
(2010) 12 AHC CK 0021
In the Allahabad High Court

Case No : Special Appeal No's. 82 of 2009, 970, 1593, 1638 and 1815 of 2010

Rajiv Kumar and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-12-2010

Acts Referred:

Constitution of India, 1950 — Article 162, 166, 246(2), 309

Citation : (2011) 1 ADJ 615

Hon'ble Judges : F.I. Rebello, C.J;A.P. Sahi, J

Bench : Division Bench

Advocate : N.A. Khan, for the Appellant;

Final Decision : Allowed

Judgement

1. These 5 Special Appeals arise out of a common question with regard to the procedure to be applied for Selection and appointment on the post of class-IV employees against sanctioned posts in Higher Secondary Institutions governed by the provisions of the U.P. Intermediate Education Act 1921 and the Regulations framed thereunder. The issue has arisen on account of there being a vacuum under the relevant Regulations with regard to the procedure to be followed by the appointing authority, which was sought to be introduced and filled up through the orders issued by the State Government and by the Director of Secondary Education, particularly the communication of the Secretary of the concerned department dated 11.5.2001 to the Director of the Education and the consequential Circular issued by the Director of Education dated 1.6.2001.

2. We had adjourned the matter on several occasions calling upon the State Government to clarify the status of the communication dated 11.5.2001 which has been interpreted in a number of decisions of this Court to be discussed hereinafter, to be a Government Order, and the source of power to issue such a Government Order traceable to sub-section (4) of Section 9 of the U.P. Intermediate Education Act, 1921.

3. This exercise has revealed that the communication dated 11.5.2001, according to the State Government itself, was not issued in exercise of the powers u/s 9 (4) of the 1921 Act. The communication of the State Government in writing issued by the Secretary and addressed to the learned Chief Standing Counsel as communicated to this Court, has been taken on record and shall be reproduced at the appropriate place in the judgment.

4. Even though the controversy raised stands answered by the State Government itself, yet we are obliged to delve into this matter in depth in order to clarify the legal position as it exists and to avoid any further complication or confusion either in the mind of the litigant or as a matter of law to be followed by this Court.

5. The U.P. Intermediate Education Act provides for regulating all matters pertaining to recognized institutions which are privately managed under the provisions of the Act. The provision which regulates the appointment of class-IV employees commences with the power conferred on the Head of the institution as the appointing authority against such posts. To begin with, the conditions of service of such employees are prescribed by Regulations framed u/s 16-G of the 1921 Act. The aforesaid Section is the charging Section and the regulations framed are contained in Chapter-I where regulation 10(1) empowers the head of the institution to appoint class-IV employees. This is followed by the Regulations framed under Chapter-III which further elaborates the exercise of such powers and the manner in which the Head of the institution is to proceed in such manners, particularly Regulation 100 of the said Chapter. The same also provides that before proceeding to initiate the process of appointment against class-IV posts, the appointing authority shall seek permission from the District Inspector of Schools and thereafter shall send the proceedings of selection to the District Inspector of Schools for granting approval. There is an exception with regard to the said procedure in relation to the post of a Sweeper which is not very much relevant for the purpose of the present litigation.

6. The Regulations, however, do not prescribe the procedure as to how the selection is to be conducted, Ordinarily the Heads of the Institutions were proceeding to make appointments after inviting applications and disputes arose as to whether such applications had been invited after proper advertisement or not. Realising this gap existing in the Regulations in a matter relating to one institution namely Yashoda Rastogi Girls Inter College, Lucknow, the Secretary of the Secondary Education Department issued the communication dated 11.5.2001 which is at the epicenter of this exercise.

7. The background in which the said communication was issued, was that one Baijnath Shukla, claimed appointment as a class-IV employee in the institution referred to herein above and claimed payment of salary. He challenged the disapproval order of the District Inspector of Schools dated 6.5.1999 in Writ Petition No. 5869 (S/S) of 1999. The District Inspector of Schools had disapproved the said appointment as being in violation of Regulations 101 to 107

of Chapter-III of the 1921 Act. A direction was issued in the said writ petition to reconsider his claim which was rejected by the District Inspector of Schools on 4.4.2000 upholding the earlier order of disapproval. A Contempt Petition was filed by Sri Baijnath Shukla alleging disobedience of the directions issued by the High Court (Lucknow Bench) in which notices were issued on 16.1.2001 and the Secretary of the Department was summoned.

8. It appears from the original files of the Secretariat, Govt. of U.P., bearing No. 1601 (793) of 2000 and file No. 1601 (42) of 2000, which have been placed for our perusal by the learned Chief Standing Counsel containing the entire communication resulting in issuance of the communication dated 11.5.2001, that the bureaucracy set into motion in its usual operational style by calling for a report in order to meet the query raised by the Court. The Secretary, Secondary Education, through his communication dated 9.3.2001 called upon the Special Secretary of the Department to study the file himself and discuss it with him as the date fixed in the contempt matter was 26.3.2001. The Special Secretary sought a report from the Under Secretary, which was submitted on 23.3.2001 on the strength of the order passed by the District Inspector of Schools and the report sent by him. A report was also sent by the Deputy Director of Education and on 26.3.2001, the Secretary through a Demi-official letter called upon the Director of Education to submit his report inquiring about the applicability of a uniform procedure that is required to be followed in general in relation to the appointment of class-IV employees in Higher Secondary Institutions. The Secretary had categorically indicated therein that the Regulations do not explicitly provide for any procedure which raises a doubt about the same to be adopted for such selections and appointment.

9. At the same time, the Secretary also gave his opinion that in such a situation, the procedure provided for appointment of class-IV employees in government service should automatically apply for privately managed recognized and aided institutions in order to fill in the gap in the Regulations, It is this opinion expressed by the Secretary on 26.3.2001 that set the exercise into motion for giving a reply in the contempt matter. The relevant part of the letter of the Secretary dated 26.3.2001 is quoted below:

10. A perusal of the said letter, which is a Demi Official letter also indicates that the Director of Education should make available appropriate orders at his level so that a suitable reply may be given to the Court and there may be no delay in the matter. It is, therefore, obvious that due to an impending contempt matter before the Lucknow Bench of this Court, the Secretary issued the aforesaid directions to the Director of Education.

11. The Director in turn called upon the Deputy Director of Education, Lucknow, who through her letter dated 30.3.2001 informed the Director about the existence of the Rules applicable to appointment against class-IV posts (Group-D Employees) in the State Government namely, the Group-D Employees Service Rules 1985 as amended in 1986. The Secretary, after having received the said

communication wrote back to the Director to inform him as to whether any Circular or order has been issued by the Director so as to apply the aforesaid Group-D Service Rules in relation to such employees as presently involved concerning privately managed recognised institutions.

12. From the records produced, it further appears that the Secretary himself was called upon by the High Court to look into the matter of Baijnath Shukla and pass appropriate orders upon which the then concerned Secretary (Secondary Education) Sri P.K. Jha passed orders on 26.4.2001 that the aforesaid Group-D Employees Service Rules as amended in 1986 would be applicable in the absence of any procedure provided in the Regulations and, therefore, the claim of the employee Mr. Baijnath Shukla was unacceptable. The aforesaid communication and Orders, as are available on records of the original file that have been produced before us, therefore, laid down the foundation of the issuance of the order dated 11.5.2001.

13. The defence in the contempt matter of Baijnath Shukla was sought to be supplemented with surer foundations, and ultimately the Secretary issued the controversial communication dated 11.5.2001 which is quoted herein below:

14. The aforesaid communication through this engineered drafting assumed the applicability of Group-D Employees Service Amendment Rules 1986 for the purpose of procedure to be adopted for selection of class-IV employees in Higher Secondary Institutions governed by the 1921 Act. However, a perusal of clause (3) of the said communication issues a direction to all authorities under the Act including the concerned institutions, that in case any appointment is made in violation of the said Rules, appropriate action should be taken forthwith and the Director of Education was further ordered to issue a communication at his level.

15. The last clause of the said communication namely clause (4) is relevant. The same recites that a proposal should be forwarded to the State Government by the Director in order to incorporate the same in the Regulations to give it a legal shape. A direction was issued strictly calling upon the Director to treat the matter on top priority and send the proposal by 26.5.2001.

16. It is this communication which has been treated to be a Government Order in the decisions of this Court having been issued in exercise of the powers of sub-section (4) of Section 9 of the 1921 Act. The Director of Education issued a Circular on 1.6.2001 in compliance of the aforesaid communication which is as follows:

17. The same refers to the communication dated 11.5.2001 aforesaid reiterating that the Group-D Employees Amended Service Rules 1986 are applicable for the purpose of procedure to be adopted for appointment on clause-IV posts and that all such appointments should be made in accordance with the aforesaid Rules or else penal action should be taken by the authorities against the concerned Management or the Head of the Institution as the case may be.

18. The original file further discloses that on 7.8.2001 the Director of Education submitted his proposal to the State Government for bringing about appropriate amendments in the Regulations and the same should be incorporated as Regulation 108 under Chapter-III after Regulation 107 as was then existing. The said letter gains significance and is of utmost importance to understand this controversy, inasmuch as, it had been issued after the communication referred to herein above, which was being treated to be an order of the State Government under sub-section (4) of Section 9 of the 1921 Act. The said communication of the Director of Education is quoted below:

19. A perusal of the last paragraph of the letter clearly makes a recital that since the proposals are to be translated into amendments, therefore, in the event of the same being approved, the proposed amendments be incorporated as regulation 108 in the regulations as existing then, with a further provision that the said procedure shall not apply in relation to compassionate appointments of the category of dependants of dying-in-harness employees.

20. It appears that since the controversy relating to the individual issue of Baijnath Shukla, which gave rise to this entire exercise, took a back seat or was resolved, consequently the file ceased to have lost momentum and was given ample rest. The note-sheet of the original records indicates that in February 2002 i.e. 11/12.2.2002, a note was put up indicating the movement of the file from Section 12 to Section 7 of the Education Department for the purpose of finalising the proposal of incorporating the proposed amendments in the Regulations. As usual, the file was sent back from Section 7 to Section 12 on 7.5.2002 and on 9.5.2002 a note was put up that the file is being maintained by Section 7 awaiting decision by Section 12.

21. Then comes a long gap from 2002 to 2010 without any further action for introducing the proposed amendment. The entire file appears to have remained dumped and was also missing or misplaced as suggested in the nothings.

22. It appears that a learned single Judge of this Court in a couple of writ petitions proceeded to investigate this matter, particularly in Writ Petition No. 39969 of 2009 after having come across the decision of a learned single Judge in the case of Smt. Shikha and others v. State of U.P. and others, 2008 (4) ADJ 573. The issue involved was the same, namely, the applicability of the Rules framed for employees of the State Government under the proviso to Article 309 to be made applicable in respect of employees to be appointed in privately managed institutions recognized under the 1921 Act. The learned single Judge in the case of Smt. Shikha (supra) came to the conclusion that the Rules made under the proviso to Article 309 of the Constitution would only apply in relation to government servants in the interregnum period till such enactment is brought forth by the competent legislature and further held that they will have no application to the service conditions of the employees of Higher Secondary Schools and Intermediate Colleges recognized under the U.P. Intermediate Education Act, 1921.

23. The learned single Judge, who was probing this aspect of the matter, called upon the State Government to inform the Court about the applicability of the Group-D Employees Service Rules 1986, as prima facie the learned single Judge was of the opinion that the said Rules have been made applicable by virtue of the aforesaid communication dated 11.5.2001 which had been validly enforced under the powers conferred on the State Government u/s 9 (4) of the 1921 Act. The learned single Judge held that the said communication dated 11.5.2001 amounts to legislation by reference and the power of the State Government to do so was traceable under sub-section (4) of Section 9 of the 1921 Act. It would be appropriate to quote the said Section, which is as follows:

(4) Whenever, in the opinion of the State Government, it is necessary or expedient to take immediate action, it may, without making any reference to the Board under the foregoing provisions, pass such order or to take such other action consistent with the provisions of this Act as it deems necessary, and in particular, may, by such order modify or rescind or make any regulation in respect of any matter and shall forthwith inform the Board accordingly.

24. Accordingly, while deciding the case of Principal, Adarsh Inter College, Umari, Bijnore v. State of U.P. and others, 2010 (1) ESC 653 (All), the learned Judge held that the judgment in the case of Smt. Shikha (supra) had not taken notice of the aforesaid legal position including the communication dated 11.5.2001, and the powers so conferred on the State Government under sub-Section (4) of Section 9, therefore, the conclusion therein was not binding.

25. The said decision of the learned single Judge, therefore, held the communication dated 11.5.2001 to be a Government Order and the consequential communication dated 1.6.2001 issued by the Director of Education to be a valid Circular. The aforesaid decision in the case of Principal, Adarsh Inter College (supra) became subject matter of Special Appeal No. 1851 of 2009 and the Division Bench also proceeded on the same presumption that the powers conferred on the State Government were wide enough to introduce such provisions and upheld the judgment of the learned single Judge and explained away the decision in the case of Smt. Shikha (supra).

26. Thereafter, several decisions, which have been brought to our notice of learned single Judges, have reiterated the same position and the same have been followed by the learned single Judges in the decisions which are under Appeal before us.

27. It is further relevant to mention that another Division Bench of this Court in Civil Misc. Writ Petition No. 1199 of 2003, Jawahar Lal and another v. State and others, while answering a reference, vide order dated 17.9.2010 has, after quoting the same communication dated 11.5.2001 held, that by necessary reference the Group-D Employees amended Rules 1986 stand adopted in the matter of procedure for privately managed, aided and recognized Intermediate Colleges. It is to be noticed that the said Division Bench order was answering a

reference in relation to a contention with regard to the status of the post of Daftari (a class-IV post) and his seniority inter se within the cadre of class-IV Employees. The reference was, therefore, not in relation to the status of the communication dated 11.5.2001 as a Government Order. The reference was answered presuming that the communication dated 11.5.2001 was a Government Order as held by several decisions of this Court including the Division Bench judgment in the case of Principal, Adarsh Inter College, Umari, Bijnore v. State of U.P. and others, 2010 (1) ADJ 403. This position is being clarified to indicate that the said Division Bench was nowhere concerned with any investigation about the status of the communication dated 11.5.2001.

28. Reference may be had at this stage to certain judgments of the learned single Judges which have also held that the procedure of the 1986 Rules would be automatically applicable in relation to selection of class-IV employees of Higher Secondary and Inter Colleges. They are in Writ Petition Nos. 30008 of 2010 decided on 24.5.2010, 39517 of 2010 decided on 28.7.2010 and 40560 of 2010 decided on 26.7.2010. It has been informed at the Bar that there are quite a few number of similar and identical decisions which are unreported, holding the same view taken by learned single Judges that the communication dated 11.5.2001 was a Government Order applying the procedure of the 1986 Rules in such matters.

29. It is in the said background that these Special Appeals question the correctness of the decisions of the learned single Judges and also raise a challenge to the communication dated 1.6.2001, which has been introduced through an amendment in Special Appeal No. 1593 of 2010. It is urged by the learned counsel for the appellants in all these matters that the said legal issue deserves to be considered in the light of the communication dated 11.11.2010 now sent by the State Government, and the original records produced before this Court, that the communication dated 11.5.2001 is not a Government Order nor does it derive its source of creation from the power conferred under sub-section (4) of Section 9 of the 1921 Act.

30. We have heard Sri Ch. N.A. Khan, Sri Ashok Khare, learned Senior Counsel, Sri Deepak Kumar Jaiswal, Sri Vinod Kumar Singh, Sri A. Chatruvedi and Sri B.P. Verma for the appellants, the learned Addl. Advocate General Sri Jaideep Mathur and the learned Chief Standing Counsel assisted by Sri A.K. Tripathi for the State.

31. Learned counsel for the appellants raising their contention urged that once it is established that the communication dated 11.5.2001 is not a Government Order, then the Group-D Employees Service Amendment Rules 1986 would be inapplicable and, therefore, the orders issued by the authorities disapproving any such appointment would be invalid. They further contend that the service of class-IV employees of privately managed and recognized institutions, may be funded by the State Government, but that by itself would not automatically apply the Rules framed for government servants under the proviso to Article 309 of the Constitution and they, therefore, submit that in view of the opinion expressed by

the learned single Judge in Smt. Shikha (supra) and the factual status of the communication dated 11.5.2001, all the decisions of the learned single Judges deserve to be overruled and the opinion expressed in the two Division Bench judgments referred to herein above in the case of Principal, Adarsh Inter College (supra) and Jawahar Lal and another (supra), be held to be per in curium and be accordingly explained as they proceed on a total erroneous assumption of the status of the communication dated 11.5.2001 to be a Government Order u/s 9 (4) of the 1921 Act.

32. It is further submitted on behalf of the appellants that such a communication issued by the Secretary on his own would not be saved even under the Uttar Pradesh Rules of Business 1975 framed by His Excellency the Governor in exercise of powers under clauses (2) and (3) of Article 166 of the Constitution of India. They submit that the said communication dated 11.5.2001 is in no way an executive instruction even under Article 162 of the Constitution and the same, therefore, cannot be automatically read by way of reference as a legislation incorporated in the Regulations. They contend that the conclusion drawn by the learned single Judge and by the Division Bench in the case of Principal, Adarsh Inter College (supra) is, therefore, unsupportable in law. The submission in essence is that in the absence of any appropriate Government Order or amendment in the Regulations, the said Rules or procedure in relation to Group-D Employees in government service cannot be pressed into service for Selections of Class-IV employees in Higher Secondary Schools. This submission according to the appellant now stands substantiated by the communication dated 11.5.2001 itself where in clause-4, the Secretary, realising this position, had himself invited a proposal for an appropriate amendment as the power had to be exercised under sub-section (4) of Section 9 of the 1921 Act. The communication of the Director dated 7.8.2001 and the subsequent maintaining of the file in the year 2002 for the said purpose unequivocally demonstrates that no such amendment in accordance with the powers to be exercised under sub-section (4) of Section 9 was ever exercised by the State Government and, therefore, to treat the communication dated 11.5.2001 to be a Government Order was a patent error which deserves to be explained. They further contend that the State Government slept over the matter for 8 years and when the issue raked up in the year 2010 then they hurriedly came up with an explanation before this Court as if the Regulations had already been amended in terms of the Government Order dated 11.5.2001, which by itself indicates that no amendment had been brought about.

33. The State Government through the learned Additional Advocate General and the Standing Counsel has come up with a plea that the constitutional provisions of Articles 162 and 166 empower the State Government to issue executive instructions and the Minister Incharge is authorized by His Excellency the Governor to issue executive instructions for which the State Government has also framed the 1975 Business Regulations namely Uttar Pradesh Rules of Business 1975 quoted here below:

The Uttar Pradesh Rules of Business, 1975

In exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution of India, the Governor of Uttar Pradesh is pleased to make the following Rules, namely:

1. Short title.--These Rules may be called the Uttar Pradesh Rules of Business, 1975.
2. Definition.--In these Rules "Department" means any of the Departments specified in the Business of Uttar Pradesh (Allocation) Rules, 1975.
3. Disposal of Business.--Subject to the provisions of these Rules in regard to consultation with other departments and submission of cases to the Chief Minister the cabinet and the Governor, all business allotted, to a department under the Business of U.P. (Allocation) Rules, 1975, shall be disposed of by or under the general or special direction of the Minister-in-charge.
4. Inter-Departmental Consultations.--(1) When the subject to a case concerns more than one department no order shall be issued until all such departments have concurred, or failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet.

Explanation.--Every case in which a decision, if taken in one department, is likely to affect the transaction of business allotted to another department, shall be deemed to be a case the subject or which concerns more than one department.

(2) Unless the case is full covered by powers to sanction expenditure or to appropriate or re-appropriate funds, conferred by any general or special orders made by the Finance Department, no department shall, without the previous concurrence of the Finance Department, issue any orders which may-

- (a) involve any abandonment of revenue or involve any expenditure for which no provision has been made in the Appropriation Act;
- (b) involve any grant of land or assignment of revenue or concession, grant lease or licence of mineral or forest rights of a right to water power or any easement or privilege in respect of such concession;
- (c) relate to the number or grade of posts, or to the strength of a service, or to the pay or allowances of Government servants or to any other conditions of their service having financial implications; or
- (d) otherwise have a financial bearing whether involved expenditure or not;

Provided that no orders of the nature specified in clause (c) shall be issued in respect of the Finance Department without the previous concurrence of the Department of Personnel.

(5) The Law Department shall be consulted on:

(b) proposals for legislation;

(c) the making of Rules and orders of a general character in the exercise of a statutory power conferred on the Government; and

(d) the preparation of contracts and assurances to be entered into by the Government.

(4) Unless the case is fully covered by a decision or advice previously given by the Department of Personnel that Department shall be consulted on all matters involving--

(a) The Determination of the methods of recruitment and conditions of service of general application to Government servants in civil employment, and

(b) the interpretation of the existing orders of general application relating to such recruitment or conditions of service.

(5) Notwithstanding anything contained in sub-rules (1), (2) and (4), the Department-in-charge of a case may, while consulting any Department other than the Law Department and Finance Department, as required under these rules, set a time limit, which shall ordinarily not be less than two weeks, and if the comments of the Department consulted are not received within that time limit, the Department-in-charge of the case may presume that the Department consulted has no comments to offer or no views to express. It may thereupon recall its file from the Department consulted and take its own decision accordingly, except where these Rules require the concurrence of the Department consulted.

(6) For the removal of doubts, it is hereby declared that the mere fact that the advice of any other Department is sought should not mean that its consent is necessary, and the Department seeking advice may take its own decision according to these Rules while differing from the Department consulted.

(5) Request for Papers.--(1) The Chief Minister may call for papers from any department.

(2) The Finance Minister may call for papers from any department in which financial consideration is involved.

(3) Any Minister may ask to see papers in any other department if they are related to or required for the consideration of any case before him.

(4) (a) The Cabinet Secretary/Chief Secretary may, on the orders of the Chief Minister or of any Minister or of his own motion, ask to see papers relating to any case in any Department and any such request by him shall be complied with by the Secretary of the Department concerned.

(b) The Cabinet Secretary/Chief Secretary may, after examination of the case, submit it for the orders of the Minister-in-charge of the Department through the Minister-in-charge.

(6) Committee of Cabinet--(1) Ad hoc Committee of Ministers may be appointed by the Cabinet or by the Chief Minister for investigating and reporting to the Cabinet on such matters as may be specified, and, if so authorized by the Cabinet, for taking decision on such matters.

(2) Any decision taken by an Ad hoc Committee may be reviewed by the Cabinet.

(3) No case which concerns more than one department shall be brought before an Ad hoc Committee of the Cabinet until all the departments concerned have been consulted.

7. Submission of cases to the Cabinet--All cases specified in the First Schedule to these Rules shall be brought before the Cabinet:

Provided that no case which concerns more than one department shall, save in cases of urgency, be brought before the Cabinet until all the departments concerned have been consulted.

8. Submission of cases to the Chief Minister and the Governor.--All cases of the nature specified in the Second Schedule to these Rules shall, before the issue of orders thereon, be submitted to the Chief Minister or to the Governor or to the Chief Minister and the Governor as indicated therein.

9. Submission of periodical returns to the Cabinet--Each department shall submit to the Cabinet a periodical summary of its principal activities and such other periodical returns, as the Cabinet or the Chief Minister may from time to time require.

10. Responsibility of Departmental Secretaries.--In each department, the Secretary (which term includes a Special Secretary or Joint Secretary, if any, in independent charge) shall be the administrative head thereof, and shall be responsible for the proper transaction of business and the careful observance of these Rules in that department and if he considers that there has been material departure from them he shall personally bring the matter to the notice of the Minister-in-charge and Chief Secretary, the Principal Secretary/Secretary, Chief Minister will be responsible.

11. Departure from Rules.--The Chief Minister may, in any classes of cases permit or condone a departure from these Rules to the extent he deems necessary.

12. Supplementary Instructions.--These Rules may to such extent as may be necessary be supplemented by instructions to be issued by the Governor on the advice of the Chief Minister.

13.(1) The Uttar Pradesh Rules of Business, 1955 are hereby rescinded except as respects things done or omitted to be done thereunder.

(2) Notwithstanding such recession, the U.P. Secretariat Instructions, 1955 shall, until rescinded or amended by instructions issued under Rule 12 of these Rules

continue in force as if they were issued under the said Rule 12.

52. The second schedule contains the various items which are to be placed before the Chief Minister or the Governor. Relevant provision relating to present controversy are reproduced as under:

THE SECOND SCHEDULE (Rule 8)

Cases to be submitted to the Chief Minister and/or the Governor

34. It is contended by the learned Addl. Advocate General and the learned Chief Standing Counsel that the government functions accordingly and the Secretaries of the respective departments are enjoined with the duty of exercising such powers that have been delegated to them by the Ministers in accordance with the aforesaid Business Rules. It is submitted on their behalf that every such file need not physically travel up to His Excellency the Governor where according to the Rules of Business such authorisation is available with the Secretary of the Department.

35. The powers can be exercised in relation to the subject matter for which the legislature is competent to legislate either under the State list or under the concurrent list. In the absence of any enacted law, executive instructions can be issued under a valid authorisation with the approval of the Head of Department, which includes the Minister of the Department concerned, and in the event the exercise undertaken is in accordance with Rules of Business aforesaid, then merely because the file had not travelled up to His Excellency the Governor, the transaction would not be invalidated.

36. In the instant case, the issue has arisen specifically with regard to the exercise of powers conferred under a Statute namely sub-section (4) of Section 9 of the U.P. Intermediate Education Act, 1921. On this, the State Government has come up with a clear stand as noted at the outset that the communication dated 11.5.2001 was not issued in exercise of any such powers. The communication dated 11.11.2010 handed down to the Court is being quoted herein below:

The State Govt. to clarify whether the letter dated May 11, 2001 is in pursuance to power exercised under Section-9(4) of the U.P. Intermediate Act 1921 and if so whether the procedure was followed including approval of the same by the Governor.

The said Govt. letter dated May 11, 2001 was not issued in pursuance to power exercise under Section-9(4) of the U.P. Intermediate Act 1921, and therefore approval of the same was not taken by the Governor.

37. Having traversed the arguments and the stand taken by the State Government, we now proceed to analyse the status of the communication dated 11.5.2001. Needless to repeat, but in order to clarify, the contest between the appellants and the State arose in relation to the communication dated 11.5.2001 and as to whether the same was a power exercised under sub-section (4) of

Section 9 of the 1921 Act.

38. The issue relating to the exercise of such powers by the State Government under the 1921 Act came up for consideration before a Division Bench of this Court in the case of Krishna Pal Singh v. Government of U.P. and others, (1981) UPLBEC 521. In that case, a Government Order dated 12.7.1978 had been issued prescribing reservation in favour of the Members of the Schedule Caste/ Schedule Tribes and Backward classes in the services of private educational institutions recognized under the 1921 Act and receiving grant-in-aid from the State Government. The Court held that the Government Order, so issued, was traceable to the power exercised under sub-section (4) of Section 9 and came to the conclusion that the Regulations can be accordingly treated to have been amended by introducing provisions in respect of any matter that may be required for the purposes of the Act, and if such a Government Order is issued, the same would acquire a statutory character and be effective notwithstanding any regulation framed under the 1921 Act.

39. The next decision to be noted is that of Dr. Ramji Dwivedi Vs. State of Uttar Pradesh and Others, , where a radiogram had been issued by the State Government imposing a prohibition on making appointment of teachers in Higher Secondary and Inter Colleges governed by the 1921 Act. The status of the said radiogram was upheld and the same was again found traceable to sub-section (4) of Section 9 of the Act and the action of the State Government making that interim arrangement for a short while was held to be valid. The Court upheld the action of the State Government that since substantial amendments with regard to the procedure of selection had already been tabled before the State Government, therefore, the Management was prevented from proceeding to make any appointment so long as the legislation did not arrive and, therefore, the action of the State Government was held to be valid.

40. The aforesaid decisions, therefore, explain in essence that the Regulations framed under the U.P. Intermediate Education Act can be modified or rescinded by the State Government in exercise of its power under sub-section (4) of Section 9 of the 1921 Act. The aforesaid issue having been settled long ago, what is required to be untravelled is the framing of the Regulations in relation to the procedure for appointment of class-IV employees as presently involved.

41. From the original records as also from a perusal of the Regulations, particularly Regulations 100 to 107 under Chapter-III of the 1921 Act, it is evident that these Regulations were enforced vide Notifications dated 30.7.1992, 26.8.1992 and 2.2.1995 and were incorporated in the Regulations in exercise of the specific powers conferred under sub-section (4) of Section 9 of the Act read with Section 16-G. Thus, the very status conferring the power on the Head of the Institution under the said Regulations has its foundation by invoking the power u/ s 16-G read with Section 9 (4) of the 1921 Act. Such regulations, in our opinion, could have been amended only by exercise of powers in a similar fashion, and not by a mere communication by the Secretary, as assumed and interpreted in

the judgments that have been cited before us or are hereunder in appeal. The communication dated 11.5.2001, therefore, on facts as admitted by the State Government and in view of the law as explained above was not a Government Order at all much less an order issued under sub-section (4) of Section 9 of the Act.

42. In view of the conclusions drawn herein above that the communication dated 11.5.2001 is not a Government Order u/s 9 (4) of the 1921 Act, the premise on which the two Division Bench judgments namely Principal, Adarsh Inter College, Umari, Bijnore (supra) and the Division Bench pronouncement in the reference answered on 17.9.2010 in Writ Petition No. 1199 of 2003, Jawahar Lal and another (supra) falls through. The said judgments, therefore, have proceeded on a wrong assumption about the status of the communication dated 11.5.2001 mistaking it to be a Government Order which was only a letter and had never been issued in exercise of the powers u/s 9 (4) of the 1921 Act. In fact, the delegator i.e. the State never exercised its powers as admitted before this Court. It was a simple inter-departmental communication and not even an executive instruction so as to have any binding force of law. The said decisions, therefore, have laid down a proposition which has no binding effect in law.

43. We are constrained to say that this was on account of the incorrect position of the status of the communication dated 11.5.2001 projected before this Court in the said two cases, and also before the learned single Judges in all other such cases that have been referred to herein above and were approved by the Division Benches. On the contrary the learned single Judge in the case of Smt. Shikha (supra) had rightly appreciated the controversy in correct perspective which was sought to be distinguished later on the strength of the aforesaid communication dated 11.5.2001 in the case of Principal, Adarsh Inter College, Umari, Bijnor, 2010 (1) ADJ 403. Needless to say that the aforesaid bureaucratic sloppiness was sought to be covered up by an intelligible draft before this Court in the decisions referred to herein above that led to the passing of the judgments on an absolutely wrong premise. A committed paper work of the Secretariat without the law having been amended was kept a complete secret from this Court and a simple matter was got complicated at the hands of the bureaucracy. In other words since the communications sent to this Court were official, they were treated to be uncontestable and an illusion was created either based on misunderstanding or an attempt to some how the other cover up the entire issue. The communications were written carefully without giving the correct information to the reader and at the same time protecting its author.

44. We, therefore, deprecate the manner in which the communication dated 11.5.2001 came to be projected by the State to be a Government Order as is evident from the original file that has been produced before us.

45. The proposal made by the Director of Education, therefore, remained a dead letter and was never translated in the shape of a regulation through any Government Order or any lawful amendment worth the name. In our opinion,

therefore, the Rules framed for government servants under the proviso to Article 309 namely the Group-D Employees Service Rules 1986 would not apply for the procedure to be adopted for selecting and appointing class-IV employees in privately managed and recognized educational institutions. The State Government could have exercised its power by issuing a proper Notification u/s 16-G read with Section 9 (4) of the 1921 Act as was done when the earlier Notifications were issued bringing about a change in the Regulations as contained under Chapter-III of the 1921 Act. This, having not been done, the conclusion that the communication dated 11.5.2001 amounts to legislation by reference would be an incorrect presumption in law. We, therefore, hold that no such Rules or Procedure apply so long as the Regulations are not amended in accordance with law.

46. Apart from this the competence of such legislation flows from Entry 25 List III of the Concurrent list which in turn is referable to the powers prescribed under the Constitution in Article 246 (2) thereof. The field is, therefore, occupied. The 1921 Act, even though a pre-Constitution Act, stands saved and, therefore, the regulations framed thereunder can be amended only in exercise of such powers.

47. In our opinion, a Rule framed under the proviso to Article 309 would, therefore, not apply where a competent and valid law exists. The proviso to Article 309 is a transitory provision in relation to service matters exclusively of the State and it does not cover the field of services, like the one presently involved, relating to class-IV employees of privately managed institutions. The status of service with which we are concerned falls totally outside the scope of the proviso to Article 309. The conclusion, therefore, of the learned single Judge in the case of Smt. Shikha (*supra*) explains the law correctly.

48. The impugned judgments in the present appeals to the aforesaid extent are set aside and the matter would stand remitted back to the learned single Judge for decision afresh on the merits of each case keeping in view the law as explained herein above. Accordingly, all the judgments of the learned single Judges, which are contrary to the opinion expressed herein, stand overruled. The judgments of the two Division Benches in the case of Principal, Adarsh Inter College (*supra*) and Jawahar Lal and others (*supra*) stand accordingly explained. The Appeals are allowed.