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**(1999) 11 AHC CK 0150**

**In the Allahabad High Court**

**Case No : Special Appeal No's. 503 and 504 of 1999**

Smt. Kusum Agarwal

APPELLANT

Vs

Smt. Uma Rani Misra and others

RESPONDENT

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**Date of Decision : 29-11-1999**

**Acts Referred:**

Uttar Pradesh Intermediate Education Act, 1921 — Section 18(1)  
Uttar Pradesh Secondary Education Service Commission (Removal of Difficulties)  
(Second) Order, 1981 — Section 2  
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,  
1982 — Section 18, 33B(1A)  
Uttar Pradesh Secondary Education Services Commission Rules, 1983 — Rule 9

**Citation : (2000) 2 AWC 1183**

**Hon'ble Judges : R.P. Nigam, J; Jagdish Bhalla, J**

**Bench : Division Bench**

**Final Decision : Dismissed**

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## **Judgement**

Jagdish Bhalla, J.—These two special appeals have been filed against the Judgment of learned single Judge dated 20.9.1996 passed in Writ Petition Nos. 3707 (S/S) of 1992 and 3746 (S/S) of 1993 by a common judgment.

2. The facts of the case, in brief. are as under :

The Principal of the Vedic Kanya Pathshala Inter College, Lucknow. Smt. Prem Lata Srivastava retired with effect from 1.7.1987 and the senior most Lecturer of the college Smt. Vimla Tandon, was promoted as Principal of the college on ad hoc basis. Consequently, the post of permanent Lecturer in History, on which Smt. Vimla Tandon was teaching fell vacant. This was a short term vacancy because Smt. Vimla Tandon was promoted on the post of Principal of the college only on ad hoc basis and she continued to retain her place on the post of Lecturer History. On 22.1.1988 the short-term vacancy of the post of Lecturer (History) was advertised. The appellant Smt. Kusum Agarwal, the petitioner-respondent, Smt. Uma Rani Misra, one Smt. Munni Mehrotra and others applied for the said post. On 19.3.1988 interviews were held. Smt. Munni Mehrotra was selected at

serial No. 1 and she was recommended by the Regional Inspectress of Girls Schools (in short RIGS) on 6.4.1988 for being appointed against the said short term vacancy of Lecturer (History) in the college. Smt. Munni Mehrotra died on 28.4.1988 before she could join the said post. Thereafter Smt. Uma Rani Misra, the petitioner-respondent who is placed at serial No. 2 in the select list was offered appointment by the Committee of Management of the College on the said post on 21.5.1988 subject to the approval by RIGS. The RIGS accorded its approval on 22.6.1988 with the condition that the appointment of Smt. Uma Rani Misra shall continue till a duly selected candidate Joins the post or Smt. Vimla Tandon reverts back to the post or till the post becomes substantive, whichever is earlier. Smt. Uma Rani Misra, respondent No. 1 Joined the post on 1.7.1988 and started teaching the subject of History to Classes IX, X, XI and XII in the said college. Thereafter the ad hoc appointment of Smt. Vimla Tandon was regularised on the post of Principal of the college u/s 33A (1-A) of U.P. Act 26 of 1991 with effect from 6.4.1991 and thereafter she superannuated with effect from 30.6.1992. At this juncture the Management of the College issued a letter dated 30.5.1992 to Smt. Uma Rani Misra that since the substantive vacancy on which she was working has fallen vacant in terms of the letter of approval of the RIGS dated 22.6.1988. she will not be treated to hold the said post as lawful with effect from 1.7.1992. Aggrieved by the said letter dated 30.5.1992, Smt. Uma Rani Misra, respondent No. 1 filed Writ Petition No. 3707 (S/S) of 1992 praying for quashing the said letter dated 3.5.1992, inter alia, on the ground that she was validly and legally appointed under the provisions of Removal of Difficulties (Second) Order, 1981. and since the services of Smt. Vimla Tandon, the ad hoc Principal, became permanent and regular with effect from 6.4.1991, therefore, her appointment be treated to be against the said substantive vacancy and she be regularised u/s 33B of the Commission Act, as amended. Learned single Judge of this Court passed an interim order on 20.6.1992 in the said writ petition to the effect that until further orders or the availability of the regularly selected teacher through Commission, whichever be earlier, the respondent No. 1 Smt. Uma Rani Misra, will be allowed to continue on the post held by her at that time. In the meantime on 16.6.1992 the Committee of Management of the college passed a resolution converting the post in question as promotional post and promoting Smt. Kusum Agarwal, a teacher in the college, on the said post. The said resolution was sent to the Commission for approval and the Commission accorded its approval to the promotion of Smt. Kusum Agarwal on 17.8.1993.

3. Smt. Kusum Agarwal, the appellant, moved an application for being impleaded in the said writ petition and the Court vide orders dated 14.10.1992 allowed her to be impleaded as respondent in the writ petition. The appellant, Smt. Kusum Agarwal, filed a counter-affidavit in the writ petition stating therein that the post held by her fell in promotional quota and the appointment of Smt. Uma Rani Misra, directly on ad hoc basis against the short term vacancy was wholly illegal. It was further stated that even otherwise the appointment of Smt. Uma Rani Misra being against short term vacancy it came to an end on 30.6.1992 in terms

of the letter of appointment dated 17.5.1988 and the conditional approval by the RIGS dated 22.6.1988. Smt. Uma Rani Misra, respondent on learning about the resolution of the Committee of Management of the college dated 16.6.1992 recommending promotion, of Smt. Kusum Agarwal to the post of Lecturer in History against which she (Smt. Uma Misra) was working, moved an application for amendment praying for quashing the said resolution. The said amendment application was allowed.

4. During the pendency of the aforesaid writ petition, Smt. Uma Rani Misra, respondent submitted representations before the Commission on 6.2.1993, 24.4.1993 and 13.8.1993 praying for regularisation of her services and rejection of the proposal of promotion of Smt. Kusum Agarwal. When these representations were not disposed of by the Commission. Smt. Uma Rani Misra, petitioner-respondent filed another Writ Petition No. 3746 (S/S) of 1993, inter alia, on the ground that once a decision has been taken to fill a short term vacancy by direct recruitment because of nonavailability of an eligible candidate for being promoted, and the said short term vacancy being converted into a substantive vacancy later on, it was not open to the Committee of Management to review their earlier decision after 5 years and consider another teacher of the college for being promoted against the same post. Learned single Judge of this Court while entertaining the above Writ Petition No. 3746 (S/S) of 1993, directed the opposite parties in the writ petition to consider and dispose of the representation of Smt. Uma Rani Misra. The Court further directed that till the disposal of the above representation, the petitioner of the writ petition, Smt. Uma Rani Misra, should not be disturbed.

The Commission considered the requisition sent by the Management of the college for promotion of Smt. Kusum Agarwal, appellant with effect from 1.7.1992 against the substantive vacancy caused due to retirement of Smt. Vimla Tandon, the ad hoc Principal of the college, and accorded approval vide its letter dated 17.8.1993. As Smt. Kusum Agarwal, appellant, was not given charge in pursuance of the approval accorded by the Commission for her promotion on the said post in question, she filed Writ Petition No. 4431 (S/S) of 1993, with a prayer to issue a writ of mandamus to the opposite parties to the writ petition to give her charge on the post in question. Later on she withdrew this writ petition.

5. In the writ petitions, the case of the petitioner-respondent. Smt. Uma Rani Misra was that :

(i) She was duly appointed by direct recruitment in short term vacancy in accordance with the provisions of clause 2 (2) of the Removal of Difficulties Order and the same vacancy having become substantive later on she was entitled to continue on the said post as ad hoc appointee till a duly selected candidate from the Commission joins and that she was further entitled to be regularised on the said post u/s 33B (1A), added by Act 1 of 1993.

(ii) Since. Smt. Kusum Agarwal, the appellant, had also applied and appeared in

the said selection for direct recruitment, it is now not open for her (Smt. Kusum Agarwal) to challenge the validity and legality of the said selection on the ground of the procedure adopted for the selection.

(iii) Once the Committee of Management had decided to fill up the vacancy in question by direct recruitment because of the non-availability of eligible candidate and the petitioner-respondent, Smt. Uma Rani Misra, having been appointed on the said post by direct recruitment after having been duly selected by the Committee constituted for the purpose, now it was not open for the Committee of Management of the college to convert the said post as the promotional post, and the resolution of the Committee of Management of the college dated 16.6.1992 recommending promotion of Smt. Kusum Agarwal, appellant, with effect from 1.7.1992 on the said post was illegal.

(iv) By Government Order dated 28.3.1992 all functions of the Service Commission regarding selection/ promotion/appointment were suspended and by U. P. Act 1 of 1993 which came into force on 6.1.1993 the said Service Commission was abolished. Therefore, the Commission had no authority to accord approval on 17.8.1993 to the resolution of the Committee of Management dated 16.6.1992 approving promotion of Smt. Kusum Agarwal on the post in question because on 17.8.1993 the Commission was not in existence.

The case of the appellant, Smt. Kusum Agarwal, respondent in the writ petition was that :

(i) The post in question clearly fell within the promotional quota and the appointment of the petitioner directly on ad hoc basis against a short term vacancy was wholly illegal.

(ii) The short term vacancy came to an end on 30.6. 1992 on the superannuating of the a d hoc Principal, Smt. Vimla Tandon, in terms of the letter of appointment dated 17.6.1988 and the conditional approval by the RIGS dated 22.6.1988 and, therefore. Smt. Uma Rani Misra, the petitioner- respondent, was not entitled to hold the post in question after 30.6.1992 and she (Smt. Kusum Agarwal) having been promoted on the post in question by the Committee of Management by its resolution dated 16.6.1992 and the Commission having accorded approval to the said resolution on 17.8.1993. was entitled to hold the post in question.

(iii) The appointment of Smt. Uma Rani Misra, petitioner-respondent, was illegal because the provisions of sub-clause (3) of clause 2 of the Removal of Difficulties (Second) Order, 1981, were not followed as the vacancy in question was not properly published.

6. The learned single Judge, after hearing the learned counsel for the parties allowed both the writ petitions by a common judgment dated 20.9.1996 quashing the letters dated 30.5.1992 and 16.6.1992 issued by the Committee of Management of the college and the order dated 12.10.1993 passed by the RIGS rejecting the representation of Smt. Uma Rani Misra, petitioner-respondent, and

directing the opposite parties to the writ petition to treat the petitioner-respondent Smt. Uma Rani Misra continuing on the post in question till a duly selected candidate from the Commission/Selection Board for direct appointment joins the post or the services of Smt. Uma Rani Misra are regularised or terminated in accordance with law.

7. Aggrieved by the said judgment and order of the learned single Judge. Smt. Kusum Agarwal, appellant, has preferred the present appeals.

8. We have heard learned counsel for the parties. Learned counsel for the appellant Sri Umesh Chandra has submitted that the learned single Judge has erred in holding that the appellant Smt. Kusum Agarwal, did not possess the requisite teaching experience of five years on the date of the occurrence of the short term vacancy. According to him, five years' teaching experience is not necessary for promotion. In support of his contention, he has placed reliance on the decision of a learned single Judge of this Court in Dinesh Kumar v. District Inspector of Schools, Muzaffarnagar and another, (1988) 3 UPLBEC 1915, wherein it has been held as under :

"A plain reading of the said clause (1) shows that the post is to be filled up by promotion of the permanent senior most teacher of the institution possessing minimum prescribed educational qualification, in the next lower grade. It does not provide any other qualification, namely to the extent that he must possess any minimum period of service in the next lower grade. The only qualification is that he should be a permanent senior most teacher with minimum educational qualification. In the next lower grade. This interpretation obviously appears to be in consonance with the scheme in which the said orders were issued, Since these appointments are made for a very limited period in short term vacancy, therefore, it was felt necessary that It should be filled up by promotion only when specifically the posts were filled up either by promotion or by direct recruitment reserving certain percentage for both the classes whereas, against the short term vacancy, the same has been altogether obliterated and only when there is no teacher, the same can be filled by recruitment made directly. In that view of the matter, it is not possible to bring about" the analogy of the qualifications laid down either in Regulation 6, framed under the 1921 Act or Rule 9, framed under the 1982 Act with read to the continuous service. The minimum qualifications as it appears from para 2 of the Second Removal of Difficulties Order relates to the educational qualification, which is not in dispute in the present case. It does not relate to any other qualification because of the explicit expression used in clause (1) to the extent that by promotion of the permanent senior most teacher of the institution in the next lower grade."

9. On the other hand, learned counsel for the petitioner-respondent has argued that for promotion to the next higher grade, it is necessary for a candidate to have at least five years teaching experience. In support of his argument, he has placed reliance on a Full Bench decision of this Court in Smt. Basanti Gaur v. Regional Inspectress of Girls Schools. VII Region, Gorakhpur and others. 1987

UPLBEC 121, wherein while interpreting the term "academic qualification", it has been held in para 8 of the report as under :

"8. It will be seen that the term "academic qualification" is wide enough to include the entire range of attributes or qualities which make a person eligible to do a certain act or to hold office. Those attributes or qualities may be inherent in the person or legally necessary to render him eligible to fill an office or perform a public duty. Teaching experience in the subject in which the lecturers' appointment has to be made cannot but be such on attribute. It is indeed inherently necessary to take up the greater responsibilities in the higher classes. It is absolutely necessary to bring out an excellence from the teacher for the benefit of students. It is an attribute, which always go with the teacher. Experience of having taught the subject for any length of time should. In our opinion, be regarded as a qualification pertaining to academics."

10. A Division Bench of this Court has also taken the same view in the case of Rakesh Kumar Kaushik v. D.I.O.S.. Muzaffarnagar and others 1993 UPLBEC 2136. and held in para 12 as under :

"It is thus clear that even if 1981 order does not prescribe that Regulation 6 of Chapter II of the Regulations framed under the Intermediate Education Act, 1921, will apply but the same will be applicable when 1981 order is read with Section 18 (1) (b) of the Act which makes Regulation applicable even for ad hoc promotions."

11. Further in the case of Smt. Prem Balika Rai v. R.I.G.S.. (1993) 2 UPLBEC 922, a Division Bench of this Court also held that the requirement of five years continuous substantive service, as provided under Regulation 6, was necessary precondition for making promotion of a teacher even for ad hoc appointment.

12. In light of the views expressed by the Full Bench as well as by the Division Bench in the cases referred to above, even for ad hoc promotion to the next higher grade, seniority is not the sole criterion. It is the cumulative assessment of various factors including seniority, and the term "academic qualifications" is wide, enough to include the entire range of attributes or qualities which make a person eligible to do a certain act or to hold office and that teaching experience in the subject in which the lecturers' appointment has to be made cannot but be such an attribute. Regulation 6 does not make any difference between ad hoc or regular promotion. Besides u/s 18 (1) (h) even for making ad hoc promotions, the Regulations framed under the Intermediate Education Act, 1921, have been made applicable. Rule 9 of U. P, Secondary Education Service Commission Rules, 1983, also provides that where any vacancy is to be filled by promotion, all teachers working in L. T. or C. T. grade who possess minimum qualification and have put in at least five years continuous service as a teacher in the concerned subject on the date of occurrence of vacancy shall be considered for promotion without their having applied for the same. This Rule provides for qualification for regular promotion but this provision substantially has incorporated the

qualifications prescribed for promotion under Regulation 6 of Chapter II of the Regulations framed under the Intermediate Education Act, 1921. There is no reason not to apply the same while making ad hoc promotions. It is the admitted case of the appellant Smt. Kusum Agarwal, that she did not possess five years' experience in the subject on the date of occurrence of the short-term vacancy. Therefore, in view of the above discussion and the case law cited above, the argument of the learned counsel for the appellant that teaching experience of five years is not necessary, has no substance.

13. The next argument of the learned counsel for the appellant is that the learned single Judge has wrongly held that the procedure of clause 2 of the Removal of Difficulties (Second) Order, 1981, was duly followed while promoting the petitioner-respondent, Smt. Uma Rani Misra, on the post of Lecturer History. In this connection, he has submitted that the post in question was not advertised in the news papers and it was advertised on the notice hoard only and, therefore, the selection was non est, ab initio void and illegal. In this connection, he has placed reliance on the Full Bench decision of this Court in Radha Raizada and others v. Committee of Management, Vidyawati Darbari Girls Inter College and others. (1994) 3 UPLBEC 1551, wherein it has been held that if the procedure as provided in sub-clause (3) of clause 2 of the Removal of Difficulties (Second) Order, 1981, is not followed the selection and appointment would be illegal. Learned counsel for the respondent while replying this argument has submitted that the above Full Bench decision will operate prospectively and not with retrospective effect. According to him, the above Full Bench decision was rendered on 12.7.1994 while in the present case the selection was made in May, 1988 and therefore, the said Full Bench judgment will not apply to the present case. In support of his submission, he has placed reliance on the decision of the Hon'ble Apex Court in State of Haryana and Ors. v. Rani Devi and Anr., 1996 (3) S.L.J. 88 (SC), and a Division Bench decision of this Court in Ashika Prasad Shukla v. District Inspector of Schools, Allahabad and another (1998) 3 UPLBEC 1722, wherein it has been held that the judgment of the Court cannot have retrospective operation and the appointment made prior to the decision of the Court cannot be said to be invalid. In light of the above, we are of the considered opinion that the Full Bench decision in Radha Raizada, (supra) will not apply to the present case as prior to the decision in the above case, the impugned selection had already taken place.

14. Learned counsel for the appellant has further submitted that in pursuance to a void appointment order, the person cannot be regularised and, therefore, Smt. Uma Rani Misra cannot claim regularisation on the basis of a void appointment order. In support of his argument, he has placed reliance on the decision of Hon'ble the Supreme Court in Santosh Kumar Singh Vs. State of U.P. and Others, wherein it has been held that in pursuance to a void appointment order the person cannot be regularised. To appreciate the argument of the learned counsel for the appellant, first we will have to consider as to whether the appellant can challenge the validity of the ad hoc appointment of Smt. Ulna Rani

Misra on the post in question. Admittedly the appellant. Smt. Kusum Agarwal, had applied for ad hoc promotion on the post in question in response to a vacancy notified on the notice board of the college. Now, it is not open to her to challenge the procedure of the said selection for the post in question on the ground that the vacancy was not properly notified. The same view was taken by the Hon"ble Supreme Court in the case of Sardara Singh and others v. State of Punjab and others 11991 4 SCC 555. In para of the above Judgment, it has been held as under :

"Though we find that the procedure adopted by the Collector, in inviting applications is not commendable, but the grievance would be voiced only by persons who did not have the opportunity to make applications within the prescribed period. But persons like the appellants could raise no such grievance. Under those circumstances, the procedure adopted though irregular, does not vitiate the selection of candidates, ultimately made by the Committee."

15. Thus, in view of the decision of the Hon"ble Supreme Court in the case of Sardara Singh (supra), it is not open to the appellant to challenge the validity of the selection since she had herself applied for the said selection and, therefore, the procedure adopted, though irregular, does not vitiate the selection. Since Smt. Uma Rani Misra was validly promoted on ad hoc basis and she is continuously teaching on the post in question w.e.f. 1.7.1988 i.e., for 11 years, she is entitled to be regularised on the post in question, i.e., Lecturer History. Our view finds support from the decision of the Hon"ble Supreme Court in the case of Miss Shainda Hasan Vs. State of Uttar Pradesh and others, , wherein the Apex Court held that asking the appellant (Shainda Hasan) to leave the job after 16 years would be doing injustice to her and directed the respondents to grant necessary approval to her appointment with effect from the date she is holding the post and further directed the respondents to pay her salary, allowances and all other consequential benefits. In the case of Sri Rabinarayan Mohapartra Vs. State of Orissa and others, , taking the same view the Apex Court held in para 6 as under :

"In order to make the existing educational set up effective and efficient it is necessary to do away with ad hocism in teaching appointments... ..The validation Act covers the field up to December 31. 1984. The State of Orissa will do well to consider the cases of all those who have completed one year or more as ad hoc teachers after December 31, 1984 and come out with a scheme or any other appropriate measure to regularise their services."

16. In view of the above, the petitioner-respondent, Smt. Uma Rani Misra, is entitled to be regularised on the post of Lecturer (History) by virtue of regularisation provision u/s 33B of the Commission Act.

17. The next point argued by the learned counsel for the appellant is that the post of Lecturer-History was the post of promotion quota and it was wrongly filled up by direct recruitment appointing the respondent. Smt. Uma Rani Misra

and, therefore,, the Committee of Management of the college had right in setting the wrong right by reconverting the post in question to be of promotional quota by its resolution dated 30.5.1992 and, thereafter, promoting the appellant. Smt. Kusum Agarwal, on the said post by issuing promotion letter dated 16.6.1992, therefore, Smt. Uma Rani Misra, respondent is not entitled to continue on the post in question after 30.5.1992 but she continued on the basis of interim order. He has further submitted that continuing on a post on the basis of interim stay does not entitle a person to regularisation. In this connection, he has placed reliance on the decision of Hon"ble the Supreme Court tn Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another, , wherein it has been held that if an ad hoc appointee continues on a post on the basts of interim stay it does not entitle him to regularisation on that post. This case does not apply to the present case because in the above case the vacancy on which Sreekumar Tewary was appointed came to an end on 30.6.1988, in accordance with Section 2 of the U, P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981. In the present case. It is not so. The petitioner-respondent Smt. Uma Rani Misra was appointed under the Removal of Difficulties (Second) Order, 1981 and is still continuing as such and, therefore, she is entitled for regularisation u/s 33B of the Commission Act.

18. As far as the submission of the learned counsel for the appellant to the effect that the Committee of Management of the college has rightly converted the post in question to be of promotional quota, is concerned, learned counsel for the respondent has argued that once the Committee of Management of the college having converted the post in question to be filled in by direct recruitment because of non-availability of eligible candidates for being promoted way back in 1985 and having appointed the petitioner-respondent. Smt. Uma Rani Misra, on the said post by direct recruitment, now it is not open to the Committee of Management to reconvert the said post to the promotion quota. We agree with the submission of the learned counsel for the petitioner-respondent and hold that once the post having been converted from promotion quota to direct recruitment and a candidate having been duly appointed thereon,. it is not open to the Committee of Management to reconvert that post to the promotion quota till the regularly selected candidate from the Commission Joins the post unless his/her services are terminated earlier for a cause in accordance with law.

19. Learned counsel for the appellant has lastly argued that in view of the condition imposed by the Regional Inspectress of Girls' Schools at time of granting approval to the appointment of the petitioner-respondent Smt. Uma Rani Misra, to the effect that her appointment will come to an end on the vacancy becoming substantive, and admittedly the vacancy having become substantive on 1.7.1992 Smt. Uma Rani Misra is not entitled to continue on the said post thereafter. This question was considered by this Court in the case of Hemanshu Kumar Chaturvedi v. University of Gorakhpur and others 1993 ALJ 1135, wherein it has been held that once a teacher is appointed against a

vacancy which is to be filled up by regularly selected candidate, then he is entitled to continue on the post till the regularly selected candidate joins the post. In this view of the matter, we are of the considered opinion that the condition imposed by the Regional Inspectress of Girls Schools at the time of according approval to the appointment of the petitioner-respondent, Smt, Uma Rani Misra will remain inoperative and the respondent Smt. Uma Rani Misra will be entitled to continue till regularly selected candidate joins the post,

20. No other point was argued.

21. In view of what has been discussed above, we find no reason to Interfere in the judgment and order of the learned single Judge. Accordingly both the above stated special appeals are dismissed. Costs easy.