

(2006) 05 AHC CK 0078

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 16065 of 2002

Subhash Chandra Tripathi

APPELLANT

Vs

District Inspector of Schools, Finance and Accounts Officer
and Committee of Management of Shri Guru Narain Khatri
Inter College

RESPONDENT

Date of Decision : 15-05-2006

Acts Referred:

Constitution of India, 1950 — Article 16
Uttar Pradesh Intermediate Education Act, 1921 — Section 16(2), 16F(1)
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 18, 33, 33B

Citation : (2006) 6 AWC 5713 : (2006) 2 UPLBEC 1945

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Advocate : Manish Goyal and A.K. Singh, for the Appellant; Rama Nand Pandey and S.C., for the Respondent

Final Decision : Allowed

Judgement

Shishir Kumar, J.—The present writ petition has been filed for issuing in the nature of certiorari quashing the order dated 22.2.2002 (Annexure 4 to the writ petition) passed by the District Inspector of Schools and issuing a writ in the nature of mandamus directing the respondents to pay the arrears of the petitioner's salary with effect from 22.4.1991 and future salary as and when it falls due.

2. The facts arising out of the present writ petition are that the G.N.K. Inter College, Kanpur Nagar is a recognized institution under the U.P. Intermediate Education Act and receives grant-in-aid from the State Government for the purposes of payment of salary to the teachers and employees of the institution. There are 23 sanctioned posts of L.T. grade teachers and eight posts of C.T. grade teachers in the institution. One Sri Shanker Dayal Pandey, who was a teacher in L.T. grade in the institution was given ad hoc promotion in the lecturer

grade with effect from 17.2.1986. Sri Shyam Bihari Singh, who was working as Assistant teacher in C.T. grade in the institution with effect from 22.1.1977 was given ad hoc promotion in L.T. grade due to the vacancy caused by the promotion of Sri Shanker Dayal Pandey in the Lecturer grade. Sri Shyam Bihari Singh after completing 10 years of service in C.T. grade automatically became L.T. grade teacher and he was absorbed in L.T. grade teacher with effect from 22.1.1987. The C.T. grade in which he was appointed substantially became a dying cadre on completion of his 10 years of service. As a result of the absorption of Sri Shyam Bihari Singh in L.T. grade the post which had fallen vacant in L.T. grade on account of ad hoc promotion of Sri Shanker Dayal Pandey in Lecturer grade fell vacant again. Sri Shanker Dayal Pandey was working as ad hoc Lecturer when the service of Sri Shyam Bihari Singh was absorbed in L.T. grade with effect from 22.1.1987. The vacancy of ad- hoc teacher in L.T. grade was advertised on the notice board as provided in U.P. Secondary Education Service Commission (Removal and Difficulties) Order (II), 1981. The Selection Committee was constituted by the management of the institution and the name of the petitioner was recommended for appointment. The papers of selection were forwarded to the District Inspector of Schools on 6.5.1991 which were received in the office of the respondent No. 1 on the same day. The District Inspector of Schools has not taken any decision in the matter within seven days from the date of receipt of the papers, therefore, treating that as the approval in view of the provision contained in Sub-clause (iii) of Paragraph 2 of the IInd Removal of Difficulties Order appointed the petitioner on 13.5.1991 and on the same day, the appointment letter was issued to the petitioner. The petitioner joined his duties and since then the petitioner is continuously working in the said institution. In view of the provision contained in Section 33 of the U.P. Secondary Education Service Selection Board Act, the services of the petitioner are liable to be regularized. The principal of the institution forwarded the salary bills of the petitioner but the same were not passed on the ground that the District Inspector of Schools had not granted financial approval to the petitioner's appointment. Left with no option petitioner filed a writ petition before this Court which was numbered as Writ Petition No. 30622 of 1991 for payment of salary which was finally disposed of vide its order dated 7.4.1998 directing the District Inspector of Schools to take decision in the matter within a period of three months. The petitioner and the manager of the institution were called upon by the District Inspector of Schools for hearing into the matter on 2.1.2002, on which date the petitioner submitted his written submission. The respondent No. 1, District Inspector of Schools, Kanpur Nagar by its order dated 22.1.2001 has refused to grant financial approval to the petitioner's appointment. A copy of the same has been filed as Annexure 4 to the writ petition.

3. It has been contended on behalf of the petitioner that at the time of petitioner's appointment, 26 teachers were working in L.T. and C.T. grade, 18 teachers were working in L.T. grade and 8 teachers in C.T. grade of against 23 Sanctioned post in L.T. grad and 8 sanctioned post of C.T. grade. The District

Inspector of Schools has clearly ignored the sanctioned post of teachers of L.T. and C.T. grades and determining the permissible strength of teachers in two grades according to the standard prescribed on the basis of strength of students of the institution in the year 2001-2002 and came to the conclusion that the teachers already working were surplus and in excess and therefore, there was no vacant post. The District Inspector of Schools had to determine the vacancy on the basis of sanctioned post and the number of teachers working in the institution. Since the number of sanctioned post of L.T. grade was 23 and number of teachers already working in L.T. grade was only 18 at the time of vacancy arose in the year 1991 when the petitioner was appointed, therefore, there were five vacant post in L.T. grade. The contrary view of the District inspector of Schools is misconceived. The view taken by the District Inspector of Schools that Sri Shyam Bihari Singh was promoted in L.T. grade in the vacancy caused by promotion of Sri Shanker Dayal Pandey in the Lecturer grade on ad-hoc basis and therefore, the appointment of the petitioner could not be made against the said post is incorrect. Sri Shyam Behari Singh was no doubt given ad-hoc promotion in L.T. grade in vacancy caused by ad-hoc promotion of Shanker Dayal Pandey in lecturer grade. But the substantive appointment of Sri Shyam Behari Singh in C.T. grade continued and after completing 10 years of substantive service in C.T., grade automatically became an L.T. grade teacher. The post hold by him in C.T. grade stood upgraded in L.T. grade with effect from 22.1.1987 on his completion of 10 years substantive service in C.T. grade.

4. Under the IInd Removal of Difficulties Order, the permission of the District Inspector of Schools for advertisement of the post was not required. The post was to be advertised on the notice board of the institution, which was done. The law laid down in the Full Bench case reported in 1998 (3) ESC 2006 that even the ad-hoc vacancy should be advertised in two newspapers of wide circulation is a law laid down by the Hon''ble High Court which shall operate prospectively and not retrospectively. The decision of Radha Raizada's case was not in existence at the time the vacancy was advertised when the appointment of the petitioner was made. The law introduced after the appointment of the petitioner was made, shall not regulate the petitioner's appointment. As the petitioner is continuously working for last 11 years and he is still working, as such, the appointment of the petitioner is good and valid.

5. It has been submitted on behalf of the petitioner that the legislature recognizes three types of appointment namely substantive appointment, ad-hoc appointment and short-term appointment. So far as the case in hands is concerned, it is with regard to a short-term appointment. A short-term vacancy can arise for a number of reasons. The short-term vacancy had arisen due to ad-hoc promotion of one Shanker Dayal Pandey on the post of Lecturer. Sri Shanker Dayal Pandey was occupying the post of Assistant Teacher in L.T. grade in a substantive capacity but was given ad-hoc promotion on the post of Lecturer in English due to resignation of Sri Uma Shanker Dwivedi. The IInd Removal of Difficulties Order contains a detailed provision for making appointment by the

Management through direct recruitment on a short-term vacancy. Clause 2 (3) which contains a detailed provision in this regard is quoted for ready reference:

2(3)(i) The management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the manager of the institution along with the particulars given in Appendix "B" to this Order. The selection shall be made on the basis of quality point marks specified in the Appendix to the Uttar Pradesh Secondary Education Service Commission (Removal of Difficulties) Order, 1981, issued with Notification No. Ma-4993/XV-7-1(79)-1981, dated July 31, 1982, hereinafter to be referred to as the First Removal of Difficulties Order, 1981. the compilation of quality point marks shall be done under the personal supervision of the head of institution.

(ii) The names and particulars of the candidate selected and also of other candidates and the quality point marks allotted to them shall be forwarded by the manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of Schools shall communicate his decision within seven days of the date of receipt of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or, as the case may be, on his failure to communicate his decision within seven days or the receipt of papers by him from the manager, the management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager.

Explanation.- For the purpose of this paragraph-

(i) the expression "senior most" teacher means the teacher having longest continuous service in the institution in the Lecturer's grade or the Trained graduate (LT) grade, or Trained under graduate (C.T.) grade or J. T. C. or B. T.C. grade, as the case may be;

(ii) in relation to institution imparting instructions to women, the expression "District Inspector of Schools" shall mean the "Regional Inspectress of Girls Schools;

(iii) "short term vacancy" means a vacancy which is not substantive and is of a limited duration.

6. The selection of the petitioner was done as per the requirement under (i) of Clause 2(3) and all the relevant papers were forwarded as per Clause 2(3)(ii). The said formalities were completed on 6.5.1991. The District Inspector of Schools did not forward his decision, therefore, as contemplated the petitioner was issued an appointment letter, as the appointment of the petitioner is being in accordance with provision of IInd Removal of Difficulties Order was valid appointment and the petitioner became entitled for payment of the salary. The

appointment, by a deeming fiction, was having the approval of District Inspector of Schools and therefore, the District Inspector of Schools cannot deny or invalidate the appointment on the basis of any subsequent reason.

7. The reliance has been placed upon by the petitioner in *Devendara Nath Mishra v. State of U.P.* reported in 2000 (4) ESC 2883. The relevant paras are 6 and 7. The same is being reproduced below:

6. A careful reading of the above noticed provision would reveal that if a short term vacancy exists, it shall be led up by the Committee of Management by promotion of the permanent senior most teacher of the institution in the next lower grade. The committee of Management of the college initially promoted one Saryu Prasad Shukla but the D.I.O.S. did not approve his promotion. The petitioner filed writ petition No. 4217 of 1997(S/S) and an interim order was issued and the said petition directing the Committee of Management to take appropriate decision on petitioner's representation after taking into account the recommendation of the DIOS as contained in his letter dated March 12, 1997. In the said letter (Annexure 13) the D.I.O.S. not only turned down the proposal of the Committee of Management regarding conversion of the post of Lecturer from Psychology subject to Hindi but also directed the Manger of the College to consider the representation of the petitioner and submit his report along with relevant papers and certificates at an early date. The Committee was reluctant to take any action and being compelled under the circumstances the petitioner was obliged to file a contempt petition against the Manager. The D.I.O.S. sent a reminder to the Manager and the principal. In the meantime, taking the contempt proceedings with a little concern the Committee of Management passed a resolution promoting the petitioner to the post of Lecturer in Psychology and sent the proposal vide letter of November 20, 1997 (Annexure 18) to the D.I.O.S. Obviously the claim of the petitioner was favorably considered and this was also in accordance with the direction of this Court as referred to earlier and also the instructions of the D.I.O.S. as contained in his letter of June 27, 1997 (Annexure 15). It is significant to mention that in this letter, the D.I.O.S. clearly instructed that the Committee of Management was under obligation to promote Sri Devendra Nath Misra (petitioner) alone to the post of Lecturer as the was not only the senior most teacher in the College but was a also eligible to be promoted. With these observations, the D.I.O.S directed the Manager to send proposal regarding promotion of the petitioner only and none else. It appears that at this juncture, there was change in the office of D.I.O.S. and despite a long drawn exercise the D.I.O.S. did not, for reasons bet know to his office, accord administrative approval nor the financial grant. However, withholding of the approval and financial sanction was absolutely meaningless in view of the clear provisions of Clause 2 (iii) of the order of the U.P. Secondary Education (Removal of Difficulties (Second) Order, 1981, which postulates as follows:

The District Inspector of Schools shall communicate his decision within seven days of the date of particulars by him failing which the Inspector will be deemed

to have given his approval.

7. It is more than clear from the above that in case the D.I.O.S. does not approve within seven days the proposal of the Committee of Management, the appointment will be deemed to have been approved and in that eventually, it shall be obligatory for the Manager to appoint the claimant. The petitioner, right for inception, traversed through odd circumstances. The Principal being associated with Saryu Prasad Shukla did not consider it appropriate to provide ad hoc appointment to the petitioner and opposed his claim tooth and nail and convinced the Committee of Management to promote Sri Saryu Prasad Shukla on the post of Lecturer although he was not eligible. The D.I.O.S. turned down that proposal and issued instructions to the Manager and the principal to consider the petitioner's claim and send proposal accordingly. When with the strength of such instructions and the authority of this Court's interim order dated 29.7.1997 in Writ Petition No. 4217 of 1997(S/S) and the contempt proceedings, the petitioner managed to get favour from the Committee of Management and proposal for his appointment as lecturer was approved, the D.I.O.S. turned hostile and kept silence for nearly ten months. Be that as it may, the proposal of the appointment of the petitioner became final on the expiry of seven days. Thereafter his appointment on ad hoc basis became operative and accordingly he was entitled to get his salary. This view is fortified from the principle of law laid down in "Kumari Radha Raizada and Ors. v. Committee of Management 1995 L.A.B. I.C. 112. In Para 39 of the said decision, this Court has held that neither the Act nor the provisions of Removal of Difficulties Order provide for such prior approval or approval by the D.I.O.S. in case of ad hoc appointment. It was further held in that case that there is another reason for not taking approval of the D.I.O.S. of such appointment because teacher working in the institution is already approved and thus no further or subsequent approval is needed for it and only intimation to the D.I.O.S. is required to be given regarding such appointment. This Court in a recent judgment "Suresh Chandra Misra v. D.I.O.S. reported in 2000 A.L.J. 1295 has reaffirmed the said principle of law. Thus the petitioner's ad hoc appointment was valid in all respects and in view of this aspect of the matter, the impugned order dated 6.10.1998 could be said to have been rendered nugatory.

8. The further reliance has been placed in Vinod Kumar Srivastava v. District Inspector of Schools Jalaun and Ors. reported in 2002 (2) ESC 471. The relevant paras are 6 and 7. The same is being reproduced below:

6. In reference to J.A. Inter College, Khurja v. State of U.P. and Ors. 1996 (3) ESC 151 and Radha Raizada v. Committee of Management Vidyawati Darsari Girls Inter College 1994 (2) ESC 345 and in reference to Chatur Singh v. Regional Deputy Director of Education, Agra Writ Petition No. 37497 of 1996 decided on 3.12.1996 (All) it was held Smt. Pratima Chauhan and Anr. v. Regional Deputy Director of Education (Madhyamik) Agra and Ors. (1999) 2 UPLBEC 1621 as under-

(c) Service Ad-hoc appointment on the post of teacher for filling short term vacancy made after advertising that post only in one newspaper will not invalidate appointment. It is only a technical irregularity. Such appointee can be allowed to continue till regularly selected candidate from commission is available for appointment. However, such ad hoc appointee will have no right to claim regularization.

7. I have heard learned counsel for the parties and perused the record. I find in facts and circumstances, the cases referred by the learned Counsel for the petitioner are protecting the cause of the petitioner, the vacancy created by the appointment of senior teacher of the institution as ad hoc Principal shall be termed as short term vacancy and advertisement to the appointment of assistant teacher in LT grade to be appointed on the short term vacancy was duly published in two newspapers, the selection committee was duly constituted and petitioner was appointed to the post in question on 5.10.1997 and the relevant papers in respect of financial approval was sent to (DIOS) who had rejected financial approval on 15.10.1997 by letter dated 17.10.1997 i.e. after seven days and since the manager of the institution has power to make appointment in the institution on such vacancy/post, therefore, the DIOS was under obligation to give approval to the appointment made on short term vacancy and in the present facts and circumstances, the petitioner was entitled to continue on the post in question and is entitled to receive the salary, therefore, the order dated 17.10.1997 (Annexure 7) is set aside in view of the above observations and the respondents are directed to pay salary as assistant teacher in II grade month to month as and when it falls due.

The writ petition is allowed accordingly.

9. It has further been submitted on behalf of the petitioner that from the bare perusal of the order, it is evident that the District Inspector of Schools has not applied his mind to the facts and circumstances of the present case. It is evident from the impugned order that the District Inspector of Schools has applied the law as existing on the date of deciding the representation that is dated 22.2.2002. Five reasons have been given for rejecting the representation of the petitioner which is apparent from the order. From the bare perusal it clearly shows that the District Inspector of Schools sought to apply the amended provision of the Act applicable from 1993 and relied upon a Government Order dated 9.6.1995 which imposes a ban upon the appointments made by the Service Commission in the year 1995. Admittedly, there was no ban when the petitioner was given appointment that is on 6.5.1991. Therefore, any amendment in the Act in the year 1993 and imposition of the ban in 1995 is not applicable in the case of the petitioner. Further it has been submitted that the ban is of no consequences and is not applicable on the short-term appointments. Similarly, the respondents have applied the ordinance of 1999 by which the Industrial Removal of Difficulties Order was repealed. It is a settled law that the repeal will have only prospective application and has got no retrospective application.

10. Therefore, the repeal of the provision of 1999 does not take away the right of the petitioner of the appointment, which was made under the provision of 1991.

11. The reliance has been placed upon a judgment of this Court reported in 2006(62) A.L.R 734 Chhama Shanker Pandey, Kanpur Napar v. District Inspector of Schools and Ors. and reliance has been placed upon Paras 10 and 11 of the said judgment. The same is being reproduced below: -

10. The fifth ground taken in the impugned order is that in view of circular dated 9.6.1995, no appointment could be made by the Management and appointment could only have been made by the Board. A copy of the circular dated 9.6.1005 is annexed alongwith the writ petition. The said circular issued by the directorate of education stipulates that no appointment should be made on any vacancy by the Management as the Board has been set up for selecting candidates and recommending appointment. This circular appears to relate only to substantial vacancies. As already observed hereinabove, the appointments to short-term vacancies are governed by Second Removal of Difficulties Order. This view is supported by a Single Judge decision of this Court in the case of Mukesh Kumar v. State of U.P.. In any event, a circular cannot over ride the provisions of the Second Removal of Difficulties Order. Therefore, this ground also cannot be sustained.

11. The last pillar on which the impugned order stands is only to be stated to be rejected. The District Inspector of Schools has held that since Section 18 of the Commission Act and the Second Removal of Difficulties Order having been repealed by notification dated 25.1.1999, no financial approval could be granted. As already observed while noting the facts, the short-term vacancies arose on 1.2.1996 and the Management served the entire papers for obtaining financial approval on 21.1.1997 and as such the subsequent repeal would be irrelevant as by then the rights of the petitioner stood crystallized and appointment stood approved in view of the deeming clause of the Second Removal of Difficulties Order.

12. The further contention raised on behalf of the petitioner is that from the perusal of the order passed by the District Inspector of Schools, the order impugned has been passed in ignorance of the material available on record and conclusion which has been drawn without any basis or material available with the District Inspector of Schools. The first reason given by the respondent No. 1 is to the effect that on the basis of strength of students there can be only 10 sections for which maximum 13 teachers can be provided and since there were 23 teachers already working as such, there were extra teachers of L.T. grade, hence no post can be said to be vacant. The said reasoning given by the respondent is without any substance as the sanctioned strength in the college is of 31 teachers, which has not been disclosed by the respondent No. 1. Regarding the sanctioned strength the petitioner has clearly mentioned this fact in Paras 5 and 21 of the writ petition, which has not been denied by the respondent in the counter affidavit.

13. The further submission made on behalf of the petitioner is that there is no provision under the Act that the District Inspector of Schools while passing the order will consider the strength of the students and can reduce the number of sanctioned teachers. A detail to that effect has been given by the petitioner in the rejoinder affidavit. The District Inspector of Schools has noticed in the order that no permission was taken by the Management before inviting the applications for appointment and further no advertisement was made in two newspapers. Hence the appointment is bad. The petitioner submits that there was no requirement of taking permission of the District Inspector of Schools, merely an intimation is to be given which was given by the institution. The petitioner has referred a Full Bench Decision of Raza Raizada's case of AIR 1994 and has submitted that the said judgment is applicable prospectively. Thus the appointment of the petitioner cannot be invalidated merely on the ground that there was no advertisement in two newspapers.

14. The reliance has been placed upon a judgment of this Court in Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another, and has placed reliance upon Paras 14 and 16 of the judgment. The same is being reproduced below:

14. Neither Sanjeev Kumar nor Suresh Chandra Varma (Supra), are attracted for application to the facts of the present case. Sanjeev Kumar was a case of ad hoc appointment by direct recruitment in a substantive vacancy u/s 18 of the U.P. Secondary Education Service Commission Act, 1982 which, as it then stood, by itself did not provide any procedure for direct appointment on ad hoc basis and it was propounded in Radha Raizada that the procedure visualized by the First Removal of difficulties Order, would governed ad hoc appointment by direct recruitment u/s 18 of the Act as well. The procedure as provided in Clause 5 of the First Removal of difficulties Order, visualizes that the Management would, as soon as may be, inform the District Inspector of Schools about the details of the vacancies and provisions therein enjoin upon the Inspector a duty to invite applications from local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh. The procedure further visualizes that the District Inspector of Schools would cause the best candidate selected on the basis of quality point specified in Appendix and forward the names of the selected candidates to the concerned institution. The management has no role except intimate the vacancy to the Inspector in the matter of selection of candidates for direct recruitment in substantive vacancy under the First Removal of difficulties Order and unlike the provisions contained in the Second Removal of Difficulties Order, there is no provision of deemed approval under the former. The procedure of direct appointment in short-term vacancy on the other hand visualizes that entire exercise of selection would be done by the Management after notifying the vacancy on the notice-board. It is after the selection that the papers are forwarded to District Inspector of Schools for approval. The provisions contained in Second Removal of difficulties Order visualize that approval would be deemed

to have accorded in fulfillment of conditions stipulated therein. In Sanjeev Kumar, the District Inspector of Schools declined vide order dated 21.2.94, to lend approbation to the appointment made by the Committee of Management and concededly, the procedure prescribed for direct recruitment was not gone through. There was no question of Sanjeev Kumar having acquired the status of a teacher and right to the post. In this view of the matter, the case of Sanjeev Kumar is distinguished and in fact in paragraph 9 of the Report 1997 ALJ 33, it has been held as under:

It may be observed that the decision in Radha Raizada's case (1994) 3 UPLBEC 1551, does not serve to erode any vested right or substantive right of a person. It has only expatiated on Section 18 of the U.P. Act 5 of 1982 and held that though Section 18 does not prescribe the procedure of ad hoc appointment, the one laid down in the Removal of Difficulties Order issues under the Act, would be applicable by implication qua the purpose of the Act. Since the petitioner was not appointed in the matter laid down by / or under U.P. Act 5 of the 1982 his ad hoc appointment was void and therefore, nonest by virtue of Section 16(2) of the Act. I therefore, do not feel persuaded to interfere into the matter.

K.N.Dwivedi was a case like the one on hand, of ad hoc appointment under the provisions of Second Removal of Difficulties Order in short-term vacancy. The requirement of advertising the vacancy in news papers, as a condition precedent to direct appointment, was not a requirement of the law u/s Removal of Difficulties order as it stood prior to K.N.Dwivedi. Advertisement in News Papers became an imperative condition of a valid appointment in a short-term vacancy only as a result of the decision dated 13.1.1994 in K.N.Dwivedi's case which finds its echo in Radha Raizada decided on 12.7.94. Appointment in a short-term vacancy by simply notifying it on the notice-board of the Institution was permissible prior to K.N.Dwivedi. The relevant clause of the Second Removal of Difficulties Order albeit held arbitrary and repugnant to Article 16(i) of the Constitution was "law nonetheless for intermediate transactions". The law as it stood prior to determination of unconstitutionality was an "operative fact" resulting in "consequences which cannot justly be ignored." Many such appointees came to be regularized by legislation on such vacancy being subsequently converted into substantive vacancy in terms of Section 33-B of the Act. The past cannot, therefore, be erased by judicial declaration in Radha Raizada. In the circumstances, keeping in view equity and good conscience, we hold that Sanjeev Kumar has no application to a case of appointment in short-term vacancy under the Second Removal of Difficulties Order. The present case being one of the ad hoc appointment by direct recruitment in a short term vacancy made prior to K.N.Dwivedi and Radha Raizada would not be invalidated merely because the vacancy was not notified in two newspapers of wide circulation in addition to notice on the notice-board of the Institution and since appointment was not cancelled nor was the deemed approval withdrawn by the District Inspector of Schools, the decision of the Supreme Court in Dr. Suresh Chandra Verma and others Vs. The Chancellor, Nagpur University and others, ,

too would not apply.

16. Paragraph 2(3) (iv) of the Second Removal of Difficulties Order is not phrased in a prohibitory language as was the language used in Section 16-F(1) of the U.P. Intermediate Education Act, 1921. The words "prior approval" have been used in Sub-clause (ii) of paragraph 2(3) of the Second Removal of difficulties order and a conjoint reading of Sub-clauses (ii), (iii), and (iv) of Clause (3) of paragraph 2 no doubt, leads to an inescapable conclusion that the appointment would be issued under the signature of the manager only on the approval having been communicated by the District Inspector of Schools within seven days of the receipt of the papers or where the approval is deemed to have been accorded as visualized by Sub-clause (Hi) of Clause (3) of paragraph 2 of the Second Removal of Difficulties Order. However, appointment if made prior to approval or deemed approval, would become effective from the date of approval of deemed approval as held by the Division bench of this Court in Lalit Mohan Misra. There is nothing on the record to connote that pre-requisite conditions attracting deemed approval were not satisfied in the instant case. The learned Single Judge has also not addressed himself to this facts of the matter and the judgment under appeal on this score too cannot be sustained.

15. The another judgment relief upon by the petitioner in Chhama Shanker Pandey Kanpur Nagar v. District Inspector of Schools and Ors. reported in 2006 (62) A.L.R. 734 and has placed reliance upon paras 6 and 7 of the judgment. The same is being reproduced below:

6. A bare perusal of the said provision would show that a mandate been issued to the District Inspector of Schools to pass orders either approving or disapproving the proposed appointment and in case the order is not passed within seven days of the receipt of the proposal, a legal fiction has been created by which the said proposal would be deemed approved. This ration has been accepted in several cases including by a Division bench of this Court in the case of Ashika Prasad Shukla v. District Inspector of Schools and Anr. and subsequently followed in several cases. Thus, the first ground given in the impugned order cannot be sustained as it was a case of deed approval.

7. The second ground on which the claim has been rejected is that without prior permission the advertisement inviting application for short-term appointment could not be issued. Neither in the impugned order or in the counter affidavit nor during arguments reference to any provisions of law where such requirement is mandatory has been disclosed. The appointment to short-term vacancies, at the relevant time, was governed by Second Removal of Difficulties Order as explained by the Full Bench decision of this Court in the case of Radha Raizada and Ors. v. Committee of Management. The only requirement in law was for advertising the short-term vacancies in at least two newspapers having wide circulation. As already noted above, the short-term vacancy was advertised in two widely circulated newspapers on 26.12.1996 and 27.12.1996. Thus, the second ground also cannot be sustained.

16. Another judgment relied upon by the petitioner in Praveen Pratap Singh Bhadauria v. District Inspector of Schools, Varanasi and Ors. reported in (1999) 3 UPLBEC 1734 and has placed reliance upon Para 8 of the said judgment. The same is being reproduced below: -

8. In the present case, after the ad hoc appointment the papers were forwarded to the District Inspector of Schools. Admittedly, the District Inspector of Schools has not granted any approval. There is no dispute that the papers were received in the office of the District Inspector of Schools. Therefore, on the date of receipt of the papers in the Office of the District Inspector of Schools and on the expiry of seven days, the appointment of the petitioner's shall be deemed to have been approved by reason of the Clause (iv) of paragraph 2(3) of the Second Removal of difficulties Order. Thus, the petitioner's appointment having been deemed to have been approved, the same is saved by reason of the decision in the case of Ashika Prasad Shukla (supra).

17. Another judgment relied upon by the petitioner in Mukesh Kumar v. State of U.P. and Ors. reported in 1996 AWC 556 and has placed reliance upon paragraph 4 of the writ petition. The same is being reproduced below.

4. In view of the above, the management has the power to fill up the short-term vacancies and there is no requirement of prior permission/approval from the District Inspector of Schools or any other authority for filling up such vacancies in non-substantive capacity.

18. In view of the aforesaid submissions the petitioner submits that the order dated 22.2.2002 is liable to be quashed the petitioner may be paid salary.

19. The respondents have filed a counter affidavit and the allegation made in the writ petition has been denied. It has been stated in the counter affidavit that Sri Shanker Dayal Pandey was promoted in Lecturer grade but as there was reduction in the strength of students and sufficient teachers were working in L.T. grade, therefore, there was no occasion for appointment of the petitioner. As no advertisement was made and no prior approval has been taken from the District Inspector of Schools, therefore, no appointment can be made and if any appointment is made that is invalid. The further contention raised in the counter affidavit is that after commencement of U.P. Secondary Education Services Board Niyamavali, 1995, no appointments can be made by the Committee of Management and if any appointment is made, the responsibility of payment of salary is of Management. It has been submitted by the learned Standing Counsel that Shanker Dayal Pandey was promoted from L.T. grade to Lecturer grade on 24.3.1986 and on the same day one Shyam Bihari Singh, who was C.T. grade teacher in the institution after having completed five years of service and being a senior most C.T. grade teacher was promoted to L.T. grade on the vacancy occurred due to the promotion of Shanker Dayal Pandey. Both the teachers were granted approval from 24.3.1986. Sri Shanker Dayal Pandey was regularized on the post of Lecturer on 6.4.1991. The post of L.T. grade also became substantive

as soon as Shanker Dayal Pandey was regularized on the post of Lecturer on 6.4.1991. The petitioner after regularization of Shanker Dayal Pandey, in Lecturer grade was appointed as L.T. Grade teacher on 13.5.1991 on the vacancy occurred due to the promotion of Shanker Dayal Pandey. The petitioner cannot be appointed under the IInd Removal of Difficulties Order because no teacher can be appointed on substantive vacancy under the Removal of Difficulties Order.

20. The reliance has been placed upon a Full Bench Decision of this Court in Smt. Pramila Misra v. Deputy Director of Education 1997 UPLBEC Page- and two other decisions namely Ram Vijay Singh Chauhan v. Joint Director of Education and Ors. reported in 2001 (1) UPLBEC 234 and Rama Shanker Padey v. State of U.P. and Ors. reported in 2002 (2) UPLBEC 1266.

21. It has further been submitted on behalf of the respondents that admittedly, the petitioner was appointed as L.T. grade teacher on the vacancy occurred due to the promotion of Shanker Dayal Pandey. When Shanker Dayal Pandey was regularized on the post of Lecturer from 6.4.11991, the post of L.T. grade teacher became substantive, as such, no appointment can be made. It has further been submitted that the appointment of the petitioner cannot be accepted as soon as the services of Shanker Dayal Pandey was regularized on the post of Lecturer, the post of L.T. grade from where Shanker Dayal Pandey was promoted as Lecturer became substantive and therefore, under the Removal of Difficulties Order-II, the petitioner cannot be appointed on substantive post of L.T. grade on 11.8.1989. The State Government has issued a Government Order declaring the C.T. grade as dying cadre. Since Shyam Bihari Singh was already promoted as L.T. grade teacher on the vacancy occurred due to the promotion of Shanker Dayal Pandey from 24.3.1986, subsequently his services has been regularized, therefore, the Government order of dying cadre which came in existence in the year 1989 will have no effect of the right of Shyam Bihari Singh who has already promoted three years before of the commencement of Government Order of dying cadre. The further argument is that the claim of the petitioner cannot be accepted as he was appointed on a substantive vacancy which cannot be made., In such a situation, the learned Standing Counsel submits that the order passed by the respondents is valid and needs no interference.

22. I have heard learned Counsel for the petitioner and learned Standing Counsel and have perused the record.

23. From the perusal of the record, it appears that there are 23 sanctioned post of L.T. grade teacher and 8 posts of C.T. grade teachers are in the institution. On the basis of resignation of one lecturer Sri Shanker Dayal Pandey, who was working as L.T. grade teacher in the institution was promoted on ad hoc basis in the lecturer grade on 17.2.1986. Sri Shyam Bihari Singh, who was working as Assistant Teacher in C.T. grade with effect from 22.1.1977 was promoted on ad hoc basis in L.T. grade. Sri Shyam Bihari Singh after completing 10 years service in C.T. grade automatically became L.T. grade teacher and was absorbed in L.T.

grade with effect from 22.1.1987. From the record, it is clear that after declaration of C.T. grade dying cadre, Sri Shyam Bihari Singh has become the L.T. grade teacher automatically then in view of the aforesaid fact, the short term vacancy of L.T. grade teacher came in existence. From the perusal of the impugned order passed by the respondent No. 1 it clearly appears that he has refused to grant financial approval on various grounds. The one of the ground in the impugned order is that appointment was without prior approval. From the fact as noted hereinabove, the approval of ad hoc promotion of Shanker Dayal Pandey to the Lecturer grade necessarily created a short-term vacancy in L.T. grade. After due advertisement, the petitioner was selected and the papers were sent to the District Inspector of Schools on 6.5.1991. This allegation made in para 12 to the writ petition has not been denied in the counter affidavit. It is apparent that in spite of the receiving the papers for granting approval, the District Inspector of Schools did not pass any order. Clause 2 (3) (iii) of the U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1981 provides as under:

The District Inspector of Schools shall communicate his decision within seven days of date of particulars by him failing which the same will be deemed to have given his approval.

24. A bare perusal of the said provision to show that a mandate has been issued to the District Inspector of Schools to pass orders either approving or disapproving the proposed appointment and in case, the order is not passed within seven days of the receipt of the papers or proposal, a legal fiction has been created by which the said proposal will be deemed to be approved. This ratio has been accepted in several cases including by a Division Bench judgment of this Court in case of Ashika Prasad Shukla v. District Inspector of Schools and Anr. reported in 1998 (3) UPLBEC 1722 and the said decision has been followed in several cases, therefore, the first ground given in the impugned order cannot be sustained as it was a case of deemed approval.

25. The second ground on which the claim of the petitioner has been rejected that without prior permission the advertisement inviting application for short term appointment could not be issued. In the impugned order or in the counter affidavit or during the argument the reference to any provision of law where such a requirement is mandatory has been disclosed. The appointment to the short term vacancies, at the relevant time, was governed by the Second Removal of Difficulties Order as explained by the Full Bench Decision of this Court in case of Raza Raizada and Ors. v. Committee of Management (1994) 3 UPLBEC 1551.

26. The another ground given in the impugned order is that before filing the vacancy, the Management ought to have obtained financial approval of the post. It is not the case of the respondents that Sri Shanker Dayal Pandey, who was working as L.T. grade teacher was given ad hoc promotion in the Lecturers grade with effect from 17.2.1986. It is also, not the case of the respondents that Sri Shayam Bihari Singh, who was working as assistant teacher in L.T. grade was not

drawing his salary in L.T. grade. It is also not the case of the respondents that at any time financial approval to that post was withdrawn by the respondents. There is no requirement of law to obtain further approval while making short-term appointment on the post except when the post has been abolished, but it is not the case of the respondents. The Learned Standing Counsel has failed to point out any provision of law by which such a requirement has been placed upon the Management.

27. The next ground taken in the impugned order that in accordance with the actual strength of students only 18 sections were being operated and according to the norms only 13 teachers can be appointed and 26 teachers were working in L.T. grade, therefore, there was no vacancy to be filled up. The case set up before the Management was that there were 23-sanctioned post of L.T. grade teachers and 8 posts of C.T. grade teachers in the institution and this fact has not been denied by the respondents in the counter affidavit or during the argument. Further, even the number of students have not been disclosed in the impugned order which hold that only 10 sections were being operated. Even in the counter affidavit, the strength of the students has not been disclosed. Though the petitioner has come with a case that no section has been reduced and the strength of the students is the same and that cannot be a ground for rejection of the claim of the petitioner. It is also to be noted that the management has got no jurisdiction to add or close down any existing sanctioned sections in the institution without previous approval of the Inspector. Assuming for the sake of argument that at the relevant time there were lesser number of students and thus they may not be any necessity to fill up the vacancy but that cannot be a ground to hold that there was, in fact, no vacancy. Thus, the said ground of the rejection by the District Inspector of Schools is not sustainable.

28. The other ground taken in the impugned order is that in view of the circular dated 9.6.1995 no appointment can be made by the Management and appointment could only be made by the Board. The said circular issued by the Directorate of Education stipulates that no appointment should be made on any vacancy by the Management as the Board has been set up for selecting candidates and recommending appointment. This circular appears to relate only to substantial appointments. The appointments to the short-term vacancies are governed by the Removal of Difficulties Order. This view is supported by a Single Judge decision of this Court in the case of Mukesh Kumar v. State of U.P. reported in 1996 AWC Page 556. It is well settled that a circular cannot over ride the provision of Second Removal of Difficulties Order, as such, the ground taken by the District Inspector of Schools is also not sustainable. It is also to be noted that the appointment of the petitioner is prior to 9.6.1995 i.e. on 13.5.1991 prior to the issuance of the aforesaid circular. Admittedly, the nature of the said circular is not retrospective.

29. The last ground taken by the District Inspector of Schools to the effect that as Section 18 of the Commission Act and the Second Removal of Difficulties

Order having been repealed by the notification dated 29.5.1999, no financial approval relating to the appointment of the petitioner could be granted. Admittedly, the short-term vacancy arose on or after 22.1.1987 and the papers relating to that for obtaining the financial approval was sent to the District Inspector of Schools on 6.5.1991. As such, the subsequent repeal of Second Removal of Difficulties Order would be irrelevant. As on that day the appointment under the short-term vacancy has to be made under the Removal of Difficulty Order. The nature of repealing of the notification-dated 25.1.1999 is not retrospective. It is prospective, therefore, the same is not applicable. The ground to this effect taken by the District Inspector of Schools is not correct.

30. For the reasons given above, the writ petition succeeds and is allowed and the impugned order dated 22.2.2002 (Annexure 4 to the writ petition) is hereby quashed. The petitioner shall be entitled to its salary along with arrears payable to him within a period of two months from the date of submission of the certified copy of the order.

31. No order as to costs.