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(2002) 05 AHC CK 0128

In the Allahabad High Court

Case No : Special Appeal No. 719 of 1997

Raghuvendra Babu Mishra — APPELLANT

Vs

District Inspector of Schools, Etah and Others — RESPONDENT

Date of Decision : 24-05-2002

Acts Referred:

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

Citation : (2002) 3 AWC 2207 : (2002) 3 UPLBEC 2155

Hon'ble Judges : S.K. Sen, C.J;R.K. Agrawal, J

Bench : Division Bench

Advocate : R.S. Dwivedi and V.S. Dwivedi, for the Appellant; Sabhajit Yadav, S.C., for the Respondent

Final Decision : Allowed

Judgement

R.K. Agrawal, J.—The present special appeal has been filed by Raghuvendra Babu Mishra against the judgment and order dated 3.9.1997 passed by the learned single Judge in Writ Petition No. 10210 of 1994, wherein the learned single Judge had held that the petitioner is not entitled to regularisation/ substantive appointment on the post of lecturer and had dismissed the writ petition.

2. Briefly stated the facts giving rise to the present appeal are as follows :

The appellant-writ petitioner was appointed as a lecturer in Physics in Gandhi Vidya Mandir Inter College, Fatehpur-Etah (hereinafter referred to as the College), on 15.7.1989 in a short-term, vacancy caused by the existing lecturer Rama Nand Mishra proceeding on leave. The appellant-writ petitioner was appointed under the provisions of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 (hereinafter referred to as the Second Removal of Difficulties Order). His appointment was approved by the District Inspector of Schools on 16.9.1989. He continued to work and received salary from the State exchequer. On 17.1.1994, he received a letter from the Manager of the college stating therein that the leave of Ram Nand Mishra was

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going to be over on 31.1.1994 and, therefore, he shall be relieved from the post in case Rama Nand Mishra joins. The petitioner approached this Court by filing a writ petition under Article 226 of the Constitution of India, seeking a writ of mandamus directing the opposite parties to pass an order of regularisation as lecturer in Physics in the institution in view of Section 33B, which was inserted in U.P. Secondary Education Services Selection Board Act, 1981 (hereinafter referred to as the Act), which came into force on 7.8.1993. According to the appellant-writ petitioner, the short-term leave vacancy on which he was appointed on ad hoc basis became substantive vacancy, when Rama Nand Mishra did not join the college after the expiry of his leave on 31.1.1994. The District Inspector of Schools did not accept the claim of the appellant-writ petitioner on the ground that the short-term vacancy was converted into a substantive vacancy on 8.2.1990 on which date Rama Nand Mishra was absorbed and confirmed as Head Master in Uchchattar Madhyamik Vidyalaya, Talesra, Aligarh and on the said date, the appellant-writ petitioner ceased to be a lecturer in Physics. The learned single Judge relying upon a Full Bench decision of this Court in the case of Smt. Pramila Misra v. Deputy Director of Education, Jhansi Division, Jhansi and Ors. 1997 AWC (Supp) 466 : (1997) 2 UPLBEC 1329, held that the appellant-writ petitioner ceased to work on the post of lecturer in Physics on 8.2.1990 on which date Rama Nand Mishra, who had gone on leave was finally absorbed and confirmed on the post of Head Master in another institution and further the continuation of the petitioner as lecturer in Physics in the said college after 8.2.1990 was not by virtue of his own right. The learned single Judge further found that the essential requirement for regularisation of service under the newly inserted provisions of Section 33B that the persons, who continued to be in service on 7.8.1993 on which date the new section came into force is lacking in the present case and accordingly, the appellant writ petitioner is not entitled for regularisation. "

3. We have heard Dr. R. S. Dwivedi, learned senior counsel assisted by Sri V. S. Dwivedi on behalf of the appellant-writ petitioner and Sri Sabhajit Yadav, learned standing counsel appearing on behalf of the respondents.

4. Dr. Dwivedi, learned senior counsel submitted that the appellant-writ petitioner was admittedly appointed on a leave vacancy caused by Rama Nand Mishra on 15.7.1989. His appointment was made after following the due procedure of law and was also given approval by the District Inspector of Schools. The college had sanctioned the leave of Rama Nand Mishra till 31.1.1994, Rama Nand Mishra did not join the college after 31.1.1994 and the appellant-writ petitioner continued to work as lecturer in Physics in the said college till 31.1.1994 and was paid his salary under the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other employees) Act, 1971 (hereinafter referred to as the Payment of Salaries Act) by the State Government without any objection. The short-term leave vacancy of Rama Nand Mishra stood converted into a substantive vacancy on 31.1.1994, when his leave expired. He also emphasized that Rama Nand Mishra had not at all informed the

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college authorities about his absorption and confirmation as Head Master in Uchchattar Madhyamik Vidyalay. Talesra, Aligarh on 8.2.1990. According to him in view of the newly inserted Section 33B in the Act w.e.f. 7.8.1993, since the appellant-writ petitioner continued in service as lecturer in Physics in the said college on ad hoc basis, his case is liable to be considered for regularisation by the Selection Committee constituted for that purpose. He further submitted that the Full Bench decision of this Court in the case of Smt. Pramila Mishra (supra) has been considered subsequently by a Division Bench of this Court in the case of Raj Kumar Verma and another Vs. District Inspector of Schools, Saharanpur and others, , wherein the Division Bench has held that the right of a teacher appointed in a short-term vacancy on or before the date specified in Section 33B (1) accrues only upon the short term vacancy being converted into a substantive vacancy and a teacher appointed in short-term vacancy on or before the specified dates, who is not found ''suitable'' and ''eligible'' for substantive appointment shall cease to hold the appointment on such date as the State Government may by order specify and not on the date the short-term vacancy came to be converted into substantive vacancy. He further relied upon a Division Bench decision of this Court in the case of Smt. Shashi Saxena Vs. Deputy Director of Education and others, and submitted that the decision in Raj Kumar Verma (supra), has been followed and this Court had held that an appointment on ad hoc basis on the post of Assistant Teacher in L.T. grade being converted into a substantive vacancy on the retirement of the person holding the substantive post does come to an end automatically. Thus, according to Dr. Dwivedi, the appointment of the appellant-writ petitioner did not come to an end automatically on conversion of short-term vacancy post into a substantive vacancy post and he is entitled for being considered for regularisation/ substantive appointment.

5. Learned standing Counsel, however, submitted that the short-term vacancy post which the appellant-writ petitioner was occupying stood converted into a substantive vacancy post on 8.2.1990, when Rama Nand Misra was absorbed and confirmed on the post of Head Master in another institution and the appointment of the appellant-writ petitioner, in view of the Full Bench decision in the case of Smt. Pramila Mishra ceased on that day itself. He further submitted that if the appellant-writ petitioner had continued to work thereafter and received salary even from the State exchequer uptill 31.1.1994, that would not give any right, benefit or advantage to him to claim regularisation of his services on the substantive post of lecturer in Physics in the said college u/s 33B of the Act, as he would be deemed not to be in service on the date of commencement of the said section. He relied upon a decision of the Hon''ble Supreme Court in the case of Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another,

6. Having heard the learned counsel for the parties, we find that in the present case, the question is as to whether the appellant-writ petitioner, who was appointed in a short-term leave vacancy on 15.7.1989 and whose appointment

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was approved by the District Inspector of Schools on 16.9.1989 and continued to work till 31.1.1994. is entitled for being considered for regularisation u/s 33B of the Act or not. It is not in dispute that the appellant-writ petitioner was appointed under the provisions of Second Removal of Difficulties Order after following the due procedure. He continued to work till 31.1.1994 without any let or hindrance from any quarter and also received salary from the State exchequer under the provisions of the Payment of Salaries Act. Section 33B of the Act deals with regularisation of certain appointments. It reads as follows :

"33B. Regularisation of certain other appointments.--(1) Any teacher, other than the Principal or Headmaster.-

(a) (i) was appointed by promotion or by direct recruitment in the Lecturer grade or Trained graduate grade on or before May 14, 1991 or in the Certificate of teaching grade on or before May 13. 1989, against a short-term vacancy in accordance with Paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 and such vacancy was subsequently converted into a substantive vacancy ; or

(ii) was appointed by direct recruitment on or after July 14, 1981, but not later than July 12, 1985 on ad hoc basis against a substantive vacancy in the Certificate of Teaching grade through advertisement and such appointment was approved by the Inspector ; or

(iii) was appointed by promotion or by direct recruitment on or after July 31, 1988, but not later than May 14, 1991 on ad hoc basis against a substantive vacancy in accordance with Section 18, (as it stood before its substitution by the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Second Amendment) Act, 1992) :

(b) possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with the provisions of the Intermediate Education Act, 1921 :

(c) has been continuously serving the Institution from the date of such appointment upto the date of the commencement of the Act referred to in Sub-clause (iii) of Clause (a) ;

(d) is not related to any member of the management or the Principal or Head Master of the Institution concerned in the manner specified in the Explanation to Sub-section (3) of Section 33A

(e) has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under Sub-section (2), shall be given substantive appointment by the management.

(2) (a) For each region, there shall be a Selection Committee comprising :

(i) Regional Deputy Director of Education of that region, who shall be the Chairman.

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(ii) One officer holding a Group ''A'' post (specified as such by the State Government from time to time) in any department other than Education Department, to be nominated by the Slate Government.

(ii) Regional Inspectress of Girls School of that region : Provided that the Inspector of the District shall be co-opted as a member while considering the cases for regularisa-tion of that district.

(b) The Selection Committee constituted under Clause (a) shall consider the case of every such teacher and on being satisfied about his eligibility and suitability in view of the provisions of Sub-section (1) shall, subject to the provisions of Sub-section (3) recommend his name to the Management for appointment under Sub-section (1) in a substantive vacancy.

(3) (a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment.

(b) If two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.

(4) Every teacher appointed in a substantive capacity under subsection (1) shall be deemed to be on probation from the date of such substantive appointment.

(5) A teacher who is not found suitable under Sub-section (1) and a teacher who is not eligible to get a substantive appointment under that sub-section shall cease to hold the appointment on such date as the State Government may by order specify.

(6) Nothing in this section shall be construed to entitle any teacher to substantive appointment, if on the date of commencement of the Act referred to in Sub-clause (iii) of Clause (a) of Sub-section (1), such vacancy had already been filled or selection for such vacancy has already been made in accordance with this Act."

7. From a reading of the aforesaid section, it is clear that a person, who has been appointed by direct recruitment in the lecturers'' grade on or before 14.5.1991 against a short-term vacancy in accordance with para 2 of the Second Removal of Difficulties Order and such vacancy was, subsequently, converted into a substantive vacancy and he possesses the qualification prescribed or is exempted from such qualification under the provisions of Intermediate Education Act, 1921, and has been continuously serving the college upto the date of the commencement of the Act and is not related to any member of the management or the Principal or the Head Master of the college and has been found suitable for appointment for a substantive capacity by a selection committee constituted under Sub-section (2) shall be given substantive appointment by the management. When considered as to whether the appellant-writ petitioner fulfils the requirement of Section 33B (i) or not, we find that the appellant-writ petitioner was appointed before 14.5.1991, i.e., on 15.7.1989 in the lecturer''s

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grade under the provisions of Removal of Difficulties Order, which appointment has also been approved by the District Inspector of Schools. He has been continuously working since 15.7.1989 till 31.1.1994, i.e., even after the commencement of the Amending Act, which is 6.8.1993. Thus, he is entitled for being considered for regularisation by a Selection Committee duly constituted under Sub-section (2) of Section 33B of the Act.

8. In the case of Smt. Pramila Mishra (supra) the Full Bench of this Court has held that :

"A teacher appointed by the management of the institution on ad hoc basis in a short-term vacancy (leave vacancy/ suspension vacancy) which is subsequently converted into a substantive vacancy in accordance with the provisions of the Act, Rules and Orders, (on death, resignation, dismissal or removal of the permanent Incumbent), cannot claim a right to continue. He has, however, right to be considered along with other eligible candidates for ad hoc appointment in the substantive vacancy if he possesses the requisite qualifications."

9. The decision of the full Bench in the case of Smt. Pramila Mishra (supra) was considered subsequently by a Division Bench in the case of Raj Kumar Verma (supra) wherein the Division Bench has held as follows :

"The question for consideration before the Full Bench in the case of Pramila Mishra (supra) was whether a teacher appointed on ad hoc basis in a short-term vacancy, such as a vacancy caused due to leave, was entitled ; as of right : to continue on the said post even after the short-term vacancy had been converted into a permanent vacancy due to death, resignation, retirement or termination of the permanent incumbent. The Full Bench noticed that the answer to the question would depend on the interpretation of Section 33B of the U.P. Secondary Education Service Commission and Selection Boards Act, 1982 (U.P. Act No. 15 of 1982) and its interaction with the provisions of the U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981. The Full Bench held as under :

"In the case of ad hoc appointment in a short-term vacancy paragraph 3 of the Second Order specifically lays down that the appointment will come to an end if the short-term vacancy otherwise ceases to exist. It follows, therefore, that when a vacancy caused due to grant of leave to or suspension of the permanent incumbent becomes a substantive vacancy on account of his death, resignation or termination or removal from service, the short-term vacancy ceases to exist and a substantive vacancy is created in its place. On a perusal of the relevant provisions anxious consideration to the matter, we do not find any provision which directly or even indirectly vests a right in a person appointed as an ad hoc teacher in a short-term vacancy to continue even after the said vacancy has ceased to exist and a substantive vacancy has been created in its place. What we want to stress and which is clear to us is that he cannot claim as a matter of right that he is entitled to continue the post till the candidate selected by the

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Commission/Board joins even if the short-term vacancy has ceased and a substantive vacancy in the post of teacher has been created in its place."

Paragraph 3 of the U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981, as amended by para 3 of the U.P. Secondary Education Service Commission (Removal of Difficulties) (Third) Order, 1982, provides that every appointment of an ad hoc teacher under paragraph 2 shall cease to have effect (i) when the teacher, who was on leave or under suspension joins the post ; or (ii) when the short-term vacancy otherwise ceases to exist. The Full Bench in support of its conclusions aforestated has placed reliance on the provisions contained in para 3 of the Second Removal of Difficulties Order, 1981, referred to above. The Full Bench, in support of its conclusion referred to above, also noticed the difference in the manner of appointments under the provisions in the following words :

"A clear distinction has been maintained between substantive vacancy and short-term vacancy of the post of teacher. The authority to make the appointment, the procedure to be followed in making the appointment and the considerations to be made in making the appointments in the two cases are distinct and different from each other."

The question herein is not whether a teacher appointed in a short-term vacancy is entitled to continue as of right even after the vacancy is converted into a substantive vacancy. The question involved in the instant case is whether the appellants are entitled to be considered for being given substantive appointment. The right to be so considered for being given substantive appointment u/s 33B accrues only upon conversion of the short-term vacancy Into substantive vacancy as provided in Sub-section (1) of Section 33B. A teacher appointed in short-term vacancy on or before the dates specified in Sub-clause (a) (i) of Sub-section (1) of Section 33B if not found ''suitable'' and ''eligible'' to get substantive appointment would cease to hold the post on such date as the State Government may by order specify. That is how the provisions contained in Section 33B of U.P. Act No. 5 of 1982 "interact" with those of the U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981, in respect of teachers appointed prior to the date specified in the section. The question as to how do the two provisions "interact" has not been specifically answered by the Full Bench in Pramila Mishra''s case (supra). In our opinion the right of a teacher appointed in a short-term vacancy on or before the date specified in Section 33B (1) accrues only upon the short-term vacancy being converted into a substantive vacancy and a teacher, appointed in short-term vacancy on or before the specified dates, who is not found ''suitable'' and ''eligible'' for substantive appointment shall cease to hold the appointment on such date as the State Government may by order specify and not on the date the short-term vacancy came to be converted into substantive vacancy. The question in our considered opinion, needs to be examined by the duly constituted Selection Committee comprehended by Sub-section (3) of Section 33B as the

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appellants were concededly appointed in Certificate of Teaching Grade before the specified date namely, May 13, 1989. Whether they fulfil other conditions of being given substantive appointment is a question which is to be decided by the Selection Committee."

10. The Division Bench decision in the case of Raj Kumar Verma was subsequently followed by another Division Bench of this Court in the case of Smt. Shashi Saxena (supra) and held that the services of a person does not come to an end automatically on the post being converted into substantive vacancy. In the case of Smt. Shashi Saxena (supra) the facts were that one Smt. Rama Dikshit, who was holding the substantive post of assistant teacher in L.T. grade was given ad hoc promotion against short-term vacancy on the post of lecturer. Smt. Shashi Saxena was appointed on ad hoc basis In the short-term vacancy caused by the ad hoc promotion of Smt. Rama Dikshit. Smt. Rama Dikshit retired from service. The substantive post held by Smt. Rama Dikshit, i.e., the assistant teacher in L.T. grade fell vacant. On these facts, after considering the provisions of Section 33B of the Act, and the Second Removal of Difficulties Order, 1981, the Division Bench while allowing the special appeal held that the services of Smt. Shashi Saxena cannot be said to have come to an end automatically on the post of assistant teacher in L.T. grade on being converted into substantive vacancy on the retirement of Smt. Rama Dikshit.

11. We are in respectful agreement with the decision given in the case of Raj Kumar Verma and Smt. Shashi Saxena (supra) and hold that there is nothing in Smt. Pramiia Mishra''s case, which prohibits giving of a substantive appointment by the Management if the person has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under Sub-section (2) of Section 33B of the Act and is found to fulfil all other requirements of Sub-section (1) of Section 33B of the Act. In the case of Committee of Management, Arya Nagar Inter College, Kanpar (supra) relied upon by the standing counsel, the Hon''ble Supreme Court was considering the question as to whether a person is entitled to the benefit of Section 33B (1) (a) (b) (i) of the Act, where the services came to be terminated on June 30, 1988. The Hon''ble Supreme Court had found that the services of the teacher concerned was terminated on May 30, 1988 w.e.f. 30.6.1988. The said teacher continued to remain in service on account of an interim order passed by this Court in the writ petition filed by the said teacher. On these facts, the Hon''ble Supreme Court found that admittedly, the services of the teacher came to be terminated w.e.f. 30.6.1988, though, he had obtained a stay order and continued to be in service, which was not by virtue of his own right under the order of an appointment but he continued in the office with the permission of the management. In this view of the matter the provisions of Section 33B (1) (a) (i) of the Act had no application.

12. Admittedly, in the present case, the appellant-writ petitioner worked without any let or hindrance till 31.1.1994. Even, the person, namely, Rama Nand Mishra on whose leave vacancy, the appellant-writ petitioner had been appointed, did

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not inform the authorities about his absorption and confirmation as Head Master in another college on 8.2.1990. The appellant-writ petitioner was being paid salary under the Payment of Salaries Act, from the State exchequer during his appointment as subsisting. The period of leave of Rama Nand Misra expired on 31.1.1994, when the management gave the notice of cessation of service of the appellant-writ petitioner. Thus, when the Amending Act, namely, U.P. Act No. 1 of 1993, which Inserted Section 33B in the U.P. Secondary Education Services Selection Board Act, 1982, came into force w.e.f. 7.8.1993, the appellant writ petitioner would be treated to be continuously serving the institution from the date of his appointment till the commencement of the Amending Act and is, thus, entitled for being considered by the Selection Committee constituted under Sub-section (2) of Section 33B of the Act in accordance with law. The decision of the Hon''ble Supreme Court in the case of Committee of Management. Arya Nagar Inter College, Kanpur (supra), would not be applicable to the facts of the present case, since the appellant-writ petitioner had continued in service in the institution/college without any let or hindrance by any of the authorities and his services was never terminated by the management or by the District Inspector of Schools.

13. In view of the foregoing discussions, the special appeal succeeds and is allowed. The respondent No. 1 is directed to refer the matter relating to the grant of substantive appointment to the appellant writ petitioner to the Selection Committee constituted under Sub-section (2) of Section 33B of U.P. Secondary Education Services Selection Board Act, 1982 and till such time any decision is taken by the said Committee, the appellant writ petitioner be permitted to continue on the post in question and be paid salary. However, the parties shall bear their own costs.

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