

A.F.R.**Court No.39****Case :-** SPECIAL APPEAL No. - 949 of 2013**Appellant :-** Mahesh Kumar Gupta (since deceased)**Respondent :-** State Of U.P. And 3 Others**Counsel for Appellant :-** Pradeep Chandra, Pankaj Kumar Shukla, Sunil Kumar Srivastava**Counsel for Respondent :-** C.S.C., R.K. Srivastava**Hon'ble Dilip Gupta, J.****Hon'ble Vinod Kumar Misra, J.**

This Special Appeal arises out of a judgment and order dated 17 May 2013 of a learned Judge of this Court by which Writ-A No.10297 of 1994 that had been filed for quashing the orders dated 27 August 1993 and 15 February 1994 passed by the District Inspector of Schools, Jalaun denying payment of salary to the writ petitioner for the reason that he had not been appointed in accordance with the procedure prescribed under the provisions of Section 18 of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982¹, was dismissed.

In order to appreciate the controversy involved in this Special Appeal, it would be appropriate to refer to some necessary facts. The writ petitioner asserted that by an order dated 30 November 1992, the Deputy Director of Education had created a new post of L.T. Grade Teacher in Science/Mathematics in Beni Madho Tiwari Inter College, Jalaun² which is a College recognised under the provisions of the U.P. Intermediate Education Act, 1921³. Subsequently, by an order dated 20

1 the 1982 Act

2 the College

3 the 1921 Act

February 1993, the Deputy Director of Education converted the said post of L.T. Grade Teacher in Science/Mathematics to a post of L.T. Grade Teacher in Biology. The writ petitioner further asserted that by a communication dated 16 March 1993, the Committee of Management of the College submitted a requisition for filling up the aforesaid post of L.T. Grade Teacher in Biology to the District Inspector of Schools but as neither a regular appointment nor an *ad hoc* appointment was made, the Committee of Management on its own published a notice on the notice board of the College inviting applications for making a temporary appointment. The name of the petitioner was ultimately recommended by the Selection Committee and the Committee of Management of the College in its meeting held on 22 June 1993 granted *ad hoc* appointment to the writ petitioner till a regularly selected candidate sent by the Commission joined the post. On the basis of the aforesaid resolution of the Committee of Management of the College, an order dated 23 June 1993 was issued in favour of the writ petitioner granting *ad hoc* appointment and thereafter papers were forwarded to the District Inspector of Schools by a letter dated 5 July 1993 for granting approval to the payment of salary to the writ petitioner. The District Inspector of Schools, however, by a letter dated 27 August 1993 returned the papers with an observation that the appointment could only have been made under the amended provisions of Section 18 of the 1982 Act which had come into effect from 14 July 1992. On receiving the said communication from the District Inspector of Schools, the Management again sent a

communication dated 31 January 1994 to the District Inspector of Schools pointing out that since no appointment had been made by the Commission nor by the District Inspector of Schools, the Committee of Management in the interest of the College as also the students made the *ad hoc* appointment of the writ petitioner. The District Inspector of Schools did not accept the plea of the Management and by order dated 15 February 1994 denied payment of salary for the reason that the writ petitioner had not been appointed in accordance with the procedure prescribed under the amended portion of Section 18 of the 1982 Act.

Initially, an interim order dated 13 January 1997 was passed by the Court in the writ petition that the petitioner shall not be disturbed from the post on which he was working provided a duly selected candidate by the Commission had not already joined. The writ petition was finally dismissed on 17 May 2013. The learned judge, after placing reliance on the Full Bench decision of this Court in **Radha Raizada & Ors. Vs. Committee of Management, Vidyawati Darbari Girls Inter College & Ors.**⁴, held that since the appointment of the writ petitioner had not been made in accordance with the provisions of paragraph 5 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981⁵, the order passed by the District Inspector of Schools denying payment of salary was justified.

This Special Appeal has been filed to assail the aforesaid judgment dated 17 May 2013. It needs to be noticed that during the pendency of this Special Appeal the sole writ petitioner and the sole appellant in this

⁴ (1994) 3 UPLBEC 1551

⁵ the First Order

Appeal, expired on 4 July 2014. However, his widow and the two children have been substituted in his place.

Sri R.K. Ojha, learned Senior Counsel appearing for the appellants has pointed out that the District Inspector of Schools was aware that a substantive vacancy on the post of L.T. Grade Teacher in Biology existed in the College as intimation for filling up the aforesaid vacancy had been sent to the Commission through the District Inspector of Schools and the said communication was received in the office of the District Inspector of Schools on 16 March 1993. It is, therefore, his submission that once this information had been received, it was obligatory on the part of the District Inspector of Schools to have made an *ad hoc* appointment under Section 18 of the 1982 Act to fill up that vacancy and that having not been done, the Committee of Management was justified in making the *ad hoc* appointment on its own as it had to ensure that the interest of the students did not suffer because of inaction on the part of the District Inspector of Schools. In support of this contention, learned Senior Counsel has placed reliance upon a Division Bench judgment of this Court in **Daya Shankar Mishra Vs. District Inspector of Schools & Ors.**⁶. It is also the contention of learned Senior Counsel for the appellants that since the writ petitioner had continued to work for a substantial period of time on the basis of an interim order, a sympathetic view should be taken in the matter, particularly when the writ petitioner is dead and his widow would merely get some benefits towards the payment of arrears of salary and funds.

6 2010 (10) ADJ 829

Learned Standing Counsel appearing for the respondents has, however, submitted that any appointment made *dehors* the provisions of Section 18 of the 1982 Act as it stood at the time the *ad hoc* appointment was made, is *void ab-initio* and does not confer any right on the appointee. It is his submission that Section 18 of the 1982 Act at the relevant point of time provided a complete procedure for making *ad hoc* appointment in case a substantive vacancy remained vacant for more than two months but in the instant case, the Committee of Management on its own had made an *ad hoc* appointment which appointment is illegal. In support of his contention that appointment made *dehors* the provisions of Section 18 of the 1982 Act is *void ab-initio*, learned Standing Counsel has placed reliance upon the decisions of the Supreme Court in **Prabhat Kumar Sharma Vs. State of U.P. & Ors.**⁷ and **Shesh Mani Shukla Vs. District Inspector of Schools, Deoria**⁸ as also the decision of the Full Bench of this Court in **Radha Raizada** (*supra*). Learned Standing Counsel has also submitted that merely because the writ petitioner had continued to work on the basis of an interim order passed by the Court, no benefits would accrue if ultimately it is found that the initial *ad hoc* appointment was found to be void.

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

It is stated that a post of Lecturer in Science/Mathematics was sanctioned for the College by an order dated 30 November 1992 but subsequently this order was modified and the said post was converted to a

7 (1996) 10 SCC 62

8 (2009) 15 SCC 436

post of L.T. Grade Teacher in Biology by order dated 20 February 1993. Even if it is accepted that the Committee of Management of the College had duly notified the vacancy to the Commission through the District Inspector of Schools on 16 March 1993 (on which date it is stated that the papers were received in the office of the District Inspector of Schools,), then too the vacancy was required to be filled up on *ad hoc* basis only in terms of Section 18 of the 1982 Act as amended with effect from 14 July 1992. The amended provisions of Section 18 of the 1982 Act are reproduced below:-

“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 or 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 seniormost 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 seniormost teacher in the lecturer's grade.

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

(6) For the purpose 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.

(7) After determining the number of vacancies as provided in sub-section (6) the management shall within fifteen days from the date of the commencement of the Uttar Pradesh Secondary Education Service Commission and Selection Board (Second Amendment) Act, 1992 intimate the vacancies to be filled by direct recruitment to the District Inspector of Schools. If the management fails to intimate such vacancies within the said period of fifteen days, the District Inspector of Schools may, after verification from such institutions or from his own records, determine such vacancies himself.

(8) The District Inspector of Schools shall, on receipt of intimation of vacancies or as the case may be, after determining the vacancies under sub-section (7), invite applications, from the persons possessing qualifications prescribed under the Intermediate Education Act, 1921 or the regulations made thereunder, for *ad hoc* appointment to the post of teachers, other than Principal or Headmasters in such manner as may be prescribed.

(9) (a) For each district, there shall be a Selection Committee for selection of candidates for *ad hoc* appointment by direct recruitment comprising-

- (i) District Inspector of Schools, who shall be the Chairman;
- (ii) Basic Shiksha Adhikari;
- (iii) District Inspectress of Girls Schools, and where there is no such Inspectress, the Principal of the Government Girls Intermediate College and where there are more than one such colleges, the seniormost Principal of such College and where there is no such College, the

Principal of the Government Girls Intermediate College as nominated by the State Government.

(b) The Selection Committee constituted under clause (a) shall make selection of the candidates, prepare a list of the selected candidates, allocate them to institutions and recommend their names to the management for appointment under sub-section (2).

(c) The criteria and procedure for selection of candidates and the manner of preparation of list of selected candidates and their allocation to the institutions shall be such as may be prescribed.

(10) Every appointment of an *ad hoc* teacher under sub-section (1) shall cease to have effect from the date when the candidate recommended by the Commission or the Board joins the post.

(11) The provisions of sections 21-D shall, *mutatis mutandis*, apply to the teachers who are to be appointed under the provisions of this section.”

It would, therefore, be seen that Section 18 of the 1982 Act requires that where the Management has notified a vacancy to the Commission and the post of such teacher has actually remained vacant for more than two months, the Management may appoint a teacher on purely *ad hoc* basis in the manner provided for in this Section. It requires the Management to determine the number of vacancies in the manner provided for in sub-section (6) and then intimate the vacancies to be filled up by direct recruitment to the District Inspector of Schools. On receipt of the intimation of vacancies, the District Inspector of Schools shall invite applications from the persons possessing qualifications prescribed under the 1921 Act or the Regulations made thereunder for *ad hoc* appointment to the post of teacher. Sub-section (9) of Section 18 of the 1982 Act provides for the constitution of the Selection Committee.

The *ad hoc* appointment had to be made in accordance with the procedure prescribed under the amended Section 18 of the 1982 Act.

What we do find from the records is that the Committee of Management of the College, on its own, had proceeded to advertise the vacancy on the notice board of the College and ultimately granted *ad hoc* appointment to the writ petitioner on the basis of a decision that had been taken in the meeting held on 23 June 1993. Papers were, thereafter, sent by the Committee of Management to the District Inspector of Schools for granting approval to the payment of salary to the writ petitioner. The District Inspector of Schools by communications dated 27 August 1993 and 15 February 1994 made it clear to the Committee of Management of the College that it was not possible to grant any financial approval to the payment of salary to the writ petitioner for the reason that his appointment had not been made in accordance with the provisions of Section 18 of the 1982 Act.

It is not disputed by learned Senior Counsel for the appellants that the appointment of the writ petitioner had not been made in accordance with the provisions of Section 18 of the 1982 Act, but what is sought to be contended is that the Committee of Management was left with no option but to make an *ad hoc* appointment in order to protect the interest of the College and the students as the District Inspector of Schools did not proceed to make an *ad hoc* appointment under Section 18 of the 1982 Act.

We express our inability to accept this submission of learned Senior Counsel for the appellants. When a detailed procedure is prescribed in Section 18 of the 1982 Act for making an *ad hoc* appointment under certain contingencies, such an appointment can be made only in accordance with the procedure prescribed therein. There is nothing on the record to indicate that the Committee of Management of the College ever made a request to the District Inspector of Schools for making *ad hoc* appointment as the post of L.T. Grade Teacher had remained vacant for more than two months from the date the papers were forwarded to the Commission for filling up the said vacancy and, if such an appointment was not made, the Committee of Management of the College could approach this Court with a prayer that the District Inspector of Schools should be directed to act in accordance with the provisions of Section 18 of the 1982 Act for making an *ad hoc* appointment to fill up the vacant post.

It needs to be noticed that prior to the amendments made in Section 18 of the Act, a detailed procedure had not been prescribed for making *ad hoc* appointments under Section 18 of the 1982 Act. The State Government had, in such circumstances, notified the First Order and the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Second Order, 1981⁹ for making *ad hoc* appointments against the substantive vacancies or short-term vacancies as the case could be, respectively. The issue regarding appointments not made in accordance with the provisions of the First Order or the Second Order fell

⁹ the Second Order

for consideration before a Full Bench of this Court in **Radha Raizada** (supra). It was observed that appointments made *dehors* the aforesaid two Orders would be *void ab-initio* and would not confer any right on the appointees to claim salary. 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** (supra). 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** (supra) the Supreme Court reiterated what was earlier observed in **Prabhat Kumar Sharma** (supra).

The contention of learned Senior Counsel for the appellants, however, is that in view of the decision of the Division Bench of this Court in **Daya Shankar Mishra** (supra), the Committee of Management was justified in making *ad hoc* appointment. This decision does not help the writ petitioner at all. The Division Bench was dealing with a situation when Section 18 of the 1982 Act had been rescinded. It is, in such circumstances, that the Division Bench placed reliance upon the provisions of Section 16-E of the 1921 Act for granting power to the Committee of Management of the College to make *ad hoc* appointments till the end of the Academic Session. This decision was recently considered by the Full Bench of this Court in **Santosh Kumar Singh Vs. State of U.P. & Ors.**¹⁰. In the present case, the amended provision of

¹⁰ Special Appeal Defective No.215 of 2015, decided on 22 July 2015

Section 18 of the 1982 Act did provide a procedure for making *ad hoc* appointment. An *ad hoc* appointment was, therefore, required to be made under that provision and what has been pointed out in this connection with regard to the provisions of the First Order and the Second Order would also be applicable to cases where an appointment has been made in contravention of the procedure prescribed under the amended Section 18 of the 1982 Act.

The learned Judge has placed reliance upon the provision of the First Order. This Order would not be applicable as the amended Section 18 of the 1982 Act itself provided a complete procedure for making *ad hoc* appointment. The appointment of the writ petitioner had not been made in accordance with the provision of Section 18 of the 1982 Act and the issue has been examined in the light of this provision.

We have, therefore, no hesitation in holding that the appointment of the writ petitioner having made *dehors* the provisions of Section 18 of the 1982 Act was *void ab-initio* and would not confer any right to claim salary from the State.

It has, however, also been submitted by learned Senior Counsel for the appellant that even if there were some minor irregularities in making the *ad hoc* appointment, the same should not deprive the writ petitioner in claiming salary as he had continued to work for a substantial period of time.

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 2560¹¹**. 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 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

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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 309¹²**. 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 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]** }”

The writ petitioner was for all the reasons stated above not entitled to any of the reliefs and the writ petition was liable to be dismissed.

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There is, therefore, no merit in this Special Appeal. It is, accordingly, dismissed.

Date:25.08.2015

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(Dilip Gupta, J.)

(Vinod Kumar Misra, J.)