

Prabhat Kumar Sharma & Ors vs State Of U.P. & Ors on 10 July, 1996

Equivalent citations: AIR 1996 SUPREME COURT 2638, 1996 AIR SCW 3288, 1996 LAB. I. C. 2268, 1996 ALL. L. J. 1519, (1996) 3 SERV LJ 21, (1996) 6 JT 579 (SC), 1996 (2) UJ (SC) 643, 1996 (10) SCC 62, (1996) 3 UPLBEC 1959, (1996) 6 SERV LR 371, (1996) 28 ALL LR 270, (1997) 1 SCT 340, 1996 SCC (L&S) 1331

Author: K. Ramaswamy

Bench: K. Ramaswamy

PETITIONER:

PRABHAT KUMAR SHARMA & ORS.

Vs.

RESPONDENT:

STATE OF U.P. & ORS.

DATE OF JUDGMENT: 10/07/1996

BENCH:

K. RAMASWAMY, G.B.PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

O R D E R This special leave petition arises from the judgment and order dated March 27, 1996 made by Allahabad High Court in Special Appeal No.258 of 1996. The petitioners came to join as L.T. Grade teachers in S.S.V. Inter College, Ghaziabad. It is claimed that 16 substantive vacancies had arisen in the said college and the intimation thereof was claimed to have been issued to the U.P. Secondary Education Services Commission at Allahabad [for short, the "Commission"]. But before recommendation came to be made by the Commission for appointment of the teachers, advertisement notifying the said 16 vacancies appears to have been issued in two newspapers on

June 28 and July 3, 1991 and interviews are claimed to have been conducted by the Management of the said college on July 12, 1991 and the petitioners were allowed as stated above, to join as teachers on July 15 and 16, 1991. When papers were sent on November 2, 1991 to District Inspector of Schools, Ghaziabad for according financial sanction to make payment of their salaries, he made certain queries regarding vacancies and the procedure adopted in making their appointments by proceedings dated December 19, 1991. Thereon the writ petition bearing No.20128 of 1992 was filed and is stated to have been allowed by the High Court. Thereon, since salaries were not paid, they filed another writ petition bearing No.26646 of 1992. In the meanwhile, an appeal same to be filed against the order in the first writ petition. The Division Bench dismissed the appeal but on appeal arising out of the special Leave Petition No.12338 of 1994, this Court on August 8, 1994 set aside the High Court's order and remitted the matter to ascertain whether appointments had been made properly and in accordance with law. The learned single Judge in an elaborate judgment dated February 27, 1996 held that the Management claimed to have selected the petitioners and made them to join duty without issuing any letters of appointment before expiry of two months' period required under Section 16 and the appointments were not made in accordance with Section 18 of the U.P. Secondary Services Commission and Selection Board Act, 1982 [5 of 1982] [for short, the "Act" read with First Uttar Pradesh Secondary Education Services Commission and Selection Board Removal of Difficulties Order, 1981 [for short, the "First 1981 Order"]]. The learned single Judge held that the selection and appointment of the petitioners, therefore, were not in accordance with law. On appeal the Division Bench upheld the same. Thus this special leave petition.

Shri P.P. Rao, learned senior counsel, contended that the U.P. Secondary Education Services Commission and Selection Board Ordinance, 1981 [Ordinance No.8 of 1981] was enacted to constitute Selection Committees and Board to make available teacher recruited by the Commission or the Board for appointment in Government aided private educational institutions. prior to the Act, appointment to the posts of teachers and principals in those institutions used to be made by the Management such institution in the manner envisaged under the U.P. Intermediate Education Act, 1921. Since the Commission could not start functioning prior to November 1, 1983 the Government had issued First 1981 Order which into force w.e.f. July 31, 1981 for making ad hoc appointments to substantive vacancies and Second Removal of Difficulties Order, 1981 which came into force w.e.f. September 11, 1981 to fill up short-term vacancies as per the procedure prescribed thereunder. After the Commission started functioning from November 1, 1983, the First 1981 Order outlived its purpose. The U.P. Secondary Education Service Commission and Selection Board Act, 1981 was further amended by the Act which came into force with retrospective effect from July 14, 1981. Section 16 of Act provides procedure for recruitment of the teachers by the Commission and allotment of the selected teachers to the institutions/colleges as per the requisition. On its failure to allot the teachers, Section 18 comes into play and gives power appointment of ad hoc teachers in accordance with the procedure prescribed thereunder. The removal of difficulties is only transient and is effective during its operational efficacy since the Commission did not function prior to from November 1, 1983. The first 1981 Order and the procedure prescribed thereunder for selection and appointment of ad hoc teachers would no longer be available. The Full Bench of the Allahabad High Court in Radha Raizada & Ors. Vs. Committee of Management, Vidyawati Darbari Girls College & Ors [1994 (3) U.P.L.B.E.C. 1551] had not properly considered the effect of the First 1981 Order. The appointments of the petitioners, therefore, were not validly made in accordance with the procedure

prescribed under Section 18 of the 1981 Act. The learned single Judge and the Division Bench, therefore, were not right in their conclusion that the appointments of the petitioners were not valid in law. We find no force in the contention.

It is true that Section 16 of the Act prescribes procedure for appointment of teachers by the Commission. The said section reads as under:

"16. Appointments to be made only on recommendations of the Commission or the Board.(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made thereunder but subject to the provision of Sections 18 and 33

(a) every appointment of a teacher specified in the Schedule shall, on or after July 10, 1981, be made by the management only on the recommendation of the Commission;

(b) every appointment of a teacher (other than a teacher specified in the Schedule) shall, on or after July 10, 1981 be made by the management only on the recommendation of the Board:

Provided that in respect of retrenched employees, the provisions of Section 16-EE of the Intermediate Education Act, 1921, shall apply with the modification that in sub-section (2) of the aforesaid section, for the word 'six months' the words 'two years shall be deemed to have been substituted.

(2) Every appointment of a teacher, in contravention of the provisions of sub section (1), shall be void.

Section 18 of the Act speaks of the procedure for appointment of ad hoc teachers and reads as under:

"18.Ad hoc Teachers.-(i) 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) 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 subsection (2) shall cease to have effect from the earliest of the following dates, namely

(a) when the candidate recommended by the Commission or the Boards as the case may be, joins the post;

(b) then the period of one month referred to in sub-section (4) of Section expires;

(c) thirtieth day of June following the date of such ad hoc appointment.

Section 33 of the Act empowers the State Government to issue by a notification order for removal of difficulties in implementation of, and to give effect to the Act by way of modifications addition or omission, as it may be deemed necessary or expedient In exercise of this power, the First 1981 Order came to be made. Para 5 of the First 1581 Order which is relevant for our purpose reads as under:

"5 - Ad hoc appointment by direct recruitment.

(i) Where any vacancy cannot to 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 envelop bearing postal stamp for purposes of registration.

(iv) The Distt. Inspector of Schools shall cause the best candidates selected on the basis of quality points specified in Appendix. The complication 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 or 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 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."

We are not concerned in this case with the Second Removal of Difficulties Order 1981 which deal with filling up of short-term vacancies of ad hoc teachers. It is, therefore, not necessary to deal with the procedure prescribed in that behalf. The Full Bench as elaborately considered the legislative history. In paragraphs 23 and 27 it had dealt with the amendments to the U.P. Intermediate Education Act, 1921 and various provisions of Ordinance 8 of 1981. The object was to provide teachers selected through the Commission or the Board with a view to raise the standard of education and in the event of there being delay in allotting the selected teachers, with view to allow the institution to appoint teachers on ad hoc basis so as to avoid hardship to the students. Procedure and Section 18 was provided for appointment of such teachers in the institutions purely on ad hoc basis in accordance with the procedure prescribed thereunder. The method of recruitment and appointment of such teachers is regulated in para 5 of the First 1981 Order. The appointment, therefore, should be made in accordance with the said procedure. In paragraph 41 of the judgment, it has expressly dealt with a appointment as under:

"41 It has already been noticed that Section 18 of the Principal Act provides for power to appoint a teacher purely on ad hoc basis either by promotion or by direct recruitment against the substantive vacancy in the institution when the condition precedent for exercise of powers exist namely that the Management has notified the said vacancy to the Commission in accordance with the provisions of the Act and the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher within one year from the date of such notification of the post of such teacher has actually remained vacant for more than two months. However, since the State Government was alive to the situation that the establishment of the Commission may take long time and even after it is established, it may take long time to make available the required teacher in the institution and as such issue three Removal of Difficulties Order dated 30.1.82 and Removal of Difficulties Order dated 14.4.1982. In fact these Removal of Difficulties Orders were issued to remove the difficulties coming in the way of a Management in running the institution in absence of teachers. This power to appoint ad hoc teachers by direct recruitment thus, it available only when pre-conditions mentioned in Section 18 of the Act are satisfied, secondly, the vacancy is substantive vacancy and thirdly, the vacancy could not be filled by promotion. Neither the Act nor the Removal of Difficulties order defined vacancy. However, the vacancy has been defined in Rule 2(11) of U.P. Secondary Education Services Commission Rules 1983. 'Vacancy' means 'a vacancy arising out as a result of death, retirement, resignation, termination, dismissal, creation of new post or appointment prevention of the incumbent to any higher post in substantive capacity. Thus, both under Section 18 of the Act and under the Removal of Difficulties Order, the Management of an institution is empowered to make ad hoc appointment by direct recruitment, in the manner laid down in paragraph 5 of the First Removal of Difficulties Order only when such vacancy cannot be filled promotion and for a period till a candidate duly selected by the Commission joins the post. As noticed earlier both Section 18 of the Act and the provisions of First Removal of Difficulties Order provide for ad hoc appointment of teacher in the institution, later further providing for method and manner of such appointments are part of the

scheme. Scheme being provision for ad hoc appointment of teacher in the absence of duly selected teachers by the Commission. The provisions may be two but the power to appoint is one and the same and, therefore, the provisions contained in Section 18 and Removal of Difficulties Order are to be harmonized. It is, therefore, not correct to say that appointment of a teacher on ad hoc basis is either under Section 18 of the Act or under the Removal of Difficulties Order. Thus, if contingency arises for ad hoc appointment of teacher by direct recruitment the procedure provided under the first Removal of Difficulties Order has to be followed. Paragraph 5 of the First Removal of Difficulties Order provides that the management shall, as soon as may be, inform the District Inspector of Schools about the details of vacancy and the District Inspector of Schools shall invite applications from the local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh. Sub paragraph (3) of paragraph 5 further provides that every such application shall be addressed to the District Inspector of Schools. Sub paragraph (4) of paragraph 5 of the Removal of Difficulties Order provides that the District Inspector of Schools shall cause the best candidate selected on the basis of quality point specified in Appendix. The complication of quality point may be done by the Retired Government Gazetted Officer, in the personal supervision of the Inspector. Paragraph 6 of the First Removal of Difficulties Order further provides for appointment of such teacher under paragraph 5 who shall possess such essential qualification as laid down in Appendix A referred to in the Regulation 1 of Chapter II of the Regulations made in the Intermediate Education Act.

42. In view of these provisions the ad hoc appointment of a teacher by direct recruitment can be resorted to only when the condition precedent for exercise of such powers as stated in paragraph 18 of the Act are present and only in the manner provided in paragraph 5 of the Removal of Difficulties Order."

".....Thus, both under Section 18 of the Act and under the Removal of Difficulties Order the Management of an institution is empowered to make ad hoc appointment by direct recruitment, in the manner laid down in paragraph 5 of the First Removal of Difficulties Order only when such vacancy cannot be filled by promotion and for a period till a candidate duly selected by the Commission, joins the post. Both Section 18 of the Act and the provisions of First Removal of Difficulties Order provide for ad hoc appointment of teacher in the institution, later further providing for method and manner of such appointments are part of one scheme. Scheme being provision for ad hoc appointments of teacher in the absence of duly selected teachers by the Commission. The provisions may be two but the power to appoint is one and the same and, therefore, the provisions contained in Section 18 and Removal of Difficulties Order are to be harmonised. It is therefore, not correct to say that appointment of a teacher on ad hoc basis is either under Section 18 of the Act or under the First Removal of Difficulties Order. Thus if contingency arises for ad hoc appointment of teacher by direct recruitment the procedure provided under the First Removal of Difficulties Order has to be followed."

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 second paragraph or the preamble to the First 1981 Order which reads as under:

"And whereas the establishment of the Commission and the Selection Boards as 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."

In Re The Delhi Laws Act, 1912, The Ajmer- Merwara [Extension of Laws] Act, 1947 and The Para C States [Laws] Act, 1950 [1951 SCR 747 at 846] this had dealt with the power of modification and held thus:

"I will now deal with the power of modification which depends on the meaning of the words "with such modifications as it thinks fit".

These are not unfamiliar words and they are often used by careful draftsmen to enable laws which are applicable to one place or object to be so adapted as to apply to another. The power of introducing necessary restrictions and modifications is incidental to the power to apply or adapt the law, and in the context in which the provision as to modification occurs it cannot bear the sinister sense attributed to it. The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it. The power to modify certainly involves a discretion to make suitable changes, but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes".

At page 849, this Court had further held thus:

"Similar instances may be multiplied, but they will serve no useful purpose. The main justification for a provision empowering modifications to be made, is laid to be that, but for it, the Bill would take longer to be made ready, and wholesome measures would be delayed, and that once the Act become operative, any defect in its provisions cannot be removed until amending legislation is passed. It is also pointed out that the power to modify within certain circumscribed limits does not go as far as many other powers which are vested by the legislature in high officials and public bodies through whom it decides to act in certain matters."

In Mahadeva Upendra Sinai etc. etc. v. Union of India & Ors. [(1975) 2 SCR 640 at 653] This Court had held thus:

"To keep pace with the rapidly increasing responsibilities of a Welfare turn out a plethora of hurried legislation, the volume of which is often matched. with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the legislature and the endurance and skill of the draftsman, it is well high impossible to force all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socioeconomic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the legislature for removal or very difficult, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making, without touching its substance."

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 in-built procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any posts in 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 special leave petition.

The special leave petition is accordingly dismissed.