
(2010) 01 AHC CK 0052
In the Allahabad High Court

Sashi Kant Srivastava

APPELLANT

Vs

District Inspector of Schools and Another

RESPONDENT

Date of Decision : 06-01-2010

Acts Referred:

Uttar Pradesh Intermediate Education Act, 1921 — Section 16E(2)

Citation : (2010) 3 AWC 2179

Hon'ble Judges : C.K. Prasad, C.J.; Pankaj Mithal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

C.K. Prasad, C.J. and Pankaj Mithal, J.—Writ petitioner-appellant, aggrieved by order dated 23.11.2009, passed by a learned single Judge in Civil Misc. Writ Petition No. 1284 of 1992, has preferred this special appeal under Rule 5, Chapter VIII of the Allahabad High Court Rules.

2. Writ petitioner-appellant (hereinafter referred to as "the writ petitioner") filed the writ application, inter alia, praying for issuance of a writ in the nature of mandamus commanding respondents to continue him in service and for payment of salary treating him to have been validly selected and appointed as teacher in the primary section of Sri Agrasen Mahavidyalaya Inter College, Chaukhambha, Varanasi.

3. The learned single Judge declined to grant relief to the writ petitioner on his finding that the appointment of the writ petitioner is void ab initio and in this connection, referred to the provisions of the U.P. Secondary Education Service Selection Board Act, 1982 and the procedure laid down in the U.P. Secondary Education Services Commission (Removal of Difficulties) Order, 1981. He also referred to the U.P. Basic Education Act, 1972 as also the U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rules, 1978.

4. Mr. Gajendra Pratap, learned senior advocate, appearing on behalf of the writ

petitioner, submits that the writ petitioner's appointment shall be governed by Section 16E of the U.P. Intermediate Education Act, 1921 (in short "the Act, 1921") and the reliance by the learned single Judge to other statutes referred to in the impugned judgment is absolutely misplaced.

5. Even if, we assume in favour of the writ petitioner that Section 16E of the Act, 1921 shall govern the appointment, he has not been appointed according to the procedure prescribed therein. Section 16E (2) of the Act, 1921, which is relevant for the purpose, reads as follows:

16E (2). Every post of Head of Institution or teacher of an institution shall except to the extent prescribed for being filled by promotion, be filled by direct recruitment after intimation of the vacancy to the Inspector and advertisement of the vacancy containing such particulars as may be prescribed, in at least two newspapers having adequate circulation in the State.

6. From a plain reading of Section 16E (2) of the Act, 1921, it is evident that for filling up of the post of teacher of an institution, vacancy is to be advertised in at least two newspapers having adequate circulation in the State. The writ petitioner has not averred that the vacancy was so advertised. In paragraph 5 of the writ application, he has averred that the vacancy was advertised "on the notice board of the institution". In that view of the matter, the appointment of the writ petitioner is in the teeth of the provisions of Section 16E (2) of the Act, 1921, which renders his appointment void in law.

7. Mr. Pratap, then submits that the writ petitioner having worked since 1991, he may not be thrown out of the employment and Justice demands that he be allowed to continue in service and a direction for payment of salary be made. In support of the submission, reliance has been placed on a Division Bench judgment of this Court in Smt. Zaitoon Fatima Vs. Director of Education, Allahabad and others, and our attention has been drawn to paragraph 6 thereof, which reads as follows:

6. The Court is no-doubt conscious of the maxim "*Quod ab initio non valet in tractu temporis non convalescit*", which implies that which was originally void, does not by lapse of time become valid but rule contained in the said maxim is subject to certain exceptions and one such exception is illustrated by the maxim, *quod fieri non debet factum valet* which means the fact cannot be altered though it should not have been done. *R. v. Lord Newborough* 4 QB 585, will illustrate the doctrine of *factum valet*. There, the question was as to the payment of salary to certain special constables whose appointments had not been made in accordance with the requirements of the Special Constable Act, 1831 nor was there any valid order for payment of their salaries. Relying upon the doctrine of *quod fieri non debet factum valet*, Lush, J., who decided that, as the order for payment had been acted upon, the account allowed, and the money paid, the proceedings should not be re-opened. The appointment of the appellant herein to C.T. grade and later, to L.T. grade by promotion having been in fact acted upon, it would not

be just and proper to re-open the question of validity of her appointment by promotion to C.T. grade and later, to L.T. grade after a lapse of about 23 years. In our opinion, the order of the Regional Inspectress of Girls Schools referring the matter to the Director of Education u/s 16E (1) is thus liable to be quashed.

8. We do not find any substance in the submission of the learned Counsel for the appellant and the decision relied on is clearly distinguishable.

9. Equity comes into picture only when the law is silent. The Supreme Court in the cases of Prabhat Kumar Sharma and others Vs. State of U.P. and others, and Shesh Mani Shukla v. District Inspector of Schools, Deoria JT 2009 (10) SC 309, has clearly held that in case the appointment is held to be void ab initio, the employee has no right either to continue on the post or to claim salary. Here, the learned single Judge has found the appointment of the writ petitioner to be void ab initio, with which he have concurred and, in that view of the matter, direction for payment of salary and continuance in service cannot be given on the ground of equity.

10. Now referring to the decision of this Court in Zaitoon Fatima (supra), the same is clearly distinguishable. In the said case, the appointment was made as also promotion and, after a lapse of 23 years, the same was sought to be reopened. Here, in the present case, the writ petitioner's prayer is for payment of arrears of salary treating him to have been validly selected and appointed. It is not his case that his appointment is sought to be rescinded after a long distance of time.

11. Lastly, Mr. Pratap, submits that the writ petitioner has been paid salary during all these years and hence on this ground alone, the order of the learned single Judge be set aside. We do not find any substance in this submission also. Payments in all these years have been made in the garb of an order passed by this Court and the learned single Judge, on fact, having found that the writ petitioner's appointment is void ab initio, the litigious payment of salary would not enure to his benefit.

12. We are of the opinion that the consideration of the matter by the learned single Judge does not suffer from any error calling for interference in this appeal.

13. We do not find any merit in this appeal and it is dismissed, accordingly.