

SHESH MANI SHUKLA
v.
D.I.O.S. DEORIA & ORS.
(Civil Appeal No. 4966 of 2009)

JULY 31, 2009

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Service law:

U.P. Secondary Education Services Commission and Selection Boards Act, 1982 – ss. 16 and 18 – First Removal of Difficulties Order, 1981 – Para 5 – Post of Teacher – Appointment for – Respondent no.3 recommended by District Inspector of Schools – Committee of Management ignoring the recommendation and selecting appellant – Disapproval of, by DIS – Challenge to – Dismissal of writ petition as also appeal – On appeal, held: Committee of Management could not appoint a teacher ignoring recommendations of DIS – Institution did not comply with the provisions of 1981 Act as also para 5 of 1981 Order – Appointment of the appellant was void ab initio, thus, could not be granted approval by statutory authority – No exception could be taken only because appellant worked for a long time – Appellant must establish legal right in himself and corresponding legal duty in the State – Constitution of India, 1950 – Article 226.

The question which arose for consideration in this appeal is whether the Committee of Management could make appointment in the post of a teacher ignoring the recommendations of the District Inspector of Schools.

Dismissing the appeal, the Court

HELD: 1.1. A substantive vacancy arose on or about 15.10.1985. Intimation as regards vacancy was given on

- A 19.9.1986. Recommendation of respondent No.3 by the District Inspector of Schools was made on 8.6.1987. Thus, a recommendation had been made within a period of one year. On what premise, the candidature of respondent No.3 was not found suitable or he was otherwise found
- B to be ineligible for holding the said post was not disclosed. Thus, the conduct of the Committee of Management of the institution is required to be considered having regard to the afore mentioned provisions. [Paras 8 and 11] [846-H; 850-G-H; 851-A-B]
- C 1.2. Para 6 of the First Removal of Difficulties Order, 1981 provides for eligibility for appointment. Para 7 thereof provides that in the event of any dispute in respect of the promotion or direct recruitment, the same would be referred to the Director whose decision shall be
- D final. The District Inspector of Schools in his letter dated 8.6.1987 addressed to the manager of the Institution regarding issue of appointment letters to the selected candidates, on temporary basis. A reminder thereto was also sent by the District Inspector of Schools on 3.8.1987
- E as respondent No.3 was not allowed to join his service. Again by order dated 20.4.1988, it was directed that till now, this Department has not received the intimation about joining of the duties by respondent No. 3. It was submitted that another person was appointed in place of
- F respondent No. 3. This act is absolutely illegal, on which it is not possible to give consent, because no directions have been given by this office for appointment of any person. Hence it is directed to take necessary action immediately for getting joining of duty done by
- G respondent No. 3, otherwise, Departmental action would be taken. [Paras 12 and 13] [851-B-D; 852-A-D]

1.3. Both the Single Judge as also the Division Bench of High Court found that the institution did not comply

with the provisions of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982 as amended as also para 5 of the 1981 order. 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. Appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void *ab initio*. The question of granting any approval thereto did not arise. 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 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 corresponding legal duty in the State. Sympathy or sentiments alone, cannot form the basis for issuing a writ of or in the nature of mandamus.

Food Corporation of India and Ors. v. Ashis Kumar Ganguly and Ors. 2009 (8) SCALE 218 and State of M.P. and Ors. v. Sanjay Kumar Pathak and Ors. (2008) 1SCC 456, relied on.

Radha Raizada v. Committee of Management, Vidyawati Darbari Girls' College (1994) 3 UPLBEC 1551 (FB); Prabhat Kumar Sharma and Ors. v. State of U.P. and Ors. (1996) 10 SCC 62, referred to.

Case Law Reference:

(1994) 3 UPLBEC 1551 (FB) referred to. Para 9

(1996) 10 SCC 62 Referred to. Para 9

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A **2009 (8) SCALE 218** Relied on. **Para 14**
(2008) 1 SCC 456 Relied on. **Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4966 of 2009.

B From the Judgment & Order dated 22.02.2006 of the High Court of Allahabad in Special Appeal No. 590 of 2004.

S.R. Singh, Manoj Swarup, Lalita Kohli (for Manoj Swarup & Co.) for the Appellant.

C R.G. Padia, Purnima Bhat, Sanjay Pandey, Mona Rajvanshi, Anurag Kashyap, D.K. Shahi, Prashant Chaudhari, Bharat Ram, Shrish Kumar Misra, for the Respondents.

D The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Satya Prakash Vivekanand Inter College, Musahari District Deoria is an institution recognized by the Board of High

E School and Intermediate Education Act, 1921(for short, 'the 1921 Act') as also by the U.P. High School and Intermediate Colleges (Payment of Salaries & Teachers and Other Employees) Act, 1971 (for short, 'the 1971 Act').

F 3. One B.G. Mishra was a teacher working in the said school in CT grade. As he left the institution, a vacancy arose on 15.10.1985. The Management of the college gave intimation of the said vacancy to District Inspector of Schools on or about 19.10.1986 requesting the said authority to forward the name of an eligible teacher for occupying the vacant post. Pursuant thereto or in furtherance thereof, the name of respondent No.3, Ali Hussain Ansari, was recommended. However, the Management Committee did not find him suitable therefor.

4. Management Committee, ignoring the said

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recommendations made by the District Inspector of Schools issued advertisement on or about 8.7.2987. Names were called for from the Employment Exchange. From amongst the candidates whose names were sent by the Employment Exchange, the appellant was selected by the Management Committee on 10.9.1987. The School Authorities, however, refused to grant approval to his appointment and by an order dated 10.12.1987 insisted on the Management to accept joining of respondent No.3. Despite the same, the respondent No.2 was not given any offer of appointment, *inter alia*, on the premise that he was not suitable for holding the post of Assistant Teacher. Indisputably, recommendation of the name of the appellant for his appointment was disapproved by the District Inspector of Schools by an order dated 24.4.1988. Appellant, however, continued to work in the school as an ad hoc employee.

5. Questioning, *inter alia*, the legality of the said order dated 24.4.1988, the appellant filed a writ application before the High Court of Judicature at Allahabad which was marked as Civil Miscellaneous Writ Petition No.14530 of 1988. By reason of an order dated 23.4.2004, the writ petition was dismissed by a learned Single Judge of the said Court, *inter alia*, holding:

"This apart, even if the Committee of Management thought that the name of respondent No.3 had been recommended by taking recourse to a procedure contrary to the provisions of the first Removal of Difficulties Order, 1981 then too it could have either challenged the said recommendation before this Court or it could have pointed out the alleged defects to the District Inspector of Schools, who upon being satisfied, could have initiated fresh steps. What is disturbing is that the Committee of Management in the present case completely ignored the recommendation of the District Inspector of Schools for issuance of an appointment letter in favour of respondent

- A No.3 and proceeded on its own, as if it had the power to do so, under the First Removal of Difficulties Order, 1981. I am clearly of the view that the Committee of Management did not have the authority to make selection and appoint the petitioner. Further a person who himself
- B was not appointed in accordance with law cannot challenge the appointment of a person on the ground that his name was recommended without following the procedure prescribed. Thus, also it is not open to the petitioner to challenge the communication dated 8.6.1987
- C sent by the District Inspector of Schools.”

An intra court appeal preferred thereagainst has been dismissed by reason of the impugned judgment.

- 6. Mr. S.R. Singh, learned senior counsel appearing on behalf of the appellant, would contend that the High Court committed a serious error insofar as it failed to take into consideration that the Committee of Management was entitled to make selection and appointment of teachers whenever ad hoc appointment is to be made due to non-availability of a
- E candidate selected by the Commission in terms of the provisions of Section 18(2) of the UP Secondary Education Services Commission and Selection Boards Act, 1982 read with para 5 of the First Removal of Difficulties Order, 1981.

- F 7. Dr. R.G. Padia, learned counsel appearing on behalf of the respondent, on the other hand, urged that as the respondent No.3 has been working and getting his salary, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

- G 8. The short question which arises for our consideration in this appeal is as to whether the Committee of Management can make appointment in the post of a teacher ignoring the recommendations of the District Inspector of Schools.

- H A substantive vacancy arose on or about 15.10.1985.

Section 16 of the Act prescribes for the procedure for appointment of teachers by the Commission. Section 18 of the Act as it then stood empowered the Management to make appointment of the ad hoc teachers. It is also not in dispute that the State of Uttar Pradesh in exercise of its power of Removal of Difficulties in terms of Section 33 of the Act issued an order in the year 1981, para 5 whereof reads as under :

"5. Ad hoc appointment by direct recruitment.—(i) Where any vacancy cannot be filled by promotion under paragraph 4, the same may be filled by direct recruitment in accordance with clauses (2) to (5).

(ii) The Management shall as soon as may be, inform the District Inspector of Schools about the details of the vacancy and such Inspector shall invite applications from the Local Employment Exchange and also through public advertisements in at least two newspapers.

(iii) Every application referred to in clause (2) shall be addressed to the District Inspector of Schools and shall be accompanied—

(a) by a crossed postal order worth ten rupees payable to such Inspector.

(b) by a self-addressed envelope bearing postal stamp for purposes of registration.

(iv) The District Inspector of Schools shall cause the best candidates selected on the basis of quality points specified in Appendix. The compilation of quality points may be done on remunerative basis by retired Gazetted government servants under the personal supervision of such Inspector.

(v) If more than one teacher of the same subject or category is to be recruited for more than one institution, the names of selected teachers and names of the institution shall be

A arranged in Hindi alphabetical order. The candidate whose name appears on the top of the list shall be allotted to the institution the name whereof appears on the top of the list of institution. This process shall be repeated till both the lists are exhausted."

B 9. A Full Bench of the High Court in *Radha Raizada v. Committee of Management, Vidyawati Darbari Girls' College* [(1994) 3 UPLBEC 1551 (FB)] held the said provision to be ultra vires.

C Correctness of the said decision came up for consideration before this Court in *Prabhat Kumar Sharma & Ors. v. State of U.P. & Ors.* [(1996) 10 SCC 62], wherein it was held :

D "7. It would thus be clear that any ad hoc appointment of the teachers under Section 18 shall be only transient in nature, pending allotment of the teachers selected by the Commission and recommended for appointment. Such ad hoc appointments should also be made in accordance with the procedure prescribed in para 5 of the First 1981 Order which was later streamlined in the amended Section 18 of the Act with which we are not presently concerned. Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees. The removal of difficulties envisaged under Section 33 was effective not only during the period when the Commission was not constituted but also even thereafter as is evident from the second para of the preamble to the First 1981 Order which reads as under:

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G 'And whereas the establishment of the Commission and the Selection Boards is likely to take some time and even after the establishment of the said Commission and Boards, it is not possible to make selection of the teachers for the first few months.'"

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This Court, however, in that decision itself, held : A

"10. These principles are unexceptionable. However, the question is whether they get attracted to the facts of this case. It is seen that when intimation was given by the college to the Commission for allotment of the teachers, the Act envisaged that within one year the recommendation would be made by the Commission for appointment; but within two months from the date of the intimation if the allotment of the selected candidates is not made to obviate the difficulty of the Management in imparting education to the students, Section 18 gives power to the Management to make ad hoc appointments. Section 16 is mandatory. Any appointment in violation thereof is void. As seen prior to the Amendment Act of 1982 the First 1981 Order envisages recruitment as per the procedure prescribed in para 5 thereof. It is an inbuilt procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any posts in an aided institution. It is obvious that when the salary is paid by the State to the government-aided private educational institutions, public interest demands that the teachers' selection must be in accordance with the procedure prescribed under the Act read with the First 1981 Order. Therefore, the Order is a permanent one but not transient as contended for. The Full Bench of the High Court has elaborately considered the effect of the Order and for cogent and valid reasons it has held that the Order will supplement the power to select and appoint ad hoc teachers as per the procedure prescribed under Section 18 of the Act. The view taken by the Division Bench following the Full Bench decision, therefore, cannot be faulted with. Accordingly, we find no merit in the special leave petition."

10. Section 18 of the Act reads as under :

A "18. *Ad hoc Teachers.*—(1) Where the management has notified a vacancy to the Commission in accordance with the provisions of the 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 (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.

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D (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'.

E (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—

- (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."

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11. Intimation as regards vacancy was given on 19.9.1986.
Recommendation of respondent No.3 by the District Inspector

of Schools was made on 8.6.1987. Thus, a recommendation had been made within a period of one year. On what premise, the candidature of respondent No.3 was not found suitable or he was otherwise found to be ineligible for holding the said post has not been disclosed. The conduct of the Committee of Management of the institution, thus, is required to be considered having regard to the aforementioned provisions.

12. We have noticed hereinbefore paragraph 5 of the First 1981 Order. Para 6 of the Order provides for eligibility for appointment. Para 7 thereof provides that in the event of any dispute in respect of the promotion or direct recruitment, the same would be referred to the Director whose decision shall be final. The District Inspector of Schools in his letter dated 8.6.1987 addressed to the manager of the Institution, directed:

"According to the abovesaid order of the Government, you have been selected by the Regional Selection Board, orders are given for issue of appointment letters to the selected candidates, on temporary basis. In case of need, without any prior notice the service can be terminated. The selected candidates may take over the charge after verification of the certificates of their date of birth, educational qualifications, with their original certificates. Intimation of joining duty may be sent to this officer, within one week of joining the duties.

432. Name of the selected candidate Qualification Category

Ali Hussain Ansari	High School	II
Vill. Barwa Bazar,	Intermediate	II"
Post : Sekhwaria,	B.A.	
Distt. Dewaria,	M.A.	
UP	B.Ed. –	
	Theory	
	Practical	

A 13. A reminder thereto was also sent by the District Inspector of Schools on 3.8.1987 as respondent No.3 was not allowed to join his service. Yet again, by order dated 20.4.1988, it was directed :

B "It is regretted that till now, this Department has not received the intimation about joining of the duties by Ansari. It is your submission that you have appointed one person, in place of Shri Ansari. Your this act is absolutely illegal, on which it is not possible for this office to give consent, because no directions have been to you, by this office for appointment of any person.

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D Hence you are again directed to kindly take necessary action immediately for getting joining of duty done by Shri Ansari, otherwise, by being compelled Departmental action shall be taken under the Administrative provisions."

E 14. 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, F 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 G 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 corresponding legal duty in the State. {See *Food Corporation of India & Ors. v. Ashis Kumar Ganguly & Ors.* [2009 (8) SCALE 218]}. Sympathy or

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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. [(2008) 1 SCC 456]}}

15. For the reasons aforementioned, there is no merit in this appeal. It is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

N.J.

Appeal dismissed.