

(2001) 08 AHC CK 0041
In the Allahabad High Court
Case No : C.M.W.P. No. 10755 of 1992

Rajni Chaudhary

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 01-08-2001

Acts Referred:

Uttar Pradesh Intermediate Education Act, 1921 — Section 9(4)
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 16, 18, 33C

Citation : (2001) 4 AWC 2548 : (2001) 3 UPLBEC 2300

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Advocate : Khalil Ahmad Ansari and Manish Goel, for the Appellant;

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.—This writ petition has been filed by the petitioner praying for a writ of mandamus directing the respondents to pay the petitioner her salary by month to month including all arrears from 16th August. 1991. Facts of the case as emerge from the pleadings of the parties are that Bhartiya Municipal Girls inter College, Chandausi, district Moradabad, is a recognised institution receiving grant-in-aid from the State Government. On retirement of Smt. Gyanwati Devi Gupta on 30.6.1990, a substantive vacancy on the post of Lecturer Sanskrit came into existence. The committee of management intimated : the vacancy on 29.6.1990 to the U.P. Secondary Education Service Commission through Regional Inspectress of Girls Schools for filling up the post on ad hoc basis. The Regional Inspectress of Girls School gave permission to the committee of management to fill up the post on ad hoc basis. The Management advertised the vacancy in one news paper, namely, Rangeela Times" on 22.6.1991. The Selection Committee constituted by the committee" of management made selection and selected the petitioner for ad hoc appointment. Petitioner has stated that the appointment order dated 14.8.1991 was issued by the committee of management. In pursuance of which she joined on 16.8.1991 and is claiming that she is working

since then. The management sent relevant papers to the Regional Inspectress of Girls School vide letter dated 9.9.1991. The petitioner was not paid her salary hence she filed the present writ petition. Counter-affidavit has been filed by the Regional Inspectress of Girls School and the Management. Regional Inspectress of Girls School in her counter-affidavit admitted that the vacancy arose on 30.6.1990. It has been stated in the counter-affidavit that the ban on appointment was imposed by the State Government vide telex dated 29.6.1991. Government order dated 17.7.1991. Government order dated 30.7.1991 and letter of the Director of Education dated 31.8.1991. It was stated that on account of the ban imposed by the State Government, the appointment of the petitioner was not approved. It was stated that the proceedings adopted by them was collusive and the management is responsible for the payment of her salary. The Management has also stated that the petitioner was appointed on ad hoc basis on 14.8.1991 and she was permitted to join on 16.8.1991. Rejoinder-affidavit has been filed by the petitioner. In the rejoinder-affidavit, it has been stated that the appointment was made with the permission of the Regional Inspectress of Girls School. The ban imposed by the State Government was quashed by this Court in the case of Prabhawati Dikshit v. Uttar Pradesh Madhyamik Shiksha Sewa Ayog and another, 1992 (1) UPLBEC 582. Petitioner has stated that the Regional Inspectress of Girls School was not justified in withholding the approval of the appointment of the petitioner. It is stated that the petitioner is entitled for payment of salary.

2. Sri Manish Goel appearing for the petitioner raised following submissions :

(i) The ban by the State Government was imposed on 31.8.1991, hence the ban is not applicable on the selection and appointment of the petitioner.

(ii) Selection was valid, ban was imposed by the State Government only on appointments after lifting the ban on the basis of the selection already made and the appointment can be made and in any view of the matter the petitioner became entitled to receive salary with effect from 26.9.1991 when the ban was lifted.

(iii) The State cannot ban the process of selection, which has to be undertaken by the U. P. Secondary Education Service Commission.

(iv) The petitioner has become entitled for regularisation u/s 33C of U.P. Act 5 of 1982.

3. With regard to first submission of the counsel for the petitioner, it is to be noted that the State Government imposed the ban on all appointments vide telex dated 29.6.1991. The radiogram is extracted below :

"Radiogram Crash

To, A.U.M. UP. W. All Divnlk Commr. U.P. All Principals, Secretaries/Seretaries U.P. A. All Principals. Head of Deptt. O.P.W. Secy. Public Service Commission. U.P. and Section Secy. U.P. Subordinate Service, Selection Commission New W.

Registrar, High Court.

From : Secy. Personal Deptt. of Govt. of U.P. No. 20.1.1991 Karmic-2 dated 29.6.1991.

Recruitment/ Appointment/ Process for each category of post in all the Deptt. of U.P. Govt. Except U.P. Public Service Commission and High Court is hereby stayed R. P. T. stayed. At their present state till further orders (.) top priority. Need personal attention."

4. Learned standing counsel has made available the copies of the Government orders dated 17.7.1991. 30.7.1991 letter dated 31.8.1991 of the Director of Education and the Government order dated 26.9.1991. After the aforesaid radiogram, a Government order was issued on 17.7.1991 by which certain exception was carved out in the ban of recruitment/appointment. The State Government issued the relevant Government order on 30.7.1991. It was stated that the recruitment process/appointment on the post of Principal. L. T. grade teacher within the purview of the U.P. Secondary Education Service Commission should be covered in the Ban till further orders. On 30.8.1991 a letter was issued by the Director of Education in which the Government stated that by order dated 30.7.1991, the process of recruitment and the appointment on the post of Principal/Lecturer L. T. grade has been stayed. It was stated in the letter that in view of the aforesaid Government order in non-Government added institutions on substantive vacancy, short term vacancy, ad hoc appointment be stayed till further orders. Last in the Government order dated 26.9.1991 by which the ban was relaxed up to certain extent. In the Government order dated 26.9.1991 Paragraphs 5 and 6 states as under :

5- ^iz"uxr LFkxukns"k ls vkPNkfnr p;u@HkrhZ dh leLr dk;Zokfg;ksa tks mDr vkns"k ykxw fd;s tkus ds fnukad rd iw.kZ dj yh x;h Fkh ,rnFkZ fujLr ekuh tk;s A

6- mijksDr fjfDr;ksa dks iquZfu/kkZfjr djds u;s fljs ls p;u dh dk;Zokgh dh tk; A**

5. That State makes the payment of salary to the teachers of the aided institutions. The State having banned the appointment/ recruitment process, no recruitment or appointment could be made during the ban period. The submission of the counsel for the petitioner that the ban was imposed for the first time on the ad hoc appointment by letter dated 30.8.1991 of the Director of Education is not acceptable. Power to impose ban is with the State Government. The Director of Education does not enjoy any power under the provisions of the U.P. Intermediate Education Act, 1921, and the provisions of U.P. Act No. 5 of 1982 to ban the appointment. When the G.O. dated 30.7.1991 was issued directing that the recruitment process/appointment on the post of Principal/ Lecturer in L. T. grade within the purview of the U.P. Secondary Education Service Commission Act shall be stayed, the clear Intent was that no recruitment process be undertaken for the post covered by the Government order nor any appointment be made. When the State has clearly stayed the recruitment/ appointment on the aforesaid post, the ban was applicable both for substantive

recruitment on regular post as well as ad hoc basis, if the Government order dated 30.7.1991 is interpreted that the ban was only with regard to the regular recruitment by the U.P. Secondary Education Service Commission and Selection Board and appointment on ad hoc basis was not banned, that will frustrate the very object of the ban and such interpretation will Indirectly defeat the sole purpose. The ban which was imposed by the Government order dated 30.7.1991 came up for consideration before the Division Bench on a reference made by the learned single Judge. The learned single Judge in *Prabhawati Dikshit v. Uttar Pradesh Madhyamik Shiksha Sewa Ayog* and another 1992 (1) UPLBBC 582 has declared the ban illegal. The matter was referred to the Division Bench. The Division Bench in its judgment dated 1.4.1994 in *Durgesh Kumari v. State of U.P. and others.* (1995) 3 UPLBEC 1387, upheld the ban in the aforesaid judgment all arguments were raised challenging the ban including the power of the State Government to impose ban. Paragraph 8 of the judgment is quoted below :

"8. Let us now see whether the temporary ban order which is valid exercise of the State Government's power u/s 9 (4) of the U.P. Intermediate Education Act In any way can be said to have abrogated the provisions of the Services Commission Act. If one looks to the past history of the Intermediate Education Act, one would find that the entire procedure of making appointment/recruitment to the post of Principal, Lecturer and L. T. grade teachers was provided in the Act and the Regulations framed thereunder. It is only later on that the Service Commission Act has been passed to provide the procedure for making selection to the aforesaid posts. In *Dr. Rajni Dwivedi's* case (supra), the ban order was issued by the State Government as it was contemplating to evolve procedure for making selection to the posts of Principal, Lecturer and L. T., grade teachers. From the supplementary counter-affidavit and from the legislation which has been passed later on, it is clear that the State Government was contemplating of changing the procedure for making the selection and also doing away with the appointment of teachers on ad hoc basis. The temporary ban which has been imposed by the State Government on the facts and circumstances of the case cannot be said to be affecting any provision of the Services Commission Act but was restraining the management for a temporary period from making or taking any process for the purpose of appointment/ recruitment of the Principal, Lecturer and L. T. grade teachers so that the new procedure of selection which was being contemplated by the State Government may be Implemented by amending the aforesaid Act. The ban order only affects the power given to the Management to make appointments temporarily and, in our opinion, does not affect the provisions of the Service Commission Act which only provides a procedure for selection on the basis of which the Management could make the appointment."

The ultimate decision of the Court was given in paragraph 10. The Court declines to hold the ban arbitrary. Relevant portion of paragraph 10 is being quoted below :

"In our opinion, the ban order issued by the State Government cannot be said to be arbitrary for the following reasons :

(i) It is not disputed that the liability of payment of salary is of the State Government in respect of teachers of the recognised institutions. The State Government has passed specific legislation for the payment of salary. If that be so, the action of the State Government to place a temporary ban for the purposes of monitoring the appointments in case they cast a great financial burden on the State cannot be said to be an arbitrary action. It has been stated in the supplementary counter-affidavit that the District Inspector of Schools had not been perfectly monitoring the appointments which were being made by the management over and above the standard prescribed which was affecting the finances of the State.

(ii) The State Government had also come to the conclusion that the Commission was not functioning properly as appointments were not being made expeditiously resulting in a situation that the management was making ad hoc appointments. The State Government wanted to abolish the system of ad hoc appointments and also wanted to regularise the service of the ad hoc teachers. In case the services of the ad hoc teachers were to be regularised by the State Government the management could not be permitted to make new appointments on the basis of selection by them as after regularisation of the ad hoc teachers, there would be no necessity to make any appointments. The ban order, therefore, made by the State Government was perfectly justified."

6. From the observations of Division Bench in the case of Durgesh Kumari (supra), it is clear that the object of the ban was to restrain the Management for making temporary appointment. On the basis of the observations made in the aforesaid judgment in paragraphs 8 and 10 quoted above counsel for the petitioner submitted that the ban only affects the powers of the management to make appointment and did not affect the procedure for selection. Aforesaid contention is not acceptable in view of the clear words of the Government order which provided that both recruitment as well as the appointment will be banned. Recruitment clearly meant recruitment both by the U.P. Secondary Education Service Commission as well as by the management.

7. The Apex Court has occasion to consider the power of the State Government to ban the appointment in the aided institutions of Uttar Pradesh. The State Government has earlier issued a ban order dated 7.4.1981. The aforesaid ban was challenged in this Court and the Division Bench dismissed the writ petition. The matter went to the Apex Court and the Apex Court also upheld the ban in the case of Ramji Dwivedi v. State of U.P. and others 1983 UPLBEC 426. In paragraph 16 of the judgment, the Apex Court held as under :

"The situation is that the power of appointment conferred by the regulation on committee of management of all non-Government aided institutions was withdrawn or suspended. The committee of management had no power to make

the appointment."

8. Counsel for the petitioner emphasised that In paragraph 17 of the aforesaid judgment in Ramji Dwivedi's case, the Apex Court held that the appointment made during the ban period was valid though ineffective. The observations made in paragraphs 17, 18 and 19 are quoted below :

"17. Undoubtedly appellant is a highly qualified person. There was nothing hanky panky in his appointment. If the power to make appointment was not suspended we would have no difficulty in upholding the appointment of the appellant and we are not oblivious to the machinations of Sh. Jagannath, who possibly thought that the appellant would be a formidable rival and wanted him to be out of way. The private management, at the instance of Sh. Jagannath appears to have subsequently backed out from the appointment of the appellant which at one stage they were willing to defend. But as there was no power of appointment, we are unable to help the appellant. However, we would like to make it very clear that the appointment was otherwise valid, though ineffective and if appellant under the orders of the High Court functioned as Principal, discharged his duties and was paid, no question of recovery of amount paid to him could arise and neither the Government nor the committee of management nor the Institution would be entitled to recover any salary paid to the appellant.

18. The State Government promulgated the U.P. Secondary Education Service Commission and Selection Board Ordinance, 1981 (8 of 1981) which was replaced by the Act bearing the Identical name. The Act envisages setting up of a Commission for selecting and recommending appointments of teachers including Heads of Institution. The college is topless and an unfair advantage is being taken of tin's situation by Jagannath whose credentials to be appointed as Principal are still to be investigated. It is the statutory duty of the Commission to proceed to take effective steps to fill in the post of Principal of the college. It is imperative that the State Government should direct the Commission to take necessary steps to fill in the post of Principal of Sri Nath Intermediate College. Garhmalpur. Ballla, within three months from today. Appellant would be eligible to apply for the same. We direct accordingly.

19. As we find no merit in any of the contentions canvassed on behalf of the appellants, appeal fails and is dismissed subject to the directions in the preceding paragraph but in the circumstances of the case with no order as to costs."

9. The Apex Court did accept the appointment of Dr. Ramjt Dwivedi which was made during the ban period and in paragraph 18 clearly directed the State to take fresh steps to fill up the post. The aforesaid judgment does not support the contention of the petitioner that the appointment of the petitioner was valid. Thus, it is clear that both recruitment and appointment was banned during the relevant period and the contention of the petitioner that the recruitment was not banned and his selection is valid cannot be accepted.

10. The second submission of the counsel for the petitioner that after lifting of

the ban, he became entitled to receive salary and his appointment will revive which was dormant during the ban period, is also not acceptable. When during the ban period, both recruitment/appointment were prohibited, the selection of the petitioner does not give any right to him. The Government order dated 26.9.1991 clearly provided ; that all selections made during the ban period shall be treated to be cancelled. The learned single Judge of this Court in Ramesh Mohan Pandey and others v. District Inspector of Schools, Deoria and others, 1995 AWC 402 has occasion to consider the Government orders pertaining to the ban including the Government order dated 30.7.1991 and 26.9.1991. Paragraphs 11 and 14 of the aforesaid judgment are extracted below :

"11. The ban was, however, lifted on certain conditions by Government order dated 26th September, 1991, in para 5 of the said Government order it was clarified that all the selection appointment made prior to 26.9.1991, during the period the ban was imposed, shall be treated as cancelled. This further refers to Government order dated 29.5.1991, whereby selection and appointments were stayed. The ad hoc appointments were being made under the provisions of Section 18 of the U.P. Secondary Education Service Commission and Selection Board Act. 1982. Section 18 was deleted by U.P. Secondary Education Service Commission and Selection Board (Second Amendment) Act, 1992. This amendment came into force with effect from 14th July, 1992. The powers to make all appointments were conferred on the District Selection Committee as provided under U.P. Secondary Education Service Commission (First Amendment) Rules. 1992.

14. Petitioner Nos. 1 to 6 claim to have been appointed in pursuance of the selection held on 23rd July. 1991. They have been issued appointment letter on 26.7.1991. The State Government had issued a Radiogram on 29.6.1991. The appointments could not have been made after the Radiogram was issued. The ban was only lifted on 26th September, 1991. Petitioner Nos. 1 to 6 cannot claim any right on the basis of the selection alleged to have been held on 23.7.1991. The Government order dated 26.9.1991 itself clearly indicates that all the selection and appointments made during the period of ban shall be treated as cancelled. The effect of lifting of ban on appointments does not either revive the selection held or appointments made during the period of ban. It is not necessary to decide the question as to whether the petitioners were appointed after duly complying with the provisions of Section 18 of U.P. Act No. 5 of 1982."

The learned single Judge has held in the aforesaid judgment that the appointment on the basis of selection held during the ban period was illegal and does not give any right to the petitioner. The Court also held that after lifting of the ban the appointment does not either revive nor the selection will revive.

11. With regard to third submission made by the counsel for the petitioner it is stated that the State was fully empowered to ban the recruitment process. The Division Bench of this Court in Durgesh Kumari's case (supra) has upheld the ban. In any view of that matter the aforesaid submission does not help the

petitioner in any manner. The petitioner's appointment is ad hoc appointment which was made by the committee of management. The U.P. Secondary Education Service Commission has not selected the petitioner. Thus, on the question as to whether the selection by the Commission was banned or not, the petitioner does not gain anything. The Division Bench in the case of Durgesh Kumari has observed in paragraph 8 that the ban order only affects the power given to the Management to make appointments temporarily and does not affect the provisions of the Service Commission Act which only provides a procedure for selection. In view of what has been said above from the above submission the petitioner does not gain any thing since he is not claiming his appointment on the basis of any selection by the U.P. Secondary Education Service Commission. The counsel for the petitioner has also relied on two more judgments of this Court in Smt. Raju V. John v. Regional Joint Director of Education, Agra Region and others, 2000 (10) ESC (All) 458. The aforesaid case pertained to claim of payment of salary by the petitioner of minority institution in which the petitioner has claimed the appointment with effect from 10.7.1995. The appointment of the petitioner under the aforesaid case was not during the ban period nor the aforesaid judgment can help the petitioner in any manner. Another judgment relied on by the petitioner is Ram Surat Dwivedi v. District Inspector of Schools, Fatehpur and others, 1984 UPLBEC 237. In the aforesaid case the petitioner was accepted to be validly appointed by the District Inspector of Schools which is clear from the observations made by the Court in paragraph 4. In the aforesaid circumstances the Court directed payment of salary to the petitioner. In the present case the petitioner's appointment was never accepted by the District Inspector of Schools. The aforesaid case is clearly distinguishable.

12. The last submission of the counsel for the petitioner that he has become entitled for regularisation u/s 33C of U.P. Act 5 of 1982 has also no substance. When the petitioner's appointment itself was not valid, he is not a teacher in the eye of law. Section 33C came into play only when a person has been validly appointed and fulfils the conditions mentioned in Section 33C. Section 33C does not give any benefit to the petitioner. The submission of the counsel for the petitioner on the basis of Section 33C has also no merit.

13. Before concluding, it will be relevant to note down the objects and reasons while enacting U.P. Act 24 of 1994 amending provisions of U.P. Act 5 of 1982. The ban was imposed by the State Government to stop the management from making illegal appointments. The statement of objects of U.P. Act 24 of 1992 makes the Intention of the Legislature clear while amending the provisions taking away the power of committee of management to make ad hoc appointment on substantive vacancy. When the intention and object of the Legislature is clear which is also noted by the Division Bench in Durgesh Kumari's case permitting the selection and appointment made during the ban period to revive after lifting of the ban will be defeating the object for which the ban was Imposed and subsequently the provision was amended to take away the power of the Management to fill up the post on ad hoc basis in substantive vacancy. The

statement of objects of U.P. Act 24 of 1992 are extracted below :

"Statement of Objects and Reasons. --The Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Bill. 1992, after its passage by both the Houses of the State Legislature was sent to the Government of India for the consideration and assent of the President. It was expected that the assent of the President to the Bill would be communicated to this State Government at a very early date. Keeping in view the policies contained in the Bill, appointment to the posts of Lecturers in the aided secondary institutions was stopped. This resulted in unexpected increase in the number of vacancies of teachers which hampered the smooth teaching work in the State. In order to overcome this situation it was considered expedient to amend the Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982, to provide for the appointment of teachers on purely ad hoc basis, to be terminated on availability of candidates selected in accordance with the provisions of the said Act.

Since the State Legislature was not in session and immediate legislative action in the matter was necessary, the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Ordinance, 1992 (U.P. Ordinance No. 21 of 1992) was promulgated by the Governor on July 14, 1992.

The Bill is introduced to replace the aforesaid Ordinance."

14. The Apex Court in Prabhat Kumar Sharma and others Vs. State of U.P. and others, . while considering the provisions of U.P. Secondary Education Service Commission and Selection Board Act. 1982, and considering the ad hoc appointment made under the Act, has clearly held that the State can be made liable to pay salary only when the appointment is made in accordance with the procedure prescribed in that Act. The Apex Court held in paragraph 10 as under :

"10. The principles are unexceptionable. However, the question is whether they attracted to the facts of this case. It is seen that when intimation was given by the college to the Commission for allotment of the teachers, the Act envisaged that within one year the recommendation would be made by the Commission for appointment : but within two months from the date of the intimation if the allotment of the selected candidates is not made to obviate the difficulty of the Management in imparting education to the students. Section 18 gives power to the Management to make ad hoc appointments. Section 16 is mandatory. Any appointment in violation thereof is void. As seen prior to the Amendment Act of 1981 the First 1981 order envisages recruitment as per the procedure prescribed in para 5 thereof. It is an inbuilt procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any post in an aided institution. It is obvious that when the salary is paid by the State to the Government-aided private educational institutions, public interest demands that the teachers' selection must be in accordance with the procedure prescribed under the Act read With the First 1981 order. Therefore, the order is a

permanent one but not transient as contended for. The Full Bench of the High Court has elaborately considered the effect of the order and for cogent and valid reasons It has held that the order will supplement the power to select and appoint ad hoc teachers as per the procedure prescribed u/s 18 of the Act. The view taken by the Division Bench following the Full Bench decision, therefore, cannot be faulted with. Accordingly, we find no merit in the special leave petition."

15. The appointment of the petitioner having been held not in accordance with law, the petitioner is not entitled for any relief nor the State can be saddled with liability of payment of salary to the petitioner.

16. In view of what has been said above, the writ petition has no force and is accordingly dismissed.