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HIGH COURT OF JUDICATURE AT ALLAHABAD

SPECIAL APPEAL No. - 384 of 2014

Arun Kumar Pathak

.....Appellant(s)

Versus

Dios And 2 Ors.

.....Respondent(s)

Counsel for Appellant(s)	:	S.P. Mishra
Counsel for Respondent(s)	:	C.S.C., Radha Kant Ojha

Court No. - 2

HON'BLE ATUL SREEDHARAN, J.
HON'BLE SIDDHARTH NANDAN, J.

1. Heard Sri Radha Kant Ojha, learned Senior Counsel assisted by Sri Manish Mishra and Sri Shivendu Ojha, learned counsel for the petitioner and Sri Anshul Nigam, learned Standing Counsel for the State.
2. The present intra-court appeal has been filed against the judgment of the learned Single Judge dated 16.12.2013 passed in Writ-A No.10476 of 1996 by way of which the writ petitioner seeking continuation on the post till regularly selected candidate comes and joins, was rejected.
3. The brief facts of the case are that the Committee of Management had advertised vacancy on 03.11.1992 and thereafter selection was made by the Selection Committee, which was accepted by the Committee of Management vide its resolution dated 25.11.1992; and the letter of appointment was issued to the petitioner. Subsequently, the documents were transmitted to the District Inspector of Schools, Jaunpur by the Committee of Management on 03.12.1992 and who accorded its approval on 14.08.1995. Subsequently, the vacancy became substantive w.e.f. 01.07.1993 and the petitioner who was working on the short term vacancy was not permitted to continue and in view of the aforesaid, the writ petition was filed seeking the extension of the approval.
4. In view of the aforesaid admitted facts, the petitioner claimed that he was entitled to continue till a regularly selected candidate is sent by the Commission.
5. Sri R.K. Ojha, learned Senior Counsel has submitted that the procedure

which ought to be followed where short term vacancy is to be filled, has been prescribed in U.P. Secondary Education Service Commission (Removal of Difficulties) (Second), 1981 read with U.P. Secondary Education (Services Selection Board) Act, 1982.

6. For ready reference, Para 2 of the Second Order is reproduced hereinbelow:

"2. Procedure for filling up short term vacancies. —(1) If 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 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-l(79)-1981, dated July 31, 1981, 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 of 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 undergraduate (C.T.) grade or J.T.C. or B. T.C. grade, as the case may be;

(ii) in relation to institutions 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.” (Emphasis added)

7. Though the learned Single Judge has taken note of the procedure which ought to have been followed for appointment in short term vacancy, but without specifying as to which part of the prescribed procedure, was not found in the appointment of the petitioner, directly gave the conclusion that the appointment made was in consistent with the said procedure and is *void ab initio* and will not be entitled to hold the post or to claim salary from State exchequer.

8. At this juncture, a specific query was made to learned Standing Counsel, as to what procedure, which may have been infringed, in the appointment of the petitioner, no reply was forthcoming; and on the contrary learned Senior Counsel has pointed out that after the advertisement and the recommendation of Selection Committee, resolution was passed by Committee of Management and the documents were transmitted to the District Inspector of Schools for approval. It is after the examination of the procedure and the recommendation of the petitioner, he was appointed and the approval was granted; and at no point of time, the said approval was recalled.

9. In view of the aforesaid, we find that learned Single Judge has not considered or given a finding, as to the nature of the infringement to the procedure prescribed with the appointment on a sort term vacancy. The second ground which learned Single Judge has considered, to non-suit the

relief of the petitioner, was to the effect that the ad-hoc appointment made in short term vacancy cannot continue after the vacancy has become substantive.

10. Learned Senior Counsel has relied upon the Full Bench decision in the case of **Jahaj Pal Vs. District Inspector of Schools and another, 2019 (3) ADJ 424 (FB)** to contend that the said issue was referred to a Larger Bench and it was answered in affirmative. For ready reference, the answer to the reference by the Full Bench is reproduced hereinbelow:

"208. We do not propose to expand our observations in respect of subsequent provisions made for substantive appointment/absorption namely, Sections 21-C, 33-D, 33-E, 33-F and 33-G, since those issues are not necessary to examine to answer the questions referred to us.

209. In view of above discussion, we answer questions referred to this Bench as under:

A. Question (a) is answered in affirmative. We hold that tenure of ad-hoc appointed teachers against short-term vacancies, provided in Para 3 of Second Order, is mandatory and will continue to hold the field till 06.08.1993. On and after 07.08.1993, when Section 33-B was enacted and enforced, teachers who come within the ambit of Section 33-B and entitled to be considered for substantive appointment thereunder, their tenure would be governed by sub-section (5) and till such teachers are not considered by Selection Committee for substantive appointment, they will be entitled to continue even if any contingency, referred to in Para 3 of Second order, has arisen on and after 07.08.1993. In other words, Section 33-B wherever applicable, shall prevail over Para 3 of Second Order, but, in cases where Section 33-B is not applicable and ad-hoc appointment is made against short term vacancies as per procedure prescribed in Second Order, in those cases only, even after 07.08.1993 tenure provided in Para 3 shall be applicable.

B. In view of the conclusion noted above and answer to question (a), question (b) is answered in negative.

C. Question (c) is answered in affirmance.

D. Question (d) is answered as under:

(i) Decision in District Inspector of Schools, Kanpur Nagar and others Vs. Diwakar Lal and others (supra) is overruled to the extent as stated in para 180 to 182 above.

(ii) *Decision in Raj Kumar Verma and others V. District Inspector of Schools, Saharanpur and others (supra)* is overruled to the extent as stated in para 183-188 above.

(iii) *Decision in Smt. Shashi Saxena and others V. Deputy Director of Education and others (supra)* is overruled to the extent as stated in para 189 above.

(iv) *Decision in Raghuvendra Babu Misra V. District Inspector of Schools, Etah and others (supra)* is overruled to the extent as stated in para 190 above.

(v) *Decision in Surendra Kumar Srivastava V. State of U.P. and others (supra)* is overruled to the extent as stated in para 191 to 199 above.

(vi) *The Full Bench judgment in Smt. Pramila Mishra V. Deputy Director of Education, Jhansi Division, Jhansi and others (supra)* to the extent of observation made in para 16 of the said judgment, are clarified in the manner as stated in para 206 above.

E. We reiterate that so far as cases which are within the ambit of Section 33-B of Act, 1982, to that extent tenure of ad-hoc teachers appointed against short term vacancies following procedure prescribed in Para 2 of Second Order shall be governed by sub-section (5) of Section 33-B. It shall prevail over otherwise inconsistent provision contained in Para 3 of Second Order. Further, for interregnum period such teachers so long as are not considered by Selection Committee constituted under sub-section (2) of Section 33-B, for that period also such ad-hoc teachers will continue and will not stand terminated by taking recourse to Para 3 of Second Order on and after 07.08.1993."

11. In view of the aforesaid, it is no longer res-integra that an incumbent who is appointed against the short term vacancy, provided in Para 3 of the Second Order, will continue till a regularly selected candidate is sent by the Commission.

12. In order to buttress his submission, he has further relied upon the judgment of coordinate Bench of this Court in **State of U.P. Thru. Secy. Secondary Education Civil Secrett. Lko. and Others Vs. Raghvendra Prasad Pandey and Others in Special Appeal Defective No.103 of 2023** passed on 03.03.2023 wherein it has been held, on the similar lines, that an incumbent appointed against short term vacancy is entitled to continue till a regularly selected candidate is sent from the Commission and merely

because short term vacancy has been converted into the substantive vacancy, it will not *ipso facto* amounts to removal of the incumbent appointed against a short term vacancy. He has further submitted that judgment of coordinate Bench of this Court has also been affirmed by Apex Court in **State of U.P. & Ors. Vs. Raghvendra Prasad Pandey & Ors.** in **Special Leave to Appeal (C) No.13023 of 2023** passed on 17.07.2023.

13. He has further submitted that on the contrary unless the post is converted into a substantive post and incumbent who is appointed on the short term vacancy, if otherwise is entitled, he cannot be considered for regularisation.

14. In view of the aforesaid fact also, we find that admittedly the petitioner has continued till attaining his age of superannuation on 05.02.2021, and accordingly, he was also entitled to be considered under Section 33-B of the Act, 1982 for being regularized.

15. In view of the aforesaid facts and circumstances, we find that the judgment dated 16.12.2013 passed by the learned Single Judge cannot be sustained and is accordingly set aside.

16. With the aforesaid observation, the writ petition is **allowed**.

March 18, 2026
R.S. Tiwari

(Siddharth Nandan,J.) (Atul Sreedharan,J.)