
(1997) 08 AHC CK 0096

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 24479 of 1994

Smt. Sushila Gupta

APPELLANT

Vs

Administrator, Nagar Nigam and Others

RESPONDENT

Date of Decision : 05-08-1997

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 — Section 18, 18(2), 18(3), 18(4), 18(5)

Citation : (1997) AWC 482 : (1997) 3 UPLBEC 1837

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Ravi Kiran Jain, for the Appellant; S.C. and Ashok Khare, for the Respondent

Final Decision : Allowed

Judgement

D.K. Seth, J.—Sri R.K. Jain, learned counsel for the petitioner raised two very interesting questions, namely whether for the purposes of recruitment in respect of only one post, the provision for reservation provided for backward classes is applicable. Secondly, whether ad hoc appointee is eligible for promotion when the persons holding substantive post eligible for promotion, are available.

2. In order to appreciate the points it is necessary to refer to the relevant facts which are as follows.

3. The petitioner was appointed as a lecturer on 15-7-1964 in Physics in M. G. Intermediate College, Civil Lines, Kanpur run by the Nagarpalika, Kanpur, now known as Nagar Nigam, Kanpur. She was confirmed on 30th June 1977. The Nagar Nigam had been running four Girls Schools. A combined seniority list of all the Girls Schools was prepared. In the seniority list the petitioner was placed at serial number, below one Smt. R. R. Srivastava, who after being promoted as Principal had retired on 30th June 1994. By reason thereof the petitioner was the senior most lecturer in all the four colleges, whereas the respondent No. 2 was placed at Serial number "43 in the said seniority list, on being appointed ad hoc

lecturer in Hindi on 17-7-1989. The petitioner alleges that she is still continuing as ad hoc lecturer in Hindi and her services have not been regularised. In the resultant vacancy occurring due to the retirement of the said Smt. R. R. Srivastava, Principal, respondent No. 2, was appointed as ad hoc Principal by an order dated 29-6-1994, issued by the Administrator, Nagar Nigam. Aggrieved the petitioner had made several representations to the appropriate authorities. But no steps have been taken on the said representation. The petitioner, therefore, has come up with the present writ petition, for quashing of the said order dated 29-6-1994 (Annexure-6 to the petition) and direction to promote and appoint the petitioner as ad hoc Principal.

4. Sri Jain contends that the petitioner is recipient of best teacher award and admittedly senior most teacher possessing requisite qualification for being promoted to the post of Principal. He also refers to the Government Order dated 12-7-1978, by which the post of Principal was excluded from the purview of reservation. By referring to different provision of various Acts he contends that the post of Principal being only one, the provision for reservation is not applicable. He also refers to three decisions in support of his contention with which I shall deal at appropriate stage.

5. Sri Ashok Khare, learned counsel for respondent No. 2 on the other hand contends that the appointment of respondent No. 2 having not been challenged and no particulars of the manner by which the respondent No. 2 was appointed, having been disclosed, the petitioner can not take the point that ad hoc appointee is not eligible for promotion. He secondly contends that in the meantime the petitioner was appointed as Principal in Intermediate College, under Nagar Nigam, Kanpur, therefore the writ petition has become infructuous. According to him by reason of Section 33-A of U.P. Secondary Education Services Selection Beards" Act, 1982 the services of respondent No. 2 has automatically been regularised and confirmed. Therefore the question of ad hoc appointment does not survive. Thirdly, he contends that there being six posts of Principal in six different schools run by the Nagar Nigam, it is not a case of single post. Over and above, reservation is also applicable in a single post as well. He also refers to various provisions of law on few of such decisions in support of his contention, with which I shall be dealing with at appropriate time.

6. For the sake of convenience the question as to whether the respondent No. 2 was an ad hoc appointee is taken up first. The respondent No. 1 Contonment Board, on the other hand in its counter-affidavit has made out a case that the respondent No. 2 was given appointment on account of her being member of backward class, none of whom are represented in the post of Principal. Therefore, in compliance with the provision for reservation the said post could only be filled up by a candidate from the reserved category.

7. In para 14 of the writ petition it is alleged that the respondent was very junior ad hoc lecturer and she is not qualified to be promoted/ appointed as ad hoc Principal unless her services are regularised and she become a regular lecturer.

The said contention has been dealt with in para 15 of the counter-affidavit filed by the respondent No. 2. There it has been contended by virtue of provisions of U.P. Act No. 26 of 1991 and U.P. Act No. 1 of 1993 the petitioner's appointment stood regularised and, therefore, she was granted promotion on her being senior most Schedule-caste lecturers amongst all the colleges. The said para has been dealt with in para 14 of the rejoinder-affidavit alleging that the petitioner was never regularised. Para 14 of the said petition has been dealt with in para 14 of the counter-affidavit filed on behalf of respondents No. 1 and 4, In the said para the question of ad hoc appointment of respondent No. 2 has been avoided. Thus it appears that neither the petitioner nor the respondents No. 1 and 4 have disclosed any particular as to on which date the respondent No. 2 was appointed and how and in what manner and under what provisions of the Act No. 26 of 1991 or U. P. Act No. 1 of 1993 the respondent op. 2 was regularised. Shri Khare contends that since the question of ad hoc appointment was not in challenge it was not necessary to disclose the particulars. Whereas Sri Jain, learned counsel for the petitioner, contends that the very ground that the respondent No. 2 being ad hoc appointee and having not been regularised she is not eligible for promotion. Therefore, it was incumbent upon the respondents No. 2 and respondents No. 1 and 4 to disclose as to how the respondent No. 2 had ceased to be ad hoc appointee.

8. In the context of the present case when allegation has been made that the respondent No. 2 is an ad hoc appointee and she does not possess requisite qualification, in such cases though ad hoc appointment is not under challenge, but absence of requisite qualification of being ad hoc appointee in absence of regularisation is a ground taken, which is required to be controverted by the respondents in its pleading. It appears that though the qualification of respondent No. 2 was under challenge and it was incumbent on the basis of pleadings made in the writ petition upon the respondents to disclose the qualification of respondent No. 2, yet they have failed to specifically disclose the same. In absence of such pleading the court is entitled to draw an adverse inference. But then exercising writ jurisdiction writ court is not supposed to enter into disputed questions of fact and records its decision without any material before it. However, in deserving cases when it is absolutely necessary the Court may very well enter into such questions and draw inference from the material placed before it when it is deemed just and proper by the court depending on the facts and circumstances of the case. In absence of appropriate material I refrain from entering into the disputed questions of fact in the present case in view of the facts and circumstances at hand.

9. The respondent No. 2, has not made out a case under which of the provision she has been regularised The pleading indicates that she was regularised by virtue of the provisions of U.P. Act No. 26 of 1991 and U.P. Act No. 1 of 1993. By virtue of U.P. Act No. 26 of 1991 Sub-section (1-A), (1-B) and (1-C) were incorporated in Section 33-A of 1982 Act while the Act No. 1 of 1993 introduced Section 33-B in the said Act. The scope of the said provisions are different. In as

much as Sub-section (1-A) of Section 33-A deal with adhoc appointment made against substantive vacancy by promotion under Para-2 of U.P. Secondary Education Services Commission (Removal of Difficulties) Order 1981. Sub-section (1-B) deals with adhoc teacher directly appointed after 12th June 1984 and before 31-5-1989 against substantive vacancy in C. T. Grade under Para-2 of the said Removal of Difficulties Order. Sub-Section (1-C) death with adhoc teacher appointed before 31-7-1988 against substantive vacancy u/s 18 of 1982 Act. These three category of teachers are governed by the said provisions. Whereas Section 33-B deals with the teacher ether than Principal or head master appointed either by promotion or by direct recruitment in the lecturers grade or L.T. Grade before 14-5-1991 or in C. T. Grade before 13-5-89 against short term vacancies subsequently converted into substantive vacancy or those who have been directly recruited on or after 14-7-1981 but not later than 12-6-1985 against substantive vacancy in C. T. Grade through an advertisement and such appointment was approved by the District Inspector of Schools or such persons appointed by promotion or direct recruitment on or after 31-7-1989, but not later than 14-5-1991 on adhoc basis against substantive vacancy u/s 18. Thus I see various provisions of Sections 33-A and 33-B deals various kind of appointment Unless a person comes within either of this specific condition regularisation is not possible Then again Section 33-B requires finding of suitability by a Selection Committee. In case the respondent No. 2 comes u/s 33-B in that event regularisation has to receive the seal of the Selection Committee in terms of clause (e) of Section 33-B (1). in case she comes under any of sub-section of Section 33-4 introduced by U.P. Act No. 26 of 1991 that has also to be specified The respondent No. 2 despite having opportunity has not specified as to how her services were regularised. From the pleadings it appears that she was appointed on adhoc basis, has not been disputed by the respondent No. 2 and respondents No. 1 and 4 avoided to deal with the question stall Even when the point was raised by Sri Jain in the course of argument Sri Khare did not seek any adjournment or leave of the court to bring these facts on record. On the other hand he had contended that the respondent No 2 comes under the purview of Section 33-A without specifying under which sub-section she comes in, Though, however, he contends that regularisation u/s 33-A does not require any order from any quarter. Regularisation u/s 33-A is automatic and becomes effective on the commencement of Act No. 26 of 1991. Even then he has not specified by which subsections the case of respondent No. 2 is covered. The whole pleading both of respondent No. 2 and that of respondents No. 1 and 4 and the argument clearly indicates avoidance of the question of ad hoc appointment of respondent No. 2 in this background though initially I had decided to refrain from drawing Inference from the pleadings available before the court but by reason of the above provision of law it is not possible for this court to remain silent on looker that respondent No. 2 having sufficient opportunity did not deal with the aspect which appears to be liberate one, particularly, in view of the facts that in the course of argument any opportunity was not asked for, though the question was specifically raised by Sri Jain with great vehemence and Sri Khare was

confronted with the question by the court, yet no opportunity was asked for by means of seeking adjournment or otherwise. Neither any document or anything was sought to be produced in the court nor any statement came from the Bar. On the other hand Sri Khare simply submits that since the question of ad hoc appointment of respondent No. 2 was not under challenge she is not required to deal with the same or answer the same except contending that her services were regularised by virtue of Section 33-A without specifying under which sub-section, the case of respondent No. 2 is covered.

10. All these facts goes to show that the respondent No. 2 has deliberately avoided the said question. By reason thereof this court cannot but to accept the contention of Sri Jain that the petitioner based its pleadings made in the writ petition on the ground that the same has not been disputed by respondent No. 2 or respondents No. 1 and 4. A disputed question of fact means a fact asserted by one and denied by the other. The kind of denial depends on the facts pleaded. The person who has special knowledge he is supposed to give details of such facts and the person who do not have any special knowledge he may deny the same simply without resorting to in detail while indicating atleast something to dress up denial to be of substance and not baseless or frivolous Similarly, when a person who is not expected to possess special knowledge alleges something it is the person who has in possession of special knowledge while denying it as to disclose the details or such materials that would render denial to be considered of substance. Thus a fact is disputed The dispute means a dispute in effect. Unless the dispute is given a shape of effective dispute the question cannot be said to be a disputed question of fact The court may come to a finding on the basis of pleading that dispute sought to be raised is not a dispute in effect. In order to be a dispute in effect it is necessary to be supported by certain materials and facts so as to render it to be a dispute sought to be raised with some amount of, seriousness. A dispute sought to be raised in a very casual manner without attempting to add colour of prima facie effect or the dispute, the same cannot be considered a dispute in effect. In the present case though dispute has been raised but the facts which were within special knowledge of respondent No. 2 she has not attempted to render it effective even prima facie. On the other hand, escapist's attitude has been reflected by avoiding to answer the same by respondent No. 2 while omitting to deal with the same by respondent Nos. 1 and 4. In these circumstances, it is very difficult to escape the liability by the court on the principle that the question is a disputed question of fact and no exercise should be undertaken to decide the same. The facts as discussed above makes it clear that it is not a decision of disputed question of fact but on the other hand if is a case leading to irresistible conclusion that they have not been effectively disputed so as to assume the character of disputed question of fact.

11. Senior most teacher means a teacher who is senior in the seniority list having been appointed in a substantive vacancy and regularised though he may holding a temporary appointment. An ad hoc appointee can never be considered to be senior even if he is appointed against a substantive vacancy. Unless he is

appointed on temporary post or regularised he cannot be considered to be senior to those temporary or permanent employee. Therefore, an ad hoc appointee cannot claim to be the senior most teacher for being appointed as Head Master when a permanent senior most teacher is available.

12. By reason of Section 16 of 1982 Act appointment can be made only in accordance with the provisions of the said Act, In the present case the appointment to the post of Principal is ad hoc appointment. It can either be done u/s 18 or under Removal of Difficulties Order. In both these provisions the post of Head Masrer or Principal is to be filled up by promotion of senior most teacher as defined in para 2 (3) Explanation (1) of the Second Removal of Difficulties Order. Admittedly, the petitioner is the senior most teacher. So far as Removal of Difficulties Order is concerned it does not contain any provision for reservation. Whereas Section 18, as substituted by Act No. 24 of 1992 makes a provision for reservation Sri Jain contends relying on Section 18, as substituted by 1995 Amendment Act where it has been specifically provided that reservation is to be taken care of by virtue of Sub-section (6) in respect of Sub-sections (2) and (3) which deal with appointment of teacher on ad hoc basis. The provision of reservation contained, in Sub-section (6) does not include Sub-sections (4) and (5) which provides for promotion in the post of Principal or Head Master.

13. Shri Khare opposes the said contention on the ground that the appointment was made on 29-6-1994 whereas 1995 Amendment came into force on 29-12-1894. Therefore, the same cannot have any impact on the appointment in question. On 29-6-1994 Section 18 as substituted by Act No. 24 of 1992 was governing the field,

14. Now ad hoc appointment is made either u/s 18 of the 1982 Act as amended from time to time or under the Removal of Difficulties Order as the case may be. Removal of Difficulties Order supplement Section 18 in the matter of ad hoc appointment. The Removal of Difficulties Order is promulgated u/s 33 to remove the difficulties created by reason of Section 16 as relaxed by Section 18. If there is any inconsistency between Section 18 and the Removal of Difficulties Order in that even Section 18 will prevail being an act of the legislature while the Removal of Difficulties Order is enacted through the delegated legislation only to supplement Section 18. Removal of Difficulties Order does not provide for any reservation in the matter of ad hoc appointment either from the Schedule Caste or Schedule Tribe or Backward Classes. Section 18 as it originally stood also did not provide for reservation in case of ad hoc appointment The present appointment having been made in 1994, the 1995 amendment of Section 18 may not affect the said appointment. But the fact remains that in 1994, U. P. Act No. 24 of 1992 had been in force and the said provision would be governing the recruitment in the present case. Section 18, as substituted by U.P. Act No. 24 of 1992, is effective from 14-7-1992 which imposed elaborate provision for reservation in the matter of ad hoc appointment of teacher. In order to appreciate the situation, it is necessary to refer to the relevant extracts of

Section 18 as was operative on the date of disputed appointment is quoted hereunder:-

"18. Ad-hoc teachers,- (1) Where the management has notified a vacancy to the Commission in accordance with the provisions of this Act, and the post of such teacher has actually remained vacant for more than two months, the management may appoint by direct recruitment or promotion a teacher, on purely ad hoc basis, in the manner hereinafter provided in this section.

(2) A teacher, other than a Principal a Headmaster, who is to be appointed by direct recruitment, may be appointed on the recommendation of the Selection Committee referred to in Sub-section (9).

(3) A teacher, other than a Principal or Headmaster, who is to be appointed by promotion, may in the manner prescribed be appointed by promoting the senior most teacher possessing prescribed qualifications.

(a) in the trained graduate's grade as a lecturer, in the case of a vacancy in lecturer's grade.

(b) in the Certificate of Teaching grade, as a teacher in the trained graduate's grade in the case of vacancy in trained graduate's grade.

(4) A vacancy in the post of a Principal may be filled by promoting the senior most teacher in the lecturer's grade.

(5) A vacancy in the post of a Headmaster may be filled by promoting the senior most teacher in the trained graduate's grade.

(6) For the purposes of making appointments under Sub-sections (2) and (3), the Management shall determine the number of vacancies, as also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories of persons in accordance with the rules or orders issued by the State Government in this behalf. If in determining the vacancies it is found that persons belonging to such categories are not holding such number of posts as should have been held by them in accordance with such rules or orders, then the vacancies shall be so determined that first and every alternate vacancy shall be reserved for the persons of such categories until the required percentage of posts is held by them."

15. On an examination of the said provision it appears that subsections (2) and (3) deal with the appointment of teachers other than Principal or Headmaster-either by promotion or by recruitment. Whereas Sub-sections (4) and (5) deal with the appointment of Principal and Head Master by promotion. Thus it appears that teachers on the one hand, the Principal or Headmaster at the other hand are being treated differently for the purpose of promotion. Since we are concerned with promotion, therefore we confine ourselves to the provisions related to promotion only.

16. Now Sub-section (6) while making provision for reservation specifies such

reservation is to be made while making appointments under Sub-sections (2) and (3) namely in respect of teachers whether by direct recruitment or by promotion. The statute has not subjected Sub-sections (4) and (5) to reservation. Legislation was conscious in making clear distinction in respect of promotion in the post of teacher on the one hand and promotion in the post of Head Master or Principal on the other hand. It has omitted to include Sub-sections (4) and (5) in the provisions for reservation provided in Sub-section (6). The omission appears to be purposive, intentional and deliberate. The intention of the legislature is to be gathered from the scheme of section itself. The scheme from the very beginning says that a distinction is being made in respect of teachers on the one hand and the Principal or Head Master on the other. When the Act is specific clear and unambiguous and the legislature was consciously making distinction and deliberately omitting to include the post of Principal and Head Master for the purpose of reservation, there is no escape from the conclusion that the legislature had intended to keep the post of Principal or Head Master free from being subjected to reservation. The promotion has been made very simply through the use of expression by promoting the senior most teacher in the Lecturer grade in case of Principal" and L. T. Grade in place of Head Master. The senior most teacher has been explained in the Removal of Difficulties Order to mean the person having longest service in the institution.

17. Now the Sub-sections (3) and (4) having not been subjected to Sub-section (6), the promotion would be given to the senior most teacher. In that event, Sub-sections (4) and (5) would be difficult to reconcile with the scheme when specifically Sub-sections (2) and (3) have been subjected to the reservation. When the statute specifically exclude the post being subjected to a reservation, the same cannot be made subject to reservation by reason of any other provision in any other Act. The appointment in the present case is an ad hoc appointment which is subject to the joining of the regularly selected candidate where the question of reservation is taken care of. The stop-gap arrangement which is subject to supersession by regular appointment may be omitted from the scope of reservation and the same would not affect the policy or provision for reservation made in any other statute. Section 18 being a special provision or a special situation it is not necessary to subject it to any other provision of reservation when the legislature itself has deliberately omitted it from the scope thereof. The wisdom of legislature in doing so cannot be questioned. Therefore, in the present case it is not necessary to go into other questions raised by respective learned counsel and the decisions cited by them at the bar in support of other points.

18. In the circumstances, the appointment given to respondent No. 2 cannot be sustained even if there are six schools under the Nagar Palika. Therefore, the appointment given to respondent No. 2 vide order dated 29-6-1994 is liable to be quashed and the petitioner is entitled to declaration that she is entitled to be promoted to the post of Principal on account of her being senior most teacher in Lecturer grade. Accordingly, a writ of certiorari do issue quashing the order dated

29-6-1994, Annexure-6 to the writ petition. Respondents are directed to give appointment on ad hoc basis as Principal to the petitioner forthwith. She should be granted such benefits, if there being any, as are admissible under the law for the post of ad hoc Principal calculated from 29-6-1994. Such appointment shall be subject to the joining of the regularly selected candidate recommended by the Commission or till such time the petitioner's service comes to an end for any reason whatsoever which is earlier. Accordingly a writ of mandamus do issue.

19. In the result, the writ petition succeeds and is allowed.

20. There will, however, be no order as to cost.