
(2011) 12 AHC CK 0432
In the Allahabad High Court
Case No : Writ - A No. - 70271 of 2010

Subhash Chandra Tripathi

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-12-2011

Acts Referred:

Uttar Pradesh Intermediate Education Act, 1921 — Section 16E(11)
Uttar Pradesh Secondary Education Services Commission and Selection Boards
(Amendment) Act, 1995 — Section 16F, 16F(4)
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 16(1), 33E
Uttar Pradesh Secondary Education Services Commission and Selection Boards
Regulations, 1998 — Regulation 9

Citation : (2011) 12 AHC CK 0432

Hon'ble Judges : Sunil Ambwani, J;Manoj Misra, J

Bench : Division Bench

Judgement

1. We have heard Shri R.C. Dwivedi, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondents.

2. In this writ petition, the following two questions have been referred for consideration by the Division Bench as follows:

(a) Whether in respect short term vacancy, appointment can be made by the Committee of Management subsequent to 25th January, 1999 when the power to make ad hoc appointment by the Committee of Management itself has been withdrawn by addition of Section 33-E to U.P. Act No. 5 of 1982?

(b) Whether initiation of process by an advertisement prior to 25th January, 1999 can lead to suggest that even after statutory withdrawal of the substantive power of the Committee of Management to make ad hoc appointment against short term vacancy, it still retains the same after 25th January, 1999, merely because the process of selection was initiated earlier?

3. The facts, giving rise to this writ petition stated in the referring order, are

quoted as below:

Petitioner had approached this Court earlier by means of Civil Misc. Writ Petition No. 37634 of 2005 (Subhash Chandra Tripathi versus State of U.P. & Others), wherein the order passed by the District Inspector of Schools dated 31st March, 1995 was subjected to challenge. The said writ petition was connected with another writ petition being Civil Misc. Writ Petition No. 20511 of 2006 (Umesh Singh versus State of U.P.), wherein Umesh Singh had challenged the decision of the Regional Level Committee dated 20th January, 2006, whereby the ad hoc appointment against a short term vacancy claimed by the petitioner was disapproved. The ground mentioned in the order was that the appointments have been made against short term vacancies on ad hoc basis subsequent to 25th January, 1999 i.e. the date when the Removal of Difficulties Orders were descended by adding Section 33-E of U.P. Secondary Education Services Selection Board Act, 1982 (U.P. Act No. 5 of 1982). Both the writ petitions were decided under common judgment dated 16th April, 2007 and it was held that since the vacancy had been advertised prior to 25th January, 1999, the procedure, which had been followed in the matter of appointment, had to be concluded accordingly. The Writ Court proceeded to issue a direction to the District Inspector of Schools to reconsider the grievance of the petitioner after examining as to whether selections have been held in accordance with law or not and whether the short term vacancy stood subsequently converted into substantive vacancy or not.

The District Inspector of Schools under the impugned order dated 20th September, 2010 has held that on the date the petitioners were appointed, there was no power in the Committee of Management to offer such appointment against short term vacancies and further that there is absolutely no record qua any procedure prescribed under Removal of Difficulties Orders having been followed nor any records have been produced in that regard. Lastly, it has been contended that the vacancy fell within the reserved category and therefore, the ad hoc appointment could not have been made.

This order of the District Inspector of Schools is being challenged by means of the present writ petition

4. In *Deshraj Singh Negi & others vs. State of U.P. and others*, 1995 AWC 1035 learned Single Judge had considered the question, "as to whether the proceedings for selection of teachers on short term vacancy by the Committee of Management, can be continued after the insertion of Section 33E by U.P. Act No. 5 of 1982, by which the Removal of Difficulties Orders were rescinded and the power of the Committee of Management to make adhoc appointment on short term vacancy was taken away. Learned Single Judge, relying upon judgments in *A.A. Calton Vs. Director of Education and Another*, and *N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others*, , held that once advertisements were made by the Committee of Management inviting applications for selection of teachers on short term vacancy, the process being

integrated process would not be affected by the insertion of Section 33E taking away the power of the Committee of Management to make such appointments.

5. The judgment, in *Deshraj Singh Negi and others vs. State of UP and others* (supra), has been followed by this Court in the later decisions including the judgment delivered by learned Single Judge in *Yogendra Nath Mishra vs. District Inspector of Schools, Allahabad Writ Petition No. 38060 of 1999* decided on 4.2.2004 in which learned Single Judge held as follows:-

A perusal of the impugned order dated 28.6.1999 shows that the only ground on which the approval was refused was to the effect that U.P. Secondary Education Service Selection Board Regulations, 1998 had been framed whereby the power of making appointment to substantive vacancies vests only with Joint Director of Education and in the same manner the short term had to be filled. But in the counter affidavit only one finding of quality points has been cited as the sole illegality.

Section 33 (E) which rescinds the first, second, third and fourth Removal of Difficulties Order w.e.f. 25th January, 1999. It is not denied in the counter affidavit that the process for selection has already been initiated prior to that date by issuance of the advertisement and inviting application. It is not denied that the said insertion has not been given retrospectivity and as such in view of the authoritative pronouncements rendered by the Apex Court in the case of *A.A. Calton Vs. Director of Education and Another*, ; *P. Mahendran and others Vs. State of Karnataka and others*, and a decision of a learned Single Judge of the Court rendered in the case of *Deshraj Singh Negi and others versus State of UP and others* (1995) ILBESR 785 (affirmed by the Division Bench in Special Appeal), the appointment to short term vacancies at the relevant time was covered by the Removal of Difficulties (Second) Order.

Though, the objection with regard to award of quality points was never taken in the impugned order but since it has been raised in the counter affidavit ought to be considered. The object behind the award of quality points clearly appears to be that a check should be enforced so that favoritism and nepotism in granting temporary appointments should be avoided. Though, sub clause (3) of clause (2) of the Removal of Difficulties (Second) Order uses the word, shall for allotment of quality points, it cannot be said that the provisions is mandatory where even a minor infraction will invalidate the entire proceedings since the consequence of not awarding quality points has not been provided. The table, which was sent by the management has been annexed with the counter affidavit as Annexure-1 wherein the educational qualification, experience etc. has been noted and out of the four candidates considered. The petitioner, even if the quality points was awarded, would have actual the maximum quality points. It is apparent from the said chart that there is substantial compliance with the requirement to sub-clause (3) of clause (2) of the Removal of Difficulties (Second) Order.

6. In the referring order dated 3.12.2010 of learned Single Judge, recorded

disagreement with the judgment in Deshraj Singh Negi's case and relied upon the principle of law laid down in Shankarsan Dash Vs. Union of India, , and Karnataka State Road Transport Corporation & another vs. S.G. Kotturappa & another (2005) 3 SCC. The principle of law evolved in these two cases is that mere selection does not confer any right on the selected candidates. The employer must give reason as to why the selected candidates have not been appointed.

7. Learned Single Judge in the referring order, has relied upon principle of law laid down in Shankarsan Dash's case, which has no application to the present case. The principle, that mere selection does not give any right, is not inconsistent with the principle, that once the selection process starts in accordance with the Rules, commencing from the stage of calling applications, the process has to be concluded in accordance with the procedure prescribed inasmuch as the entire process of selection is an integrated process up to the stage of appointments. The process of selection, so begun, shall not be affected by the rescission of the power to appoint, unless the Act rescinding such powers specifically states and affects the pending proceedings for selection.

8. In A.A. Calton v. Director of Education and another (supra) the Supreme Court held as follows:-

5. It is no doubt true that the Act was amended by U.P. Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment u/s 16-F (4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings u/s 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection u/s 16-F of the Act commencing from the stage of calling for applications for a post up to the date on which the Director becomes entitled to make a selection u/s 16-F(4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the Legislature may pass laws with retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18,

1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case.

9. In the present case, it is admitted that the selection process had started prior to the rescission of the Removal of Difficulties Orders, by inserting Section 33E of U.P. Secondary Education Service Selection Board Act, 1982. The advertisement was made for inviting applications on 14.1.1999, whereas Section 33E was inserted on 25.1.1999.

10. Section 33E inserted by U.P. Act No. 13 of 1999 (w.e.f. 25.1.1999) reads as follows:

33-E. Rescission of Orders-The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Third) Order, 1982 and the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Fourth) Order, 1982 are hereby rescinded.

11. There is nothing in Section 33E rescinding the Removal of Difficulties Order, or the object and reasons of the amendments which may indicate that the proceedings pending under these Removal of Difficulties Order would have to abate or come to an end.

12. We further find that a reference was made by learned Single Judge in Daya Shanker Mishra vs. District Inspector of Schools (Writ Petition No. 20843 of 2002, on 7.7.2006) on the following questions:-

(i) Whether after rescission of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 with effect from 25.1.1999, the Committee of Management can make temporary / ad hoc appointment on short term vacancies resorting to its power given under Chapter-II, Regulation 9 and Section 16-E(11) of the U.P. Intermediate Education Act, 1921 despite the provisions of Section 16(1) of the U.P. Secondary Education (Services Selection Boards) Act, 1982?

(ii) Whether the judgment of learned Single Judge in Rakesh Chandra Misra Vs. State of U.P. and Others, , lays down correct law?

13. In Daya Shanker Mishra vs. District Inspector of Schools and others 2011 (1) ESC 221 (All) (DB) a Division Bench considered the questions referred on 7.7.2006, and returned the findings on 31.3.2010, that after insertion of Section

33E, deleting the Removal of Difficulties Orders, there should have been some provision for filling up the substantive vacancies by making adhoc appointments. The Court was of the view, that the vacancies, whether substantive or short term, should be filled up at the earliest to maintain our Constitutional goal to imparting quality secondary education. However, as long as the statutes created a bar, the management could not be conferred with any power to make adhoc appointment against substantive vacancy. The management, however, has the power to make adhoc appointments on short term vacancies under the provisions of 1921 Act and the Regulations framed thereunder. The Court upheld in Rakesh Chandra Misra Vs. State of U.P. and Others, , that even after rescission of the various Removal of Difficulties Orders, the Committee of Management would still have the power to make adhoc appointments against short term vacancies by drawing the power vested in it, under the provisions of the Uttar Pradesh Intermediate Education Act, 1921 and the Rules and Regulations framed thereunder.

14. Hence for both the reasons, namely the principle of law laid down in A.A. Calton v. Director of Education & another (supra), and the view taken by this Court in Daya Shanker Mishra vs. District Inspector of Schools (supra) even after the rescission of Removal of Difficulties Orders by Section 33E w.e.f. 25.1.1999, the Committee of Management has the powers to make adhoc appointment on short term vacancies, we are of the opinion, that the view taken in Deshraj Singh Negi & others versus State of UP and others (supra) is the correct view to be followed by the Court.

15. We may also observe here, that an interpretation of local laws, which has stood the test of time and has been applied to cases coming before the Court, unless it is principally wrong should not be easily reconsidered for departure. A large number of teachers appointed on adhoc basis on short term vacancies for which the selection process had started prior to 25.1.1999 or who were appointed by the Committee of Managements thereafter, may have been benefited by Deshraj Singh Negi & others versus State of UP and others. The court's endeavour should not be to unsettle the position of law, followed by the Court for a long period of time.

16. For the aforesaid reasons we answer the questions referred to us as follows:

(a) A short term vacancy for which the process of appointment was started to fill it up by the adhoc appointment by the Committee of Management of the College prior to 25.1.1999 can be filled up and the appointment can be made by the Committee of management even after the rescission of the Removal of Difficulties Orders by inserting Section 33E to the U.P. Act No. 5 of 1982.

(b) The initiation of process by an advertisement prior to 25.1.1999 by the Committee of Management to fill up a short term vacancy by adhoc appointment can be continued and concluded and appointment letters issued even after initiation of Section 33E to the UP Act No. 5 of 1982 w.e.f. 25.1.1999.

17. Let the matter be sent back to learned Single Judge to be decided on the aforesaid principles of law.