A.F.R.

Court No.39

Case :- SPECIAL APPEAL No. - 1958 of 2011

Appellant :- Hari Shankar Ojha And Another
Respondent :- District Inspector Of Schools, And Others

Counsel for Appellant :- B.P. Singh,Gaurav Kumar Chand,Neeraj Singh,R.K.Ojha
Counsel for Respondent :- C.S.C.,A.P. Tiwari,Ashok Kumar Singh,Chandan Sharma,V.K. Singh

Hon'ble Dilip Gupta, J.
Hon'ble Mahesh Chandra Tripathi, J.

This Special Appeal has been filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 to assail the judgment dated 12 March 2008 of a learned Judge of this Court by which Writ Petition No.11698 of 1990 that had been filed by the appellants for a direction upon the District Inspector of Schools to make payment of salary due to them since November 1988 as they had been validly appointed as *ad hoc* teachers in the C.T. Grade in the National Inter College, Barhalganj, District Gorakhpur[1], was dismissed. The appellants have also sought the quashing of the order dated 5 December 2008 by which the review application filed by them was rejected by the learned Judge on the ground that it had been filed by a counsel who had not argued the matter.

The facts as they emerge from a perusal of the records would indicate that the writ petitioners claimed that two short-term vacancies had arisen in the C.T. Grade in the College on 13 November 1988 and the Committee of Management of the College on the same date resolved to

1 the College

grant *ad hoc* appointments to the two writ petitioners in the C.T. Grade under the provisions of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981[2]. The papers were forwarded to the District Inspector of Schools for granting financial approval to the aforesaid two *ad hoc* appointments but as no orders were passed, a writ petition bearing No.11698 of 1990 was filed in which an interim order was granted in 1995 and it is stated that on the basis of the interim order passed by the Court, the two writ petitioners continued to work and received their salary till the dismissal of the writ petition in March 2008.

The learned Judge dismissed the writ petition for the reason that the procedure contemplated in paragraph 2 of the Second Order had not been followed and that the order dated 18 January 1989 passed by the District Inspector of Schools refusing to grant financial approval to the payment of salary to the two writ petitioners had not been assailed in the writ petition.

Sri R.K. Ojha, learned Senior Counsel for the appellants has submitted that the Committee of Management of the College at the relevant point of time could make *ad hoc* appointments and as two short-term vacancies had arisen and both the writ petitioners were not only qualified and eligible but had also been appointed in accordance with the procedure prescribed in the Second Order, the District Inspector of Schools should have granted financial approval for payment of salary to them. It is his submission that the learned Judge failed to appreciate this

---

2 the Second Order

fact. Alternatively, learned Senior Counsel submitted that even if there were some minor procedural irregularities in the making of these *ad hoc* appointments of the two writ petitioners, the same should be overlooked as they had continued to work for such a long period of time. In support of this contention, learned Senior Counsel for the appellants has placed reliance upon a decision of the Supreme Court in **Roshni Devi & Ors. Vs. State of Haryana & Ors.**[3] and also the decisions of the Division Benches of this Court in **Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad**[4] and **Rajindra Prasad Srivastava Vs. District Inspector of Schools, Gorakhpur**[5].

Learned Standing Counsel appearing for the respondents has, however, submitted that the *ad hoc* appointments of the two writ petitioners were *void ab-initio* for the reason that the procedure as contemplated in the Second Order had not been followed. It is also his submission that mere working on the basis of an interim order would not confer any right on the writ petitioners to claim salary.

Sri Chandan Sharma, learned learned counsel appearing for the respondent-Committee of Management has also submitted that the writ petitioners are not entitled to any relief as the procedure contemplated in the Second Order had not been followed in making the *ad hoc* appointments.

We have considered the submissions advanced by the learned counsel for the parties.

---

3 (1998) 8 SCC 59
4 (1998) 3 UPLBEC 1722
5 1994 (3) ESC 117

What has been contended by learned Senior Counsel for the appellant and what has also been observed by the learned Judge is that two short-term vacancies had arisen in the C.T. Grade in the College on 13 November 1988.

Section 18 of the U.P. Secondary Education Services Commission and Selection Board Act, 1982[6] at the relevant time dealt with *ad hoc* appointments of teachers in the Institutions till the availability of a selected candidate by the Commission.

Section 18 of the Act, as it stood prior to its substitution by UP Act No. 24 of 1992, is reproduced below:

> "**18.**- (1) Where the management has notified a vacancy to the Commission in accordance with the provisions of this Act, and
>
> (a) the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher specified in the Schedule within one year from the date of such notification; or
>
> (b) the post of such teacher has actually remained vacant for more than two months, then, the management may appoint, by direct recruitment or promotion, a teacher on purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Intermediate Education Act, 1921 or the regulations made thereunder.
>
> (2) The provisions of sub-section (1) shall also apply to the appointment of a teacher (other than a teacher specified in the Schedule) on ad hoc basis with the substitution of the expression 'Board' for the expression "Commission".
>
> (3) Every appointment of an ad hoc teacher under sub-section (1) or sub-section (2) shall cease to have effect from the earliest of the following dates, namely-

---

6 -the Act

> (a) when the candidate recommended by the Commission or the Board, as the case may be, joins the post;
> (b) when the period of one month referred to in sub-section (4) of section 11 expires;
> (c) thirtieth day of June following the date of such ad hoc appointment."

Since the Commission had not been established when the Act was enforced, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981[7] was issued by the State Government under Section 33 of the Act on 31 July 1981. It provided that the Management of an Institution could appoint by promotion or by direct recruitment a teacher purely on *ad hoc* basis in accordance with the provisions of the First Order in the case of a substantive vacancy caused by death, retirement, promotion or otherwise. Soon thereafter, the Second Order was issued on 11 September 1981. It provided for *ad hoc* appointment against a short-term vacancy on the post of a teacher caused by grant of leave or on account of suspension duly approved by the District Inspector of Schools or otherwise.

Thus, the provisions of Section 18 of the Act, the First Order and the Second Order independently empowered the Management of the Institution to make *ad hoc* appointments of teachers in the Institution. Section 18 of the Act, at the relevant time, did not provide the method and manner of such appointments, while the First Order and the Second Order provided a procedure for such *ad hoc* appointments of teachers.

A Full Bench of this Court in **Radha Raizada & Ors. Vs. Committee of Management, Vidyawati Darbari Girls Inter College &**

---

7 the First Order

Ors.[8] held that *ad hoc* appointments of teachers either under Section 18 of the Act or under the provisions of the First Order or the Second Order have to be made in the manner provided therein. The Full Bench also pointed out that the First Order dealt with *ad hoc* appointment either by promotion or direct recruitment only against a substantive vacancy which had been notified to the Commission and the Second Order dealt with short-term vacancies which could arise on account of a teacher going on leave or on account of suspension pending disciplinary proceedings. The Full Bench also observed that by merely notifying the short-term vacancy on the notice board did not give equal opportunity to all eligible candidates and would, therefore, not satisfy the requirements of Article 16 of the Constitution. The Full Bench, therefore, held that the procedure for notifying a short-term vacancy under the Second Order should be the same as provided for under the First Order, namely that the Management after intimating the vacancy to the District Inspector of Schools should also advertise such short-term vacancy in at least two newspapers having wide circulation in the State.

A short-term vacancy can, therefore, be filled up only in accordance with the procedure contemplated under the provisions of the Second Order and paragraph 2 of the Second Order, which deals with the procedure, is reproduced below :-

> "2. Procedure for filling up short-term vacancies.--
> (1) A short term vacancy in the post of a teacher, caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise, shall be filled

8 1994 (3) UPLBEC 1551

by the Management of the institution, by promotion of the permanent senior most teacher of the institution, in the next lower grade. The management shall immediately inform the District Inspector of Schools of such promotion alongwith the particulars of the teacher so promoted.

(2) Where any vacancy, referred to in clause (1) cannot be filled by promotion, due to non-availability of a teacher in the next lower grade in the institution, possessing the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in clause (3).

(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 alongwith 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 Services 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 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 of 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 (L.T.) 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."

It needs to be noticed that according to the writ petitioners, a notice had been put up on the notice board of the College on 13 November 1988 for filling up the two short-term vacancies on the post of C.T. Grade Teachers in the College that arisen on 13 November 1988 and the Selection Committee also met on 13 November 1988 to make its recommendation. It has also been asserted by the writ petitioners that the procedure as contemplated in paragraph 2 of the Second Order was followed.

What is important is that the Second Order requires that information of the vacancies should be given to the District Inspector of Schools. There is nothing on the record which may substantiate that any information was given by the Committee of Management of the College to the District Inspector of Schools. What is also important to notice is that the notice was put up on the notice board of the College on 13 November 1988 and on the same date the Committee of Management of the College resolved to fill up these two vacancies by granting appointments to the writ petitioner on *ad hoc* basis. The purpose of putting up a notice on the notice board is not an empty formality. Due notice has to be given so that all eligible candidates can respond to the

notice. Even if it is assumed that the notice was put up on the notice board of the College on 13 November 1988 in the morning, then too we fail to appreciate as to how the Committee of Management of the College can consider granting *ad hoc* appointments on the same date. The procedure, which has been followed, clearly contravenes the well established principles laid down in Articles 14 and 16 of the Constitution which guarantee equal opportunity to all persons. Thus, we are more than satisfied that the most important requirement of sub-paragraph (3) of paragraph 2 of the Second Order that vacancies should be intimated to the District Inspector of Schools and that due notice should be put up on the notice board, has not been complied with. This is an important and integral part of the procedure contemplated in the Second Order and any violation thereof would clearly render an *ad hoc* appointment made under the Second order *void ab initio*.

We are conscious of the fact that a Full Bench of this Court in **Radha Raizada** (supra) in regard to the Second Order held that putting up a notice on the notice board does not satisfy the requirements of Articles 14 and 16 of the Constitution and the procedure of causing an advertisement in at least two newspapers having wide circulation in the area as contemplated in the First Order should be followed but we are also conscious of the fact that the two *ad hoc* appointments in the present case were made in 1988 much before the decision was rendered by the Full Bench in **Radha Raizada** (supra). It is for this reason that we have examined the issue raised by learned Senior Counsel for the appellants

taking into considerations the provisions of the Second Order as they stood.

What is also important to note is that sub-paragraph (3) of paragraph 2 of the Second Order also requires the compilation of quality point marks under the supervision of the Head of the College and the forwarding of these quality point marks allotted to the candidates by the Manager of the College to the District Inspector of Schools for his prior approval. The writ petition is silent about this aspect.

The Full Bench of this Court in **Radha Raizada** (supra), though in respect of an ad-hoc appointment made under the First Order, held that any ad-hoc appointment made without following the procedure laid down in the First Order would be void and would not confer any right on such appointees.

The Supreme Court also had an occasion to examine the validity of ad-hoc appointments which were not made in accordance with the procedure provided for under paragraph 5 of the First Order in the case of **Prabhat Kumar Sharma and others Vs. State of U.P. and others**[9]**.** The Supreme Court held that any ad-hoc appointment not made in accordance with paragraph 5 of the First Order would be illegal and void and would not confer any right on the appointee.

In **Shesh Mani Shukla vs. The District Inspector of Schools, Deoria**[10]**,** the Supreme Court reiterated what was earlier observed in **Prabhat Kumar Sharma** (supra).

9- (1996) 10 SCC 62
10- JT 2009 (10) SC 309

It has, however, also been submitted by learned Senior Counsel for the appellants that even if there were some minor irregularities in making the *ad hoc* appointments, the same should not deprive the writ petitioners in claiming salary as they had continued to work for a substantial period of time from 1995 upto 2008, when the writ petition filed by them was dismissed by the learned Judge.

A similar submission was made before the High Court in the writ petition filed by Shesh Mani Shukla but it was not accepted. The decision is reported in **(2004) 3 UPLBEC 2560**[11]**.** While rejecting the aforesaid contention, the Court held as follows :-

> "In my opinion, the petitioner is not entitled to a relief from this Court merely on the ground that an interim order had been passed in his favour under which he continued to receive salary. The petitioner has to give way to the candidate who had been appointed in accordance with the procedure then prescribed for making an ad-hoc appointment. In this context it may be useful to reproduce a passage from the judgment of the Supreme Court in the case of **State of Madhya Pradesh and another Vs. Dharam Bir reported in JT 1998 (4) SC 363** wherein it has been observed as follows:-
>
> > "The plea that the Court should have a "human approach" and should not disturb a person who has already been working on this post for more than a decade also cannot be accepted as the Courts are hardly swayed by emotional appeals. In dispensing justice to the litigating parties, the Courts not only go into the merits of the respective cases, they also try to balance the equities so as to do complete justice between them. Thus the Courts always maintain a human approach. In the instant case also, this approach has not been departed from. We are fully conscious that the respondent had worked on the post in question for quite a long time but it was only in ad-hoc capacity. We are equally

11 -Shesh Mani Shukla vs. The District Inspector of Schools, Deoria

conscious that a selected candidate who also possesses necessary educational qualification is available. In this situation, if the respondent is allowed to continue on this post merely on the basis of his concept of "human approach", it would be at the cost of a duly selected candidate who would be deprived of employment for which he has striven and had ultimately cleared the selection. In fact, it is the "human approach" which requires us to prefer the selected candidate over a person who does not possess even the requisite qualification."

The Supreme Court in the case of **Kishorilal Charmakar and another Vs. District Education Officer and another reported in (1998) 9, SCC 395** examined the termination of persons who had been appointed under a bona fide mistake by considering them as Scheduled Tribes candidates and the mistake had not occurred on their account. It was submitted on their behalf that they had worked for 10 years as teachers under the interim orders granted by the Court in their favour and since they were not responsible for the mistake they should be allowed to continue. The Court rejected this contention holding that this alone could not entitle them to retain the undeserved benefit which had accrued to them. In yet another case the Supreme Court in the matter of **State of Rajasthan Vs. Hitendra Kumar Bhatt (1997) 6 SCC 574** examined the effect of an interim order on the dismissal of the petition. In the said case the respondent was not called for an interview since he did not possess the technical qualification. However, pursuant to the interim order passed by the High Court requiring the appellant to call him for interview he was interviewed and his name was included in the list of selected candidates. He was also appointed on a provisional basis and was also subsequently confirmed. The writ petition was ultimately dismissed by the High Court holding that on the cut of date, he did not possess the requisite qualification. It was submitted by the respondent before the Supreme Court that since he had been continued in service and had also been confirmed, the Court should not disturb his appointment and his case should be considered sympathetically. The Supreme Court observed that the appellants had taken the correct stand right from the beginning and the respondent's application was not considered and he was not called for interview. It was

> only on account of the interim orders, which were obtained by the respondent that he was given an appointment and continued. He was aware that his appointment was subject to the out come of the petition. As such a sympathetic view could not be taken.
>
> In view of the aforesaid facts and in view of the principles laid down by the Supreme Court in the aforesaid cases I am unable to accept the argument put forth by the learned counsel for the petitioner that even if it is held that the appointment of the petitioner was made in violation of the provisions of the First Removal of Difficulties Order, 1981, the Court should take a sympathetic view and allow the petition since he had received salary on the basis of the interim order which he has enjoyed for all these 11 years."

The Special Appeal filed against the aforesaid decision was dismissed by a Division Bench of the High Court.

These two judgments were challenged before the Supreme Court. The Supreme Court did not accept the contention raised by the appellants and the decision is reported in **JT 2009 (10) SC 309**[12]. The observations are as follows :-

> "Both the learned Single Judge as also the Division Bench have found that the institution has not complied with the provisions of the 1981 Act as amended as also para 5 of the 1981 order. If the appointment of the appellant was not valid, the question of granting any approval thereto did not arise. Action, on the part of the Committee of the Management to hold selection, being not consistent with para 5 of the Order has rightly been held to be wholly unsustainable. It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab-initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said

12 -Shesh Mani Shukla vs. The District Inspector of Schools, Deoria

> purpose, the writ petitioner must establish a legal right in himself and a correspondent legal duty in the State. {See **Food Corporation of India & ors. V. Ashish Kumar Ganguly & ors. [2009 (8) Scale 218]**}. Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ of or in the nature of mandamus. { **See State of M.P. & Ors. v. Sanjay Kumar Pathak & Ors. [JT 2007 (12) SC 219: (2008) 1 SCC 456]**}"

Learned counsel for the appellant has, however, relied upon the decision of a Division Bench in **Rajidra Prasad Srivastava (supra)** in which it has been held that since the appellant therein had worked for about twenty years in view of the interim order passed by the Court, it would be unfair to remove him on the ground that his initial appointment is illegal.

This decision, is clearly contrary to the position of law explained by the Supreme Court in **Kishorilal Charmakar (supra)** and **Hitendra Kumar Bhatt (supra)** as also a decision of the Supreme Court in **Shesh Mani Shukla (supra)** case.

The decision of the Supreme Court in **Roshni Devi & Ors., (supra)** which had been relied upon by learned counsel for the appellant would also not help the appellant. In a subsequent decision of the Supreme Court in **State of Karnataka & Ors., Vs. Uma Devi (3) & Ors.,** [13] the Supreme Court clearly held that no benefit can accrue to a person whose initial appointment was bad in law merely because that person had continued to work for some period.

---

13 (2006) 4 SCC 1

In this view of the matter, we see no justification to grant any relief to the two writ petitioners only because they had continued to teach on the basis of the interim order passed by the Court. We have found as a fact that the writ petitioners were granted *ad hoc* appointments by the Committee of Management of the College without following the procedure contemplated under the Second Order. The two writ petitioners are, therefore, not entitled to any relief. The judgments under Appeal, in such circumstances, do not call for any interference.

The Special Appeal is, accordingly, dismissed.

Date:31.08.2015
SK

(Dilip Gupta, J.)

(Mahesh Chandra Tripathi, J.)