

(2006) 01 AHC CK 0210
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 75590 of 2005 and No. 204 of 2006

Smt. Shahida Parveen

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 17-01-2006

Acts Referred:

Uttar Pradesh Secondary Education Service Selection Board Rules, 1998 — Rule 14

Citation : (2006) 5 AWC 5077

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Advocate : Ashok Khare and Sunil Kumar Srivastava, for the Appellant; Prakash Padia and S.C., for the Respondent

Final Decision : Disposed Of

Judgement

A.P. Sahi, J.—These 2 writ petitions are interlinked and arise out of common questions of law and fact, as such, have been taken up together and are being disposed of by a common judgment.

2. The petitioner in the first writ petition namely Smt. Shahida Parveen is the Respondent No. 5 in the second writ petition and the respondent in the first writ petition Smt. Veer Bala Agarwal is the petitioner in the second writ petition. Smt. Veer Bala Agarwal has also filed a counter-affidavit in the first writ petition. Sri Ashok Khare, Learned Senior Counsel, has been heard for Smt. Shahida Parveen and Sri Prakash Padia has been heard on behalf of Smt. Veer Bala Agarwal in both the writ petitions. Learned Standing Counsel has been heard on behalf of the respondent - State and its authorities.

3. After having heard learned Counsel for the parties, this Court finds that the matter requires to be remitted back to the Joint Director of Education for a decision afresh on the issues involved and, as such, it is not necessary to wait further for exchange of Affidavits as the case at this stage does not require any

further investigation of facts. The matter is, accordingly, being disposed of by this judgment.

4. Writ petition No. 75590 of 2005 has been filed by Smt. Shahida Parveen questioning the legality of the order dated 26.11.2005 praying for quashing of the same and for a further direction to the Respondents not to interfere in her functioning as Lecturer in History in the institution. She has basically questioned the findings recorded against her in respect of her regularisation in the Lecturer's grade and also the infirmities pointed out in her promotion on ad hoc basis in the said grade.

5. Smt. Veer Bala Agarwal has tiled writ petition No. 204 of 2006 challenging the same order dated 26.11.2005, whereby she has questioned the conclusion of the Joint Director of Education in treating Smt. Shahida Parveen to be a Lecturer in History. The challenge to the said order is only to that extent and further, the orders dated 20.4.2003 and 31.5.2003 passed by the Joint Director of Education, conferring the benefits of regularisation on Smt. Shahida Parveen as Lecturer and LT grade Teacher respectively have also been assailed.

6. The undisputed facts are that Smt. Shahida Parveen was appointed on 1.9.1992 as ad hoc Teacher in LT grade in the institution known as Nehru Nagar Palika Kanya Inter College, Rampur, which is an institution recognized and governed by the provisions of the U.P. Intermediate Education Act, 1921 and the regulations framed there under read with the provisions of the U.P. Secondary Education Services Selection Board Act, 1982 and the Rules framed there under.

7. It is further undisputed that Smt. Veer Bala Agarwal, the contesting opposite party was appointed in the LT grade on 22.11.1976. Thus, it is admitted to the parties that Smt. Veer Bala Agarwal is senior to Smt. Shahida Parveen in the LT grade. The appointment of Smt. Shahida Parveen on ad hoc basis in LT grade was duly approved and she claimed regularisation in the LT grade under the provisions of Section 33-C. Her case of regularisation came to be considered under the aforesaid provision of U.P. Act No. 5 of 1982 and an order was passed on 31.5.2003 extending the said benefit of regularisation to Smt. Shahida Parveen w.e.f. 20.4.1998 which is the date of Notification of Section 33-C of U.P. Act No. 5 of 1982.

8. A substantive vacancy on the post of Lecturer in History occurred on 30.6.1999. Smt. Parveen claimed that she was qualified for being promoted as lecturer in History as she had completed almost 7 years of service as a LT grade Teacher. Smt. Agarwal was not qualified for the said post. The Management of the institution extended the benefit of ad hoc appointment to Smt. Parveen as Lecturer in History on 1.11.1999 which was approved by the District Inspector of Schools on 2.12.1999. Smt. Parveen, therefore, started functioning as an ad hoc Lecturer in History. At this juncture, it is to be noted that when Smt. Parveen was appointed, as such, her services as ad hoc LT grade Teacher had not yet been regularized under the provisions of Section 33-C which had already come into

effect vide notification dated 20.4.1998.

9. The post of Lecturer in Civics became vacant on 30.6.2002. From the impugned order dated 26.11.2005, it appears that against the said post selections were held by the Board under U.P. Act No. 5 of 1982 and recommendations were made by the Board against the said post for substantive appointment of one Smt. Archana Verma and Km. Mamta Sen who were of the Schedule Caste Category. Smt. Veer Bala Agarwal staked her claim for promotion against the said post of Lecturer in Civics on the ground that the post was to be filled up by promotion and, therefore, it could not have been filled up by direct recruitment through a selection conducted by the Board. The selected candidates were not able to join in spite of the orders being issued by the District Inspector of schools. The dispute appears to be as to whether the post could have been filled up by direct recruitment or not. The fact that emerges from the records indicates that Smt. Veer Bala Agarwal was duly qualified and available for promotion as Lecturer in Civics when the vacancy occurred on 30.6.2002. Her claim for promotion was considered and she was ultimately promoted by the orders of the Joint Director of Education as is evident from the order dated 24.4.2003.

10. In between Smt. Parveen was given the benefit of appointment as Lecturer on substantive basis by way of promotion by the Regional Level Committee on 20.4.2003 and the consequential orders were issued by the Joint Director of Education and the District Inspector of Schools on 12.6.2003 and 16.6.2003. The Joint Director of Education, however, stayed the operation of his own order dated 12.6.2003 by an order of the same date on the ground that Smt. Parveen was not entitled for promotion as such. Smt. Parveen filed writ petition No. 33779 of 2003 and an interim order was passed in her favour on 6.8.2003 as a result whereof she continued to function as Lecturer in History.

11. The question of regularisation in the LT grade of Smt. Parveen was taken up by the Regional Level Committee and an order was issued on 31.5.2003 u/s 33-C of U.P. Act No. 5 of 1982 giving the benefit of regularisation and appointment on substantive basis to her w.e.f. 20.4.1998. By virtue of this order Smt. Parveen was treated to a Teacher in substantive capacity in the LT grade w.e.f. 20.4.1998 which is the date of Notification of Section 33-C.

12. The dispute of seniority was decided and the Principal of the College issued an order on 3.3.2004 whereby Smt. Veer Bala Agarwal was declared to be senior than Smt. Parveen. This order dated 3.3.2004 was challenged by Smt. Parveen in writ petition No. 11603 of 2004 and the operation of the said order was stayed. As a consequence of the aforesaid interim order in favour of Smt. Parveen, she continued to function as Lecturer in History. The writ petitions were finally heard by this Court and the writ petitions were allowed on the ground that the stay order of the Joint Director dated 12.6.2003 was without notice and opportunity and that the order of the Principal dated 3.3.2004 was without jurisdiction as he had no authority to decide the question of seniority. The writ

petitions were allowed and the orders were set aside with a direction to the Joint Director of Education, Moradabad, to decide the matter afresh.

13. It is in these circumstances that the question of the status of Smt. Parveen and Smt. Veer Bala Agarwal was sought to be re-determined together with their claim of seniority in the Lecturer's grade and for which the matter was remitted back by the judgment of this Court dated 9.8.2005.

14. All the facts, which have been narrated herein above, have been noticed by the Joint Director of Education and the Joint Director of Education by the impugned order has held that the ad hoc promotion of Smt. Parveen in the Lecturer's grade, which was approved by the District Inspector of Schools on 2.12.1999, was legally unsustainable and that she had been paid salary illegally, on the ground that when she was promoted as a Lecturer on ad hoc basis, she was still ad hoc in the LT grade and, therefore, the order which was made in her favour on 12.6.2003 was rightly stayed by the Joint Director of Education by an order of the same date. It has been further held that Smt. Parveen did not hold the qualification of 5 years service in substantive capacity in the LT grade so as to make her eligible for promotion as a Lecturer on the date of occurrence of vacancy i.e. on 30.6.1999. The Joint Director of Education rejected the representation of Smt. Sahida Parveen and declared Smt. Veer Bala Agarwal to be senior than Smt. Parveen.

15. Sri Ashok Khare, learned Senior Advocate, has assailed the aforesaid finding and has urged that the qualification for the purposes of promotion have to be seen on the first day of the year of recruitment and not on the date of the occurrence of vacancy of the post in question. He further contends that the requirement under Rule 14 of the U.P. Secondary Education Services Selection Board Rules, 1998 is of 5 years continuous regular service and not of service in substantive capacity. He further contends that once the petitioner was extended the benefit of regularisation w.e.f. 20.4.1998, then he will be deemed to be in substantive capacity in the LT grade before the vacancy occurred in the Lecturer's grade and has urged that Smt. Parveen had already completed almost 7 years of service in LT grade and, as such, she fulfilled the eligibility criteria required under Rule 14 referred to herein above for being promoted as a Lecturer. The writ petition also questions the entitlement of Smt. Agarwal for being promoted as according to Sri Khare, there was no occasion for promoting her as Lecturer in Civics, once the candidates recommended and selected by the Board had already been sent to the institution.

16. Sri Prakash Padia, on the other hand, has urged that the orders of regularisation in favour of Smt. Parveen are illegal. He contends that the finding of the Joint Director to the extent it treats the period of ad hoc services of Smt. Parveen as irrelevant for counting the period of 5 years is a correct order and he relies on the decision of the Apex Court in the case of State of Haryana Vs. Haryana Veterinary and A.H.T.S. Assn. and Another, wherein the expression regular service has been held not to include services on ad hoc basis or stop gap

arrangement. He further contends that the benefit of regularisation in the LT Grade to Smt. Parveen w.e.f. 20.4.1998 by an order dated 31.5.2003 is illegal as the benefit of regularisation cannot be granted with retrospective effect as the provisions u/s 33-C contemplate appointment on substantive basis only from the date of recommendation of the Selection Committee constituted u/s 33-C where after a candidate is placed on probation and hence the benefit of promotion cannot be granted prior to the said date. Sri Padia has further relied on the decision of K. Madhavan and Another Vs. Union of India (UOI) and Others, to support his submissions. He has further invited the attention of the Court that the benefit of regularisation in LT grade was granted to Smt. Parveen on 31.5.2003 whereas she was granted the said benefit as Lecturer even prior to that on 20.4.2003 and it is for this reason that the Joint Director of Education rightly stayed his own order dated 12.6.2003. In essence, he contends that the regularisation order in favour of Smt. Parveen are manipulated and have been done in quick acquisition without taking recourse to law.

17. Learned Standing Counsel has supported the impugned order and has urged that the seniority in favour of Smt. Veer Bala Agarwal has been fixed in accordance with law.

18. Sri Khare in the Rejoinder-Affidavit has urged that the period of continuous regular service has been interpreted by this Court correctly in the decision of Smt. Suman Bhatnagar v. State of U.P. and Ors. reported in 2005 ADJ 266 and that since the law in this regard has not been correctly interpreted in the decision reported in the case of Yogendra Pal Singh v. District Inspector of Schools and Ors. 2001 (3) ESC 1110 therefore, the same has been rightly referred to be reconsidered by a larger bench by an order of Hon'ble Mr. Justice R.K. Agarwal, a copy whereof was produced by him during the course of arguments. He, therefore, contends that the Joint Director of Education without even considering the said aspects and the issues raised between the parties has cursorily recorded conclusions without adverting to the said issues and recording reasons in respect thereof.

19. The first question that has to be determined is with regard to status of Smt. Parveen and Smt. Agarwal as Teachers in their respective grade which issue has been advanced before this Court. As noticed above, Smt. Parveen was appointed on ad hoc basis in the LT grade on 1.9.1992. The Notification of introducing Section 33-C which extended the benefit of regularisation to Teachers like Smt. Parveen was brought into effect from 20.4.1998. The provisions of the said Section contemplate the scrutiny of the cases of such candidates, who are entitled for regularisation by a Committee and approval of such claims with the stipulation that appointment letters shall be issued by the Committee of Management after such scrutiny and the candidate concerned shall be treated to be on probation with effect from the date of such substantive appointment. The section also provides that where there are more than one such candidates to be considered for regularisation then their inter se seniority shall be determined

from the date of their appointment which is the date of their appointment on ad hoc basis. This provision has been interpreted by this Court in the case of Ram Prakash v. State of U.P. and Ors. reported in 2005 ADJ 256. At this juncture, what is to be noted is that with regard to the benefit of regularisation u/s 33(1-A)(1-B)(1-C), the said provisions provided for regularisation with effect from the date of Notification of the said provisions. However, there is no such express provision in Section 33 A, B and C with which we are presently concerned. Sri Padia contends that in this view of the matter, the benefit of regularisation in the LT grade to Smt. Parveen could not have been granted w.e.f. 20.4.1998 and it could have only been from the date of the passing of the order i.e. 31.5.2003. The aforesaid issue has to be examined from the angle that once the notification of regularisation was issued then it was incumbent.

20. On the Management as well as the authorities to dispose of the claim of such candidates for regularization at the earliest and not delay it so as to defeat the claim of any candidate. To illustrate this position, take the example of a candidate who is appointed directly by the Commission after 20.4.1998. He immediately attains the status of a Teacher but a candidate who is entitled to be regularized to await an order of regularization even though the right to be appointed on substantive basis has already accrued in his favour with the introduction of the Notification on 20.4.1998. The right of such a candidate by delaying the process of regularization would, therefore, be defeated in case the argument advanced by Sri Padia is accepted. The Management an institution or the authority concerned in order to give benefit of seniority to a directly recruited candidate can also delay the process of regularization deliberately and thereby defeat the claim of seniority of such a candidate.

21. This situation can also arise between candidates who are entitled for regularization u/s 33-C. For example, supposing 2 posts of Lecturers fall vacant and the claim of regularization against one such post is decided earlier and the claim of regularization against the other post is delayed, the same would also produce an anomalous situation in case the argument advanced to the effect that the date of seniority will be with effect from the date of actual appointment is accepted.

22. Another situation, which also deserves to be taken note of, is that the claims of regularisation are not sent simultaneously by the managements for disposal for various reasons of delay. There is only one Committee at the regional level and it may not be possible for the said Committee to dispose of the claims at one stroke for reasons referred to herein above or on account of its own shortcomings like deficiency in Constitution, frequent transfer of officials, non-convening of the meetings regularly or for that matter any other conceivable fortuitous circumstances beyond the control of the Committee. In such a situation, in the opinion of the Court, it would be appropriate to interpret the rules under consideration to be applied uniformly in respect of all such similar claims. The date of eligibility, therefore, should be from the date of notification of

Section 33-C. The non-consideration or postponement of consideration of a candidate for regularisation on account of any delay, therefore, should not come to the disadvantage of such a candidate. The rule of regularisation is a beneficial rule meant to declare the services of such a candidate to be of a permanent and enduring nature. The candidate, therefore, should not be deprived of his entitlement, as such, merely because the consideration was not made immediately after the notification.

23. The date of eligibility to acquire the status of a regular permanent teacher upon regularisation should not be dependent on the mere issuance of a formal letter of appointment, which is only a ministerial act. The suggestion of Sri Padia that in this case no formal letter had been issued, is therefore of neither any significance or consequence. The candidate, is, by operation of law, entitled to be regularized with effect from the date he is eligible thereunder. If a candidate, as in the instant case, was eligible for being regularized in his/her services on the date of notification, then there is no reason for not extending the benefit accordingly unless some deficiency in the candidature is otherwise pointed out. The scrutiny to be carried out by the regional level committee is only to find out as to whether a candidate is eligible and qualified as per the provisions of Section 33-C for regularisation or not within the cut-off dates referred to therein. Once a candidate is found to fulfill the said criteria, then there appears to be no justification for giving the candidate the benefit of regularisation from the date of issuance of a formal letter of appointment. Upon the scrutiny having been made, the candidate's entitlement from the date of notification cannot be denied for any valid reason.

24. The legislature may not have expressly used words for extending the benefit of substantive appointment with effect from the date of notification to such candidates, but in view of the fact that such similar provisions namely Section 33-(1-A), (1-B) and (1-C) had included provisions of extending benefit of regularization from the date of notification, it would be safe to interpret the provisions under scrutiny on a similar logic. The provisions of regularisation under U.P. Act No. 5 of 1982 are *pari materia* in the sense that they all relate to regularisation of ad hoc appointees. In order to avoid any uncertainty or friction, it would be legally appropriate and justified to interpret Section 33-C to extend the benefit of regularisation from the date of notification if a candidate is found eligible and qualified otherwise by the Committee from the said date. This would eliminate all possibilities of discrimination and would prejudice none. The provisions of Section 33-C are not negatively worded so as to exclude the possibility of the interpretation rendered herein. Thus, on all scores, the order of Joint Director of Education giving the benefit of regularisation in LT grade to Smt. Parveen with effect from the date of notification i.e. 20.4.1998 is perfectly justified and cannot be said to be legally infirm in any way.

25. The contention of Sri Padia that the appointment will be given effect to only from the date of such consideration would, therefore, in the opinion of the Court

be not a correct interpretation of the said provision as it tends to defeat the claim of a candidate who is otherwise entitled to such benefits with effect from the date of Notification. In the present case, the Joint Director of Education has not adverted to this aspect of the matter at all when the order of regularization in favour of Smt. Parveen clearly indicates that the date of her regularization in LT grade would be w.e.f. 20.4.1998.

26. The argument that this would render the provisions u/s 33-C of placing a candidate on probation nugatory also cannot be accepted inasmuch the period of probation is only provided to ascertain, confirm and judge the suitability of the continuance of such a candidate on the basis of his/her performance. This is only to ensure a right in the employer to revert back a candidate who is unable to satisfy the suitability test for confirming his or her services. This provision in no way cuts at the provisions under which a candidate is entitled to be notionally treated for having been included in a particular grade. The purpose of extending the benefit of regularization should not be allowed to be defeated even though the Notification has arrived way back on 20.4.1998. Accordingly, it is held that Smt. Shahida Parveen was rightly extended the benefit of regularization in the LT grade w.e.f. 20.4.1998. In this view of the matter, Smt. Parveen was very much in the regular main stream cadre of the LT grade even on the date of occurrence of vacancy i.e. 30.6.1999 and thereafter even in the year of recruitment in which she was considered for being promoted.

27. The next question that follows thereafter to be determined is as to whether the benefit of services in ad hoc capacity in the LT grade was available to Smt. Parveen for her consideration for promotion in the Lecturer grade. As already noticed herein above and in view of the decision of this Court in the case of Smt. Suman Bhatnagar, Smt. Parveen is entitled to get her services on ad hoc basis, which were also regular in nature and duly approved by the District Inspector of Schools vide order dated 2.12.1999, counted for the purpose of Rule 14 of 1998 Rules framed under the U.P. Act No. 5 of 1982. The ad hoc services rendered in LT grade cannot be described as fortuitous. The appointment on ad hoc basis and its approval by a competent authority in favour of Smt. Parveen was under rules and not de hors the rules. It is not the case of either of the respondents that Smt. Parveen was not appointed in accordance with rules in ad hoc capacity. The ad hoc appointee has to possess the same qualifications for appointment provided for regular selections under Appendix-A of the U.P. Intermediate Education Act, 1921. He or she has to perform the same duties which are in no way inferior to the duties of a teacher appointed on substantive basis. His or her continuance as a teacher is in no way different than that of a permanent employee except that the capacity is that of an ad hoc teacher which in the present case gets regularized u/s 33-C.

28. Such candidates have a vested right created in them of being regularized. Their expectation to be continued in a substantive regular capacity stands legitimized in law u/s 33-C of U.P. Act No. 5 of 1982, as in the present case. In

this view of the matter Smt. Parveen is entitled to get her services rendered in ad hoc capacity counted for the purposes of computing 5 years regular service as contemplated under Rule 14 of the U.P. Secondary Education Services Selection Board Rules, 1998. The finding recorded by the Joint Director of Education contrary to the aforesaid position, therefore, is unsustainable and the order is liable to be set aside.

29. The decision in the case of State of Haryana (*supra*) was dealing with a situation where the ad hoc appointment of the candidate was de hors the rules and, as such, could not be counted as regular service. The present case is clearly distinguishable on the said score and therefore the ratio of the said decision does not apply herein.

30. In the case of Raghuraj Singh Yadav, reported in 1997 (1) ESC 513 the Court was called upon to examine the impact of the words "substantive service" for counting seniority. The court found that the temporary services of the petitioners were again de hors the service rules as such the petitions were dismissed. This judgment, therefore, is also not applicable for the same reason stated herein above.

31. Sri Padia has invited the attention of the Court to para 10 of the judgment in the case of K. Madhavan and Another Vs. Union of India (UOI) and Others, and has urged that ad hoc period of service is not regular service. The said decision was rendered in the context of services on deputation in the Central Bureau of Investigation. In order to appreciate this contention, notice will have to be taken of the Constitution Bench decision in the case of The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, The Apex Court while considering the claim of seniority clearly ruled as follows:-

If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

32. The period of continuous service in the present case has undisputedly remained uninterrupted followed by regularisation. In such a situation the judgment in the case of K. Madhavan (*supra*) will not cover the case at hand.

33. Coming to the status of Smt. Veer Bala Agarwal, it is evident that she was not qualified for the post of Lecturer in History and, therefore, she could not have claimed the said post. Her claim arose for the first time when the vacancy of Lecturer in Civics arose on 30.6.2002. Her claim came to be considered and she was granted the benefit of promotion on 24.4.2003. Sri Khare contends that she could not have been promoted as the post had to be filled up only by the candidates, who had been recommended by the Commission namely Smt. Archana Verma and Ku. Mamta Sen. He further contends that even assuming for the sake of argument that the post of Lecturer in Civics was also to be filled up

by promotion then in that even since the post was earmarked for being filled up by a candidate of the reserved category, the same could not have been filled up by promoting Smt. Agarwal, who was of the general category. It is to be noted that in the writ petition filed by Smt. Parveen, there is no prayer for quashing of the order dated 24.4.2003 promoting Smt. Agarwal on the post in question. However, the averments commenting on the said issue have been made in the writ petition and, therefore, are being answered herein after.

34. From a perusal of the impugned order it appears that the post of Lecturer in Civics was also treated to be a post for being filled up by promotion. If that be so, then in that event a post which has to be filled up by promotion could not have been filled up by way of direct recruitment. The post of Lecturer in Civics fell vacant on 30.6.2002 on which date Smt. Agarwal was fully qualified and eligible to be promoted. It appears that since there was no other candidate available from amongst the reserved schedule caste category for being promoted, the post came to be recommended to be filled up by direct recruitment through a reserved category candidate namely Km. Mamta Sen of the schedule caste category. In the event it is found that the post was to be filled up by promotion then such a course could not have been adopted by making appointment through direct recruitment on the ground of reservation and thereby defeating the right of Smt. Agarwal to get promoted. The argument of Sri Khare on this issue, therefore, is unacceptable. The Court is fully supported in its view by the decision of the Division Bench in the case of Smt. Sunita Bhagat v. State of UP. and Ors. Special Appeal No. 1094 of 2005 decided on 22.9.2005. This aspect of the matter has also not been taken notice of by the Joint Director of Education even though he has taken notice of the facts leading to the promotion of Smt. Agarwal. The Joint Director of Education ought to have recorded clear findings on this contentious issue which he shall now do keeping in view the observations made herein above.

35. The writ petition No. 75590 of 2005, accordingly, succeeds and is allowed to the extent indicated herein above and the order dated 26.11.2005 is quashed. The Joint Director of Education shall redetermine the status of the contesting parties namely Smt. Parveen and Smt. Agarwal in the light of the observations made herein above and further determine the question of seniority in accordance with the provisions contained in the U.P. Intermediate Education Act, 1921 read with the provisions of U.P. Act No. 5 of 1982 as expeditiously as possible preferably within a period of 3 months from the date of presentation of a certified copy of the judgment before the said authority. The writ petition No. 204 of 2006 also stands disposed of. accordingly, with no orders as to costs.