

CASE NO.:
Appeal (civil) 2748 of 2007

PETITIONER:
Nagar Mahapalika, Kanpur

RESPONDENT:
Smt. Vibha Shukla & Ors

DATE OF JUDGMENT: 18/05/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2748 OF 2007
[Arising out of S.L.P. (Civil) No. 9072 of 2006]

S.B. SINHA, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 01.09.2005 passed by a Division Bench of the Allahabad High Court whereby and whereunder the writ petition filed by the appellant herein questioning the judgment and order dated 18.01.1991 passed by the U.P. State Public Services Tribunal, Lucknow, (for short, 'the Tribunal'), was dismissed.

3. Respondent No. 1 was a Sports Teacher appointed on or about 21.7.1973 for a period of one year purported to be in terms of the U.P. Municipal Corporations Adhiniyam, 1959, (for short 'the 1959 Act'). Her services were extended from time to time. By reason of an order dated 18.08.1980, her services were terminated on payment of one month's salary in lieu of notice. She filed an application before the UP Public Services Tribunal, inter alia, questioning the said order of termination dated 18.08.1980 and claiming regularization of her services purported to be in terms of Section 16(GG) of the UP Intermediate Education Act, 1921 (for short 'the 1921 Act'). The Tribunal allowed the said application. As indicated hereinbefore, the High Court dismissed the writ petition filed by the appellant herein.

4. The short question which arises for consideration in this appeal is the applicability of the 1921 Act vis-a-vis the 1959 Act.

5. The 1921 Act was enacted to establish a Board to take the place of the Allahabad University in regulating and supervising the system of High School and Intermediate Education in the United Provinces, and to prescribe the courses therefor. Appointment in terms of the said Act is permissible only upon furnishing information in that behalf to the District Inspector of Schools as laid down under Section 16-E(2) thereof. A teacher of an institution is required to be selected by a Selection Committee constituted thereunder. The Committee of Management of the institution is empowered to appoint candidates out of the list of teachers recommended in order of preference. The names of the selected candidates, as far as practicable, should consist of three candidates for each post found by the Selection Committee to be suitable for appointment. It is required to communicate its recommendations together with such list to the Committee of Management in terms of Sub-section 6 of Section 16-E of the 1921 Act. However, sub-section (11) thereof provides for a non obstante clause, in terms whereof,

appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months may be made by direct recruitment or promotion without reference to the Selection Committee. The proviso appended thereto in no uncertain terms states that such an appointment shall not continue for a period of more than six months or beyond the end of the educational session during which such appointment was made.

6. Section 16-F of the Act prescribes the manner in which the Selection Committee is to be constituted. Section 16(FF) of the Act provides for the terms and conditions of service of the Head of Institutions, teachers and other employees.

7. The Legislature of the State of Uttar Pradesh inserted Section 16(GG) in the 1921 Act by the UP Act No. 5 of 1977, which came into force with effect from 21.4.1977. It reads as under :

"16(GG): Regularization of appointment of ad hoc teachers: (1) Notwithstanding anything contained in Section 16_E, 16-1 and 16-FF, every teacher of an institution appointed between August 18, 1975 and September 30, 1976 (Both dates inclusive) on ad hoc basis against a clear vacancy and possession prescribed qualifications or having been exempted from such qualifications in accordance with the provisions of this Act, shall, with effect from the date of commencement of this section, be deemed to have been appointed in a substantive capacity, provided such teacher has been continuously serving the institution from the date of his appointment up to the commencement of this section."

8. The 1959 Act, on the other hand, provides for the mode and manner in which appointment for the employees of the Municipal Corporations are to be made. Section 106 of the 1959 Act provides for creation of one or more posts specified therein; Clause (vi) whereof reads as under :

"106. Creation of posts \026 (1) Subject to such conditions as may be prescribed a Corporation may from time to time create one or more of the following posts, as it may consider necessary, in connection with its affairs, namely \026

(iv) other posts of officers; staff and other servants necessary for the efficient discharge of its functions"

9. Section 107 prescribes the manner in which such appointments are required to be made. Sub-sections (2) and (3) thereof read as under :

"(2) Appointments to the posts not included in the posts referred to in Sub-section (1) per mensem shall be made after consultation with the State Public Service Commission in the manner prescribed and not otherwise. The authority to appoint such officers and servants of the Corporation shall vest \026

(a) in respect of those officers and servants who are immediately subordinate to the Mukhya Nagar Lekha Parikshak, in the Mukhya Nagar Lekha Parikshak, and

(b) in respect of all other officers and servants, in the Municipal Commissioner.

(3) All other appointments except those specified

in Sub-sections (1), (2) and (5) shall be made in accordance with the recommendations of a Selection Committee constituted under Sub-section (4) and authority to make such appointments shall vest \026

(a) in respect of those officers and servants who are immediately subordinate to the Mukhya Nagar Lekha Parikshak, in the Mukhya Nagar Lekha Parikshak, and

(b) in respect of all other officers and servants, in the Municipal Commissioner."

10. Sub-section (4) of Section 107 provides for constitution of the Selection Committee referred to in sub-section (3) therein. Section 108, however, empowers the authorities to make officiating and temporary appointments to certain posts without consulting the State Public Service Commission or obtaining the recommendations of the Selection Committee, but no such appointment shall continue beyond the period of one year, nor shall be made where it is expected to last for more than a year without consulting the State Public Service Commission or otherwise than in accordance with the recommendation of the Selection Committee, as the case may be.

11. With effect from 01.12.1977 by UP Act 10 of 1978, Section 108-A was introduced in the 1959 Act. A further amendment was made by inserting Clause (b) therein with effect from 25.04.1978. Section 108-A of the 1959 Act reads as under :

"108-A \026 Appointment of teachers of institution maintained by Corporations \026 Notwithstanding anything in Sections 107 and 108 \026

(a) the appointment of a teacher in any college, affiliated to any University as defined in the Uttar Pradesh State Universities Act, 1973 and maintained by a Municipal Corporation, shall be made in accordance with the provisions of that Act, and

(b) the appointment of a teacher or Head of an institution recognized in accordance with the Intermediate Education Act, 1921 and maintained by the Municipal Corporation shall be made in accordance with the provisions of that Act."

12. Section 540 occurring in Chapter XXIII of the 1959 Act provides for the Rule making power of the State.

13. It is not in dispute that pursuant to or in furtherance of the said provision, UP Nagar Mahapalika Education Services Rules have been framed. Rule 13 of the Rules provides for appointments to be made through a departmental Selection Committee. Rules 16 and 17 lay down the procedure for appointment. Rule 19 empowers the appointing authority to make temporary appointment for a period of less than one year. Sub-rule (3) of Rule 19 reads thus :

"(3) Temporary and officiating appointments \026 The appointing authority shall make appointments in temporary and officiating vacancies also from the list, which will be valid for one year or the next selection whichever is earlier, of candidate recommended by the Commission or prepared by the Selection Committee, as the case may be.

Provided that in any year if the list is

exhausted or if no candidate is available in that list, the appointing authority may, without consultation with the Commission, where such consultation is necessary, or without the recommendation of the Selection Committee, make appointments in such vacancies for a period not exceeding one year from amongst servants or persons possessing the qualifications prescribed for recruitment to those posts."

14. First respondent, as noticed hereinbefore, was appointed in 1973. Her appointment indisputably was extended from time to time. Having regard to the statutory embargo contained in Section 108 of the 1959 Act, each of such extension must be treated to be a fresh appointment. She was appointed on a temporary post. Her appointment indisputably was not made in terms of Section 16-E of the 1921 Act. It is of some significance to notice that whereas an appointment in terms of Section 108 of the 1959 Act cannot be made for a period exceeding one year, in terms of Section 16-E(11) of the 1921 Act, an appointment can be made for a period not exceeding six months and, that too subject to the condition that no appointment made under the said section would not, in any case, continue beyond the end of the educational session during which such appointment was made.

15. The 1959 Act, being a later Act, ordinarily would prevail over the 1921 Act. Rules have also been framed under the 1959 Act. The provisions of the said Rules being in consonance with the provisions of the 1959 Act would be treated to be a part thereof as it is well-settled that Rules validly framed would become part of the main legislation. Any appointment made in terms of Section 108 of the 1959 Act must, thus, conform to the provisions contained therein as also the rules framed thereunder. Section 108 of the 1959 Act is an exception to the provisions of Section 107 thereof, which in turn is in tune with the constitutional scheme laid down under Articles 14 and 16 of the Constitution of India. Prior to 1.12.1977 when Section 108-A was introduced, an appointment of a teacher to be made by a Municipal Council was to be governed by the provisions contained therein or the rules framed thereunder. Section 108-A does not incorporate the provisions of the 1959 Act by reference. It merely carves out an exception to Section 107 and 108 of the Act provided that all such appointments were made in terms of the 1921 Act. Section 16 (GG) of the 1921 Act per se, therefore, would not apply when no appointment has been made in terms thereof. Section 16(GG) of the 1921 Act raises a legal fiction wherefor the conditions precedent laid down thereunder must be strictly complied with. [See Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., 2007 (5) SCALE 452]

16. Respondent No. 1 was appointed during the period August 18, 1975 and 30th September, 1976 on temporary basis. Such an appointment was not made in terms of sub-section (11) of Section 16-E of the 1921 Act. There is nothing to show that there existed a clear vacancy or she was appointed in terms of the Act. Procedures for appointments under the 1921 Act and the 1959 Act are different. The Selections Committees constituted under both the Acts also are different. The terms and conditions of the teachers appointed under the two acts are also different. It is, thus, difficult to accept the findings of the Tribunal as affirmed by the High Court that the said provisions would apply to the case of the first respondent herein.

17. Learned counsel appearing on behalf of the respondents, however, has drawn our attention to paragraph 4.5 of the counter affidavit to contend that the respondent was appointed along with others during the period 1.7.1976 to 30.6.1977. It may be so but having not been appointed in conformity with the provisions of the 1921 Act, in our considered opinion, Section 16-GG thereof has no application in the instant case.

18. Our attention has been drawn to a decision of this Court in Vikramaditya Pandey v. Industrial Tribunal, Lucknow & Anr. [(2001) 2 SCC 423] wherein this Court in a case arising under the UP Cooperative

Societies Employees Services Regulations, 1975 opined that having regard to Regulation 103, termination of service of an employee in violation thereof would be illegal, stating :

"In this case we do not find any such pleading of special circumstances either before the Tribunal or before the High Court. Since Regulation 103 of the Regulations is referred to in the order of the Tribunal as well as in the High Court and it has bearing in deciding the controversy, the focus is needed on it. It reads:

"103. The provisions of these Regulations to the extent of their inconsistency with any of the provisions of the Industrial Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmen's Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any cooperative society or class of cooperative societies, shall be deemed to be inoperative." By a plain reading of the said Regulation it is clear that in case of inconsistency between the Regulations and the provisions of the Industrial Disputes Act, 1947, the State Act, the Workmen's Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any cooperative society or class of cooperative societies, to that extent the Regulations shall be deemed to be inoperative. In other words, the inconsistent provisions contained in the Regulations shall be inoperative, not the provisions of the other statutes mentioned in Regulation 103. The Tribunal in this regard correctly understood the regulation but wrongly refused the relief on the ground that no reinstatement can be ordered on a regular employment in view of the provisions contained in the said Regulation. But the High Court read the regulation otherwise and plainly misunderstood it in saying that if there is any inconsistency between the Regulations and the Industrial Disputes Act, 1947 and other labour laws for the time being in force the Regulations will prevail and the Industrial Disputes Act, 1947 and other labour laws shall be deemed to be inoperative. This misreading and wrong approach of the High Court resulted in the wrong conclusion. In the view it took as regards Regulation 103 the High Court proceeded to state that even if there was retrenchment in view of Regulation 5 of the Regulations the Labour Court was not competent to direct reinstatement of the appellant who was not recruited in terms of Regulation 5 because the Labour Court had to act within the ambit of law having regard to the Regulations by which the workman was governed."

19. Such a question does not arise for consideration before us. Indisputably, the appointment as also the terms and conditions of services of the first respondent are governed by the 1959 Act. Herein no case involving inconsistencies in the provisions of the two statutes arises.

20. Furthermore, it is trite that regularization is not a mode of appointment. It has been so held by a Constitution Bench of this court in Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors. 2006 (4) SCC 1]. The principle enunciated by the Constitution Bench of this Court in Umadevi (supra) has inter alia been applied by this Court in Post Master General, Kolkata & Ors. v. Tutu Das (Dutta) [2007 (6) SCALE 453] stating as under :

"12. What was considered to be permissible at a given point of time keeping in view the decisions of this Court

which had then been operating in the field, does no longer hold good. Indisputably the situation has completely changed in view of a large number of decisions rendered by this Court in last 15 years or so. It was felt that no appointment should be made contrary to the statutory provisions governing recruitment or the rules framed in that behalf under a statute or the proviso appended to Article 309 of the Constitution of India.

13. Equality clause contained in Article 14 and 16 of the Constitution of India must be given primacy. No policy decision can be taken in terms of Article 77 or Article 162 of the Constitution of India which would run contrary to the constitutional or statutory schemes."

21. Submission of the learned counsel that persons similarly situated are still continuing in service is not of any moment. This aspect of the matter has also been dealt with by this Court in Post Master General, Kolkata (supra) stating:

"17. Submission of Mr. Roy is that the respondent has been discriminated against inasmuch as although the services of Niva Ghosh were regularised, she had not been, may now be noticed.

18. There are two distinctive features in the present case, which are:-

(i) Equality is a positive concept. Therefore, it cannot be invoked where any illegality has been committed or where no legal right is established.

(ii) According to the appellant the respondent having completed 240 days, does not fulfil the requisite criteria. A disputed question of fact has been raised. The High Court did not come to a positive finding that she had worked for more than 240 days in a year.

19. Even otherwise this Court is bound by the Constitution Bench decision. Attention of the High Court unfortunately was not drawn to a large number of recent decisions which had been rendered by this Court."

22. For the reasons aforementioned, we are of the opinion that Section 16(GG) of the 1921 Act has no application to the fact of the present case and, thus, the Tribunal as also the High Court committed a manifest error in passing the impugned judgments. They are set aside accordingly. The appeal is allowed. However in the facts and circumstances of this case, there shall be no order as to costs.