

(2013) 04 AHC CK 0295

Allahabad High Court

Case No: Second Appeal No. 421 of 2013

State of U.P. and Others

APPELLANT

Vs

Anil Kumar Singh Yadav and
Others

RESPONDENT

Date of Decision: April 26, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Constitution of India, 1950 - Article 311
- Specific Relief Act, 1963 - Section 34, 41, 41(e), 41(h)
- Uttar Pradesh Urban Planning and Development Act, 1973 - Section 59(1)(a)

Citation: (2013) 4 ALJ 517 : (2013) 99 ALR 100 : (2013) 2 UPLBEC 1588

Hon'ble Judges: Sudhir Agarwal, J

Bench: Single Bench

Advocate: K.S. Tiwari, for the Respondent

Final Decision: Dismissed

Judgement

Sudhir Agarwal, J.

Heard learned Standing Counsel for the appellants and Sri K.S. Tiwari, Advocate for respondent. The following substantial questions of law are involved in this matter:--

(I) Whether in the facts and circumstances of the case, the decree of injunction could have been granted in favour of plaintiffs-respondents by Lower Appellate Court?

(II) Whether the injunction, in the facts and circumstances of the case, was barred by Section 41 of Specific Relief Act, 1963?

2. This is a defendants' second appeal filed u/s 100, C.P.C. The plaintiff-respondent, Anil Kumar Singh Yadav, instituted Original Suit No. 839 of 1996 in the Court of Civil Judge (Senior Division), Varanasi. The plaint case was that a vacancy on the post of Lecturer occurred due to retirement in Gandhi Rashtriya Inter College, Sadalpur,

Varanasi (hereinafter referred to as the "College"). One Ram Awadh Singh Yadav working as Assistant Teacher, L.T. Grade was given promotion in 50% promotional quota on the aforesaid vacancy by Committee of Management of College and he was promoted on 01.07.1994. It resulted another vacancy on the post of Assistant Teacher, L.T. Grade and since no person in promotional quota was found eligible and suitable to fill in aforesaid vacancy, the Committee of Management proceeded to make direct recruitment. The vacancy was advertised in newspaper, interview was held on 10.01.1996, as result whereof the plaintiff-respondent, Anil Kumar Singh Yadav appointed on ad hoc basis u/s 18 of U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as the "Act, 1982") for a period till regular selected candidate through Secondary Education Service Selection Board (hereinafter referred to as the "Board") is available or is otherwise directed. The documents were forwarded to District Inspector of Schools, Varanasi (hereinafter referred to as the "DIOS") for his approval but no such approval was received from his office though document was received in the office of DIOS on 17.01.1996. Thereafter several reminders were given and yet salary was not paid, hence the management threatened the plaintiff for removal and that is how the suit in question was instituted. The defendants-respondent Nos. 1 to 4 who are, State of U.P., DIOS, Director of Education and Accounts Officer in the office of DIOS contested the matter pleading that appointment of plaintiff was illegal and contrary to the provisions of Act, 1982 and, therefore, the plaintiff was not entitled for salary from State Exchequer. The defendant Nos. 5 and 6 were the College and Committee of Management of the College. They did not contest the matter and suit proceeded ex parte against them. The Trial Court formulated five issues and Issue Nos. 1, 2 and 3, relevant in this matter, may be reproduced as under:--
(Vernacular matter omitted.... Ed.)

1. Whether the appointment of plaintiff to the post of Assistant Teacher was made as per rules by the Competent Officer, Management Committee, Gandhi Inter College, Sadalpura, Varanasi? If yes, its effect?

2. Whether the plaintiff is entitled to the relief of mandatory injunction as prayed in the plaint?

3. Whether the suit of the plaintiff is barred by Section 41 of Specific Relief Act? (English translation by the Court)

3. The Trial Court found that ad hoc appointments were made by Government Order 14.05.1991 and the aforesaid Government Order was upheld by Division Bench in Durgesh Kumari v. State of U.P., (1995) 3 UPLBEC 1387 and also that the ad hoc appointment of plaintiff was not made in accordance with Section 18 and hence it was clearly illegal. The issue No. 1 was decided accordingly.

4. The court also held that where an appointment is illegal, the incumbent has no right either to hold post or continue in service. No injunction can be granted which

would require the defendants to commit breach of law and such an injunction is barred by Section 41(h) of Specific Relief Act, 1963 (hereinafter referred to as the "Act, 1963"), hence Issue Nos. 2 and 3 were also decided against plaintiff, as a result whereof the suit was ultimately dismissed vide judgment and decree dated 31.01.2000.

5. There against the plaintiff came in Civil Appeal No. 25 of 2000 and Sri S.P. Singh, the then Second Additional District Judge, Varanasi vide his judgment and decree dated 22.12.2000 has allowed appeal and set aside Trial Court's judgment and decree. The Lower Appellate Court (hereinafter referred to as the "LAC") has directed the defendants to allow plaintiff to continue in service till a regular selected candidate by the Board is available and for the period plaintiff continued to work, his salary should also be paid.

6. Looking to the issue relating to validity of appointment of plaintiff, the LAC has observed that since Sri Ram Awadh Singh Yadav was promoted as Lecturer (English) resulting in vacancy on the post of Assistant Teacher, L.T. Grade, the management found necessity of a Teacher for imparting education in English and in furtherance thereof proceeded to make ad hoc appointment. The vacancy was notified on notice board of College on 20.12.1995 and published in daily newspaper dated 20.12.1995. There was no ban on ad hoc appointment and, therefore, the management could have proceeded for ad hoc appointment. Treating the vacancy as a short-term vacancy, the LAC has referred to U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 (hereinafter referred to as the "Second Order") and has observed that entire process of selection was completed by management and the mere fact that appointment was made before seeking approval would make no difference inasmuch as for the purpose of deemed approval even the subsequent communication would be valid.

7. The approach and understanding of LAC on this aspect, unfortunately, is patently erroneous and illegal. Where a short term vacancy is to be filled in on adhoc vacancy, the procedure prescribed under para 2 of the Second Order has to be observed. It reads as under:--

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 along with the particulars of the teacher so promoted.

(2) Where any vacancy referred to in Clause (1) cannot be filled by promotion, due to nonavailability 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 along with 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-1993/XV-7(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 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 which is not substantive and is of a limited duration.

8. A bare perusal of the aforesaid procedure prescribed in Second Order as also the steps taken, as borne out from record, makes it clear that the said procedure has not been followed. The appointment of plaintiff has been made in utter disregard of the aforesaid procedure. This procedure has been considered in a catena of decisions of this Court as well as the Apex Court. This Court does not intend to add the bulk of judgments by referring to all such decisions but suffice is to mention that a detailed judgment was rendered by a Full Bench of this Court in [Kumari Radha Raizada Vs. Committee of Management, Vidyawati Darbari Girls Inter College and](#)

Others, and confirming the above Full Bench judgment, Apex Court in Prabhat Kumar Sharma and others Vs. State of U.P. and others, held that procedure laid down in Removal of Difficulties Order is mandatory and has to be observed in words and spirit. An appointment made inconsistent with the said procedure is void ab-initio and will not confer either any right upon the incumbent to hold the post or to continue in service or to claim salary from State exchequer. The relevant observations made by the Apex Court in Prabhat Kumar Sharma (supra) is as under:--

Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees.

9. Again in para 11 of the judgment the Court held as under:--

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.

10. The Lower Appellate Court held that even if before appointment prior approval is not obtained, if subsequently the documents are conveyed, provision of deemed approval will take effect after expiry of period prescribed therein when there is no decision conveyed by DIOS and that itself would not vitiate the appointment. This observation is clearly in the teeth of a Division Bench decision of this Court in Joint Director of Education, Azamgarh Mandal and District Inspector of Schools Vs. Udai Raj Vishwakarma and Committee of Management, Vindheshwari Inter College, wherein it has been held:

Since payment has to be made from the State Exchequer, the appointment can be made only when the entire selection procedure as well as particulars of the candidate selected are scrutinized and examined by the DIOS and he has an occasion to convey his approval to the selection prior to appointment. Under clause 2(3) of the Second Order, "prior approval" is required after the selection but before appointment. A well defined and unambiguous procedure for short term appointment has been provided in the Second Order which does not admit of any doubt...where the statute specifically provides "prior approval" before passing any order, what its effects would be has been considered in some other cases which we propose to refer as under. Rule 11 of U.P. Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975 provides that no service can be terminated without prior permission from the District Basic Officer. A Division Bench of this Court in Ms. Shailja Shah v. Executive Committee, Bharat Varshiya National Association and another, 1995 (25) ALR, 88 held that expression "prior approval" and "approval" connotes different situation. Where a statute uses the term "prior approval" anything done without prior approval is

nullity. Where a statute employs expression "approval", however, in such cases subsequent ratification can make the act valid.

Section 59(1)(a) of U.P. Urban Planning and Development Act, 1973 provides for "prior approval". The Apex Court in [U.P. Avas Evam Vikas Parishad and another Vs. Friends Co-op. Housing Society Ltd. and another](#), held that "prior approval" and "approval" are two different connotations and if the statute does not mention "prior approval" what is material would be only "approval". The earlier judgment in [Life Insurance Corporation of India Vs. Escorts Ltd. and Others](#), was also referred where it was held that the word "prior" and "previous" may be implied if the contextual situation or circumstances justify such reading and the Act which requires only approval, the action holds good until it is disapproved.

Section 9 of the 1971 Act provides for "prior approval". In [Director of Education and others Vs. Gajadhar Prasad Verma](#), it was held that the absence of "prior approval" would not have an effect of creation of post and therefore the State is not obliged to reimburse salary to the management without "prior approval" of the Director or the competent authority under the Act. In Shiv Gorakh Nath Charitable Society, Kanpur and others v. Cantonment Board, Kanpur and others, 1997 (31) ALR 616, a Division Bench while considering the effect of "prior permission" held where construction is made without "prior permission" a "post permission" cannot be granted and the construction, so made, has to be dismantled. Same view has been taken by another Division Bench in [Vivek Srivastava Vs. Union of India \(UOI\) and Others](#).

At this stage learned counsel for the petitioner pointed out that since under para 2(3) of Second Order there is a provision for deemed approval and therefore strict construction of the statute requiring "prior approval" as such may not apply and a deemed approval may be treated, if after making appointment, documents were subsequently sent to DIOS and he failed to communicate his decision within seven days. The appointment would not be invalid for all times to come. We are unable to accept the aforesaid submission in view of the binding precedent of the Apex Court providing for strict observance of the procedure prescribed under the First and Second Order.

...It is well settled when law requires something to be done in particular manner anything otherwise is prohibited and illegal and would not confer any right upon the person appointed in a manner not provided under the statute. This Court in Special Appeal No. 331 of 1992, [District Inspector of Schools, Accounts Officer and Committee of Management, S.S.V. Inter College Vs. Naresh Chandra Verma](#), held as under:--

Thus when the law requires some thing to be done in a particular manner no other way is permissible and any action not in accordance with such procedure would be void and illegal. The provision of statute and the rigor of statutory procedure cannot be diluted by holding the same to be mere irregularity, since it would be very

difficult in such case to restrict or define the extent of such irregularity. For illustration, in one case, the management, who has made appointment after 58 days instead of 60 days may claim it to be a mere irregularity and in another matter the management after making appointment even within a week instead of waiting for 60 years may claim the similar protection. Such interpretation would result in making the period prescribed u/s 18 to be ununiform, illusory and virtually redundant. A statutory provision cannot be read in a manner, which will bring redundancy to any part of the statutory provision. In this view of the matter, we are clearly of the view that any infraction of the procedure prescribed u/s 18 of the Act would vitiate the appointment being void and illegal and such deviation cannot be said to be a mere irregularity.

In view of the aforesaid discussions thus it cannot be held that the appointment of the petitioner was made validly by observing the procedure prescribed in para 2(3) of Second Order.

11. The decision in [Prabhat Kumar Sharma and others Vs. State of U.P. and others](#), has been followed and reiterated recently by the Apex Court in [Shesh Mani Shukla Vs. D.I.O.S. Deoria and Others](#), wherein the Apex Court has held as under:--

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 corresponding legal duty in the State.

12. In view of the aforesaid decisions it cannot be said that appointment of plaintiff-respondent was valid and in accordance with law and in view of the dictum laid down by Apex Court in [Prabhat Kumar Sharma and others Vs. State of U.P. and others](#), and [Shesh Mani Shukla Vs. D.I.O.S. Deoria and Others](#), and this Court in *Radha Raizada* (1994 All LJ 1077) (supra) as well as [Joint Director of Education, Azamgarh Mandal and District Inspector of Schools Vs. Udai Raj Vishwakarma and Committee of Management, Vindheshwari Inter College](#), .

13. An appointment made in violation of procedure prescribed in Removal of Difficulties Order read with Section 18 of Act, 1982 is void ab initio and nullity. It does not give any right to incumbent either to hold the post or to claim salary from State Exchequer. In these circumstances, granting injunction in favour of plaintiff to continue in service and pay salary is clearly amounts to directing the defendants to commit a blatant breach of statutory provisions. Such an injunction is impermissible and could not have been granted being barred by Section 34 read with Section 41(e) of Act, 1963.

14. The suit for enforcement of contract of personal service is also not maintainable since a contract of personal service cannot be specifically enforced unless the conditions prescribed in certain circumstances are available. In [Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi](#), considering the question as to when such a relief is granted the Apex Court observed:--

Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well-recognised exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service, even though by doing so the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the Industrial Law, jurisdiction of the Labour and Industrial Tribunals to compel the employer to employ a worker whom he does not desire to employ, is recognised. The Courts are also investigated with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute,....

15. Again in para 25 of the judgment, the Court held:--

The position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well-recognized exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) a public servant, who has been dismissed from service in contravention of Article 311. (2) Reinstatement of a dismissed worker under Industrial law by Labour or Industrial Tribunals. (3). A statutory body when it has acted in breach of a mandatory obligation, imposed by statute.

16. The above view has been reiterated in [Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others](#), ; [Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others](#), ; [Life Insurance Corporation of India Vs. Escorts Ltd. and Others](#), . Similar view has been taken by this Court also in [A.K. Home Chaudhary v. National Textile Corporation U.P. Ltd., Kanpur 1984 UPLBEC 81](#); [B.M. Varma Vs. State of U.P. and Others](#), ; and [Vivek Kumar Mishra Vs. State of U.P.](#) .

17. In view of above, question No. 1 is answered in negative, i.e., against plaintiff-respondent and in favour of defendants-appellants and question No. 2 is answered in affirmative, i.e., in favour of appellants. In the result, the appeal is allowed. The impugned judgment and decree dated 22.12.2000 passed by Lower Appellate Court is hereby set aside and the judgment and decree dated 31.01.2000 passed by Trial Court is restored and confirmed. The Original Suit No. 839 of 1996 filed by plaintiff-respondent is accordingly dismissed. The defendants-appellants shall be entitled to costs throughout.