join he would have been granted the same benefit of regularisation as claimed by the appellant. He further submits that such situations would attract the principle that have been laid down in some judgments of the Apex Court and of this Court where this relief can be granted. He has cited the decision in the case of Union of India Vs. Mohan Singh Rathore and another, , the decision in the case of Manoj Manu and Another Vs. Union of India (UOI) and Others, , the division bench judgment in Special Appeal No. 241 of 2005, B.S.N.L. Vs. Ms. Sonia Gupta, decided on 21.4.2005, the decision in the case of Rabindra Kumar Battick and Another Vs. State of Orissa and Others, and in order to advance the said principles as to how a relief can be extended under Article 226 of the Constitution of India that should be deduced from the pleadings he has relied on the case of Joshi Technologies International Inc. Vs. Union of India and Others .

34. Having heard the learned counsel for the parties and having considered their submissions, the first issue is as to whether the procedure prescribed in law was

followed by the Management in proceeding to make selection and appointment on ad-hoc basis against the post of Demonstrator. As noted above the then ad-hoc appointments were to be made under Section 18 as it stood then (now repealed). For the purpose of procedure the decision in the case of Radha Raizada (supra) clearly lays down that in the case of a substantive vacancy, which is also here as it arose out of the death of the earlier incumbent, the post has to be first requisitioned to the Commission and then an advertisement has to be made after the expiry of the statutory period whereafter the Management has to proceed to request the District Inspector of Schools in the matter for appointment on ad-hoc basis. If that law is taken into consideration as explained in the case of Radha Raizada (supra) then in that event in relation to a substantive vacancy the provisions of Removal of Difficulties First Order would apply which clearly requires that the Management will forward the details of the vacancy and it is the District Inspector of Schools who would invite the applications through the Local Employment Exchange and also through public advertisement in at least two daily newspapers having wide circulation in Uttar Pradesh. These applications have to be sent to the District Inspector of Schools accompanied by a crossed postal order and a self addressed envelope and the District Inspector of Schools shall cause the best candidates selected on the basis of quality point marks.

35. The procedure in relation to short-term vacancies was slightly different where the Management was directly given the power to make such appointments on the basis of quality point marks.

36. In the instant case it is the Management which has proceeded to complete the process without any involvement of the District Inspector of Schools as envisaged in law. The District Inspector of Schools came later on when he is stated to have passed orders disapproving the appointment of the appellant and/or that of the respondent, and made his own appointment of one Ram Das.

37. Thus, on record it is established that the aforesaid procedure as spelt out in Radha Raizada's case (supra) was not followed as the Management itself advertised the post in only one local newspaper and then proceeded with the selections in which the respondent No. 8 was also the applicant. The said procedure having not been followed it was not a regular ad-hoc appointment that was processed by the Management. Neither the appellant nor the respondent No. 8 were, therefore, entitled to claim any such continuance or appointment as the entire selection process was clearly vitiated. This position clearly emerges on the basis of the impugned resolution and the law laid down in the case of Radha Raizada (supra) and Prabhat Kumar Sharma (supra) aforesaid. No law to the contrary has been shown by either of the counsel on the basis whereof it could be said that the procedure followed by the Management was valid. Thus, in the absence of any such benefit that could be extended, the learned Single Judge, therefore, fell in error by overlooking the procedure prescribed in law as also the aforesaid legal provisions and judgments which have not been even considered

while delivering the judgment, even though the said law was in existence at that time. The government rescinded the Removal of Difficulties order w.e.f. 25.1.1999 and the legislature in it's wisdom repealed Section 18 of the 1982 Act discontinuing ad-hoc appointments of Teachers w.e.f. 30.12.2000 through U.P. Act No. 5 of 2001. The impact thereof has gone completely unnoticed while pronouncing the impugned judgment on 17.11.2004.

38. It is no doubt true that the Management could not find any valid justification for eliminating the respondent No. 8, but on account of the lapse of procedure as detailed above, the respondent No. 8 also could not claim any right of consideration. Apart from this, the respondent No. 8 could have only claimed his consideration even if the procedure had been followed. The Management had admittedly passed a resolution eliminating him and had not issued any letter of appointment. In this context the judgment of the division bench in the case of Surendra Narain Pandey (supra) as relied upon by the respondent gains significance. The respondent No. 8 could not have been extended any benefit of appointment or continuance when there was no resolution in his favour nor had he been appointed without recording a specific finding about the non-production of documents by the respondent No. 8.

39. The third and not the least most relevant issue is that even assuming for the sake of arguments that the respondent No. 8 had been wrongly eliminated then what is the remedy that can be claimed by him. The statutory provision of ad-hoc appointments by the management against substantive vacancies having already been done away with, he cannot now be given any relief of ad-hoc appointment, moreso when an interim order was passed by this court in this appeal whereby he had been restrained from being appointed or joining in the Institution. The argument of Dr. L.P. Mishra that this remedy is available on the strength of the judgments relied upon by him cannot be accepted for the simple reason that the judgments cited at the bar were all in relation to vested statutory rights of appointments which were not ad-hoc in nature. No judgment has been cited by Dr. Mishra where the matter related to an ad-hoc appointment and a similar statutory provision having been repealed as in the present case. Consequently, the ratio of the decisions relied on by Dr. Mishra do not come to his aid on the facts and the legal position that emerges in the present case and discussed hereinabove. The suggestion of Dr. Mishra that the respondent No. 8 is found entitled to be given appointment, then he would gain the benefit of regularisation, also would be stretching the proposition too far, inasmuch as, the respondent No. 8 cannot be by fiction deemed to have been appointed. He was actually also not appointed. He was not selected for appointment even though he claims to have been wrongly excluded. Mere selection also does not give any right of appointment. The regularisation rule requires not only actual ad-hoc appointment and approval but also continuance on the date of the insertion of the regularisation rule. The respondent No. 8 was admittedly neither appointed nor was continuing against the said post on the appointed day under the rule.

40. The net outcome is that neither the appellant nor the respondent No. 8 can succeed in claiming consideration for appointment on the post of Demonstrator as discussed hereinabove. Consequently, the appeal fails in so far as the relief claimed by the appellant is concerned, but is partly allowed in so far as the relief granted to the respondent No. 8 is concerned. The certiorari exercised by the learned Single Judge and as a consequence thereof a mandamus issued in favour of the respondent No. 8 is set aside to the aforesaid extent. The appeal is partly allowed but without any relief of ad-hoc appointment and its consequences either to the appellant or to the respondent No. 8. It is however made clear that any salary received by the appellant during this long drawn battle shall not be recovered from him.

41. The appeal stands disposed of accordingly.