

CASE NO.:
Appeal (civil) 2442 of 2007

PETITIONER:
STATE OF U.P. & ANR

RESPONDENT:
NIDHI KHANNA & ANR

DATE OF JUDGMENT: 11/05/2007

BENCH:
C.K. Thakker & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2442 OF 2007
(Arising out of S.L.P. (C) No. 10984 of 2004)

C.K. Thakker, J.

1. Leave granted.

2. This appeal is directed against the judgment and order passed by the Division Bench of the High Court of Judicature at Allahabad on March 15, 2004 in Civil Miscellaneous Writ Petition No. 45418 of 2003. By the said judgment, the High Court directed the appellants to give an appointment letter to respondent No. 1 (writ petitioner) for the post of Lecturer in Geography in C.M.P. Degree College, Allahabad 'forthwith'.

3. Short facts giving rise to the present appeal are that in June, 2000, Uttar Pradesh Higher Education Services Commission ('Commission' for short) advertised under Advertisement No. 29, vacancies of Lecturers in different non-Government Degree (P.G.) Colleges. In pursuance of the said advertisement, respondent No. 1 (writ petitioner) applied for the post of Lecturer in Geography in August, 2000. A Select List was prepared on July 19, 2001. Respondent No. 1 was declared selected, but her name was placed at Serial No. 1 in the Wait-List of General Category candidates. It is the case of the appellants that the Director of Higher Education, U.P., Allahabad, appellant No. 2, herein issued an order on November 23, 2002 by which respondent No. 1 was appointed as Lecturer in Geography in R.G. Girls College, Meerut. According to the appellants, however, respondent No. 1 did not join at Meerut College and hence another candidate was appointed and placement of respondent No. 1 was cancelled. On March 5, 2003, another merit list was prepared pursuant to Advertisement No. 32 and names of selected candidates were received by the Director on March 7, 2003. On July 3, 2003, respondent No. 1 met the Director and stated that though she was selected as Lecturer in Geography and was placed at Sr. No.1 in Wait-List, she had not received a Letter of Appointment. Respondent No. 1 also stated to the Director that there was a vacancy in C.M.P. Degree College, Allahabad and the said College had no objection to appoint respondent No. 1. She, therefore, prayed that she be appointed in C.M.P. Degree College, Allahabad. The prayer was,

however, rejected by the appellants on the ground that new list was prepared in March, 2003 under Advertisement No. 32. Respondent No. 1 was selected under Advertisement No. 29, but the said list had lapsed as it was valid only till new list was prepared. Hence, even though C.M.P. College, Allahabad had no objection for appointment of respondent No. 1, she could not be appointed after the new list was prepared. This led respondent No. 1 to filing of writ petition. It was her case in the petition that she had never received any order or communication about her appointment as Lecturer in Geography in Meerut College nor was she informed about her placement in that college. Though the appellants herein filed an affidavit controverting the assertion of respondent No. 1 (writ petitioner), the Court held that stand of the Authorities was not tenable and they were responsible for not giving appointment to respondent No. 1 and had acted arbitrarily. Since respondent No. 1 (writ petitioner) was selected by the Commission and was wait-listed and as there was vacancy of Lecturer in Geography in C.M.P. Degree College, Allahabad, the petition was allowed and a Writ of Mandamus was issued directing the authorities to appoint respondent No. 1 in C.M.P. Degree College, Allahabad 'forthwith'.

4. The above order is challenged by the Authorities by filing the present appeal. On July 14, 2004, notice was issued and interim stay was granted against the order of the High Court. Affidavits and further affidavits are filed thereafter. Considering the controversy and interim order

passed by this Court, direction was issued to the Registry to place the matter for final hearing and that is how the matter has been placed before us.

5. The learned counsel for the appellants contended that the High Court has committed an error of law in directing the Authorities to appoint respondent No. 1 forthwith in C.M.P. Degree College, Allahabad. It was submitted that once new select-list was prepared in March, 2003, the old list came to an end and no appointment could be made from that list. It was also submitted that according to the appellants, respondent No. 1 was intimated that she was appointed in Meerut College, but she did not join the said college and hence another person was appointed. She, therefore, had no occasion to make any grievance. The order passed by the High Court, therefore, deserves to be set aside by ordering dismissal of the petition filed by respondent No. 1 (writ petitioner).

6. The learned counsel for respondent No. 1, on the other hand, supported the order of the High Court. He submitted that admittedly respondent No. 1 was selected by the Commission. She was at Serial No. 1 in the Wait-List. It was, therefore, incumbent on the Authorities to consider her claim when a case for appointment of a candidate from wait-list arose. She had never received any communication/order that she was appointed in Meerut College and it was only in July, 2003 that the Director told her that she did not join at Meerut College. She, therefore, made a prayer to allow her to join in C.M.P. College, Allahabad and also obtained no objection certificate from the said college. Respondent No. 1 had thus suffered without there being any fault on her part. The High Court, in the circumstances, was right in directing the Authorities to give her appointment in

Allahabad College and the said order requires no interference.

7. Having heard the learned counsel for the parties, in our opinion, the High Court was not justified in issuing a Writ of Mandamus directing the appellants to appoint respondent No. 1 (writ petitioner) as Lecturer in Geography in C.M.P. Degree College, Allahabad.

8. Before we consider the rival contentions of the parties, it would be appropriate if we refer to the statutory provisions. In 1980, an Act has been enacted known as the Uttar Pradesh Higher Services Commission Act, 1980 (hereinafter referred to as "the Act"). The Preamble of the Act declares that it had been enacted with a view "to establish a Service Commission for the selection of teachers for appointment to the colleges affiliated to or recognized by a University or for matters connected therewith or incidental thereto". "Commission" is defined as the Higher Services Commission established under Section 3. Chapter II deals with establishment of Commission, its composition, terms of office and conditions of service, etc. Chapter III enumerates functions of the Commission and its powers and duties. Sections 12 and 13 as then stood are material and may be re-produced;

12. Procedure for appointment of teachers.\027(1) Every appointment as a teacher of any college shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

(2) The management shall intimate the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation.\027The expression "academic year" means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed a subject wise consolidated list of vacancies intimated to him from all colleges.

(4) The manner of selection of persons for appointment to the posts of teachers of a college shall be such, as may be determined by regulations:

Provided that the Commission shall with a view to inviting talented persons give wide publicity in the State to the vacancies notified to it under sub-section (3) :

Provided further that the candidates shall be required to indicate their order of preference for the various colleges, vacancies wherein have been advertised.

13. Recommendation of Commission. (1)
The Commission shall, as soon as possible, after the notification of vacancies to it under sub-section (3) of Section 12, hold interview (with or without written examination of the candidates and send to the Director a list

recommending such number of names of candidates found most suitable in each subject as may be, so far as practicable, twenty-five per cent more than the number of vacancies in that subject. Such names, shall be arranged in order of merit shown in the interview, or in the examination and interview if any examination is held.

(2) The lists sent by the Commission shall be valid till the receipt of a new list from the Commission.

(3) The Director shall having due regard in the prescribed manner, to the order of preference if any indicated by the candidates under the second proviso to sub-section (4) of Section 12, intimate to the management the name of a candidate from the list referred to in sub-section (1) for being appointed in the vacancy intimated under sub-section (2) of Section 12.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in sub-section (2) and such vacancy has not been notified to the Commission under sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

(5) Notwithstanding anything in the proceeding provisions, where abolition of any post of teacher in any college, services of the persons substantively appointed to such post is terminated the State Government may make suitable order for his appointment in a suitable vacancy, whether notified under sub-section (3) of Section 12 or not in any other college, and thereupon the Director shall intimate to the management accordingly.

(6) The Director shall send a copy of the intimation made under sub-section (3) or sub-section (4) or sub-section (5) to the Candidate concerned. (emphasis supplied)

9. Section 14 imposes a duty on the management to appoint teachers pursuant to the order passed by the Director. Section 15 empowers Director to get information from the Management so as to enable him to take an appropriate action. The Commission is also authorized to call for information from the Management of any college as it thinks fit. It also has power to inspect records and registers of the Management.

10. It is the case of the appellants that appellant No. 2, Director of Higher Education informed respondent No. 1 as also R.G. College, Meerut on November 23, 2002 that a vacancy had arisen in the said college, of Lecturer in Geography due to non-joining by one Ku. Shradha Shrivastava. It was, therefore, decided to appoint Ku. Nidhi Khanna, (respondent No. 1 herein : writ petitioner) pursuant to the recommendation made by the Commission under sub-section (4) of Section 13 of the Act. The Management was, therefore, directed to issue an order of appointment by registered post within thirty days from the date of receipt of the letter appointing respondent No. 1 as Lecturer in Geography in the said college. Likewise, respondent No. 1 also was informed by the

Authorities by a registered letter. It is no doubt true that according to respondent No. 1, she had not received any such letter, but even in the High Court, the case of the appellants was that the letter was sent by registered post to respondent No. 1 at the address supplied by the candidate, i.e. respondent No. 1, but she did not join Meerut college. It was, in these circumstances that another person came to be appointed. It was, therefore, submitted that respondent No. 1 had no right to insist for appointment after the new list was prepared.

11. The learned counsel for the appellants, in this connection, referred to a decision of this Court in *State of Bihar & Anr. v. Madan Mohan Singh & Ors.*, (1994) Supp (3) SCC 308. A three-Judge Bench of this Court there held that a select list prepared for filling up of vacancies would be valid for filling up of those vacancies for which it was prepared. For other vacancies, fresh list will have to be prepared and no appointment could be made from the list prepared for vacancies not advertised. In *Madan Mohan Singh*, applications were invited by the Government for filling up of 32 vacancies of Additional District & Sessions Judges against direct recruitment quota. A list of 128 candidates ($32 \times 4 = 128$) was prepared, but since last two candidates secured equal marks, names of both were included at Sl. No. 128 and 129. The High Court conducted oral interview and a panel of 32 candidates was prepared. Selected candidates were asked to appear for Medical Test on March 2, 1991. The Full Court, however, sought to include further vacancies as well and decided to fill up those vacancies that arose subsequently, from the merit list which was already prepared. This Court held the action of the High Court invalid as no appointment could be made from a list in respect of vacancies that arose subsequently.

12. A question similar to the one which we are called upon to decide, came up for consideration before this Court as to interpretation of Sections 12, 13 and 14 of the Act in *Kamlesh Kumar Sharma v. Yogesh Kumar Gupta & Ors.*, (1998) 3 SCC 45 : JT (1998) 1 SC 642. In *Kamlesh Kumar*, an advertisement was issued on April 20, 1992 by the Commission for certain vacancies of Principals. The appellant applied for the said post and was included in the Select List. Due to certain reasons, however, he could not be appointed. On July 1, 1993, a post of Principal in one college fell vacant on account of retirement of the incumbent thereof. The Director of Higher Education purportedly exercising power under sub-section (4) of Section 13 of the Act directed the Management of the College to appoint the candidate who was in the Select List as the Principal. The action was challenged. It was contended that no appointment could have been made as the advertisement was issued on April 20, 1992 and the post of Principal fell vacant on July 1, 1993. The Authorities, on the other hand, contended that the word 'otherwise' occurring in Section 13(4) of the Act should not be read ejusdem generis and was wide enough to cover and take within its sweep all vacancies including the vacancies for which interview might not have been held. After quoting the relevant provisions of the Act, this Court stated; "Having heard learned counsel for the parties and having gone through the relevant Act and the Rules, we find that the aforesaid amendments were brought in to eliminate ad hocism and irregular appointment of teachers. This is also to eliminate favouritism, nepotism and other processes, through which unqualified,

undesirable persons were appointed excluding meritorious teachers. The proviso to sub-section (4) of Section 12 provides for wide publicity through advertisement for inviting talented persons for filling up such vacancies, as notified under sub-section (3). This was keeping in mind that whenever such vacancy occurs selection should be from a larger sphere through wide advertisements which would include large applicants competing. Both, ad hoc appointment and appointment made for any vacancy not properly advertised limits sphere where it may either as under the old Act to be regularised or under the principle of equity, sympathy to be regularised if a case be made out which erodes the very foundation of a teaching institution by lowering the teaching standard".

13. The Court observed;
We find, after giving our careful consideration that in case the appellant's argument is accepted by giving wider interpretation to the word "otherwise", it would thwart the very object of the Act. In other words it would permit the filling of the vacancy occurring which was never advertised and a person in the select list panel, even though not applying for any vacancy, would be absorbed. Hence it would be limiting the sphere of selection in contradiction to the object of the provision to draw larger applicants by advertising every vacancy to be filled in. We have no hesitation to say that any appointment to be made on a vacancy occurring in the succeeding year in question for which there is no advertisement under the provisions of sub-section (4) of Section 12, the person on the panel list of preceding academic year in question, cannot be absorbed or be appointed. The word "otherwise" has to be read as ejusdem generis that is to say in group similar to death, resignation, long leave vacancy, invalidation, person not joining after being duly selected. In other words, it would be a case of unforeseen vacancies which could not be conceived under Section 12(2). Section 12(2) conceives of a vacancy which is existing on the date the vacancy is to be advertised and which is likely to be caused in future but constricted for a period ending in the ensuing academic year in question. The words "likely to be caused" under Section 12(2) are followed by the words "during the course of the ensuing academic year" that is any person likely to retire by the end of the academic year in question. In other words, such vacancies could be foreseen and not unforeseen. While vacancies under Section 13(4) are unforeseen vacancies which fall under the group, death and/or resignation. Hence the word "otherwise" cannot be given the wide and liberal interpretation which would exclude large number of expected applicants who could be waiting to apply for the vacancies occurring in the succeeding year in question.

14. In our opinion, in view of the above legal position, the appellants were right in their submission that respondent No. 1 could not be appointed in pursuance of Advertisement No. 32 since she was selected and empanelled pursuant to Advertisement No. 29.

15. The learned counsel for respondent No. 1

contended that there was no fault on her part. It was also stated that though the Authorities asserted that a communication was sent to respondent No. 1 at the address supplied by her, she had never received such so-called communication. It was also urged that the address at which the communication was sent was not correct address. It was only because of the fact that there was no communication by the Director of Higher Education that constrained respondent No. 1 to approach him as to what had happened to her appointment though she was at Serial No. 1 in the Wait-List. Only at that time she was informed about the order of appointment and her placement in Meerut College but since she did not join duty, other person was appointed. Precisely because of subsequent development that respondent No. 1 approached C.M.P. College, Allahabad and obtained 'No Objection Certificate' from the Management of that College. The High Court, submitted the counsel, believed the case of respondent No. 1 and granted relief observing that it was the mistake of the Authorities for which the candidate should not suffer.

16. Without expressing final opinion as to correctness or otherwise as to assertion of respondent No. 1, even if it is believed that what respondent No. 1 contended before the High Court and before us is correct, in our considered opinion, no writ of Mandamus could have been issued by the High Court in the light of express and unequivocal statutory provisions referred to hereinabove and the declaration of law in Kamlesh Kumar Sharma.

17. It is an admitted fact that the first respondent was selected and empanelled in the Wait List pursuant to Advertisement No. 29 on July 19, 2001. It is further not disputed that Advertisement No. 32 was thereafter issued and Merit List was prepared on March 5, 2003 which was received by the Director on March 7, 2003. Once the above facts have been established, the statutory provisions will come into play. Under the said provisions as soon as the new list is prepared, the old list comes to an end. The High Court, in view of the above facts, in our considered opinion, could not have issued a writ of Mandamus directing the Authorities to act contrary to law. That is not the ambit and scope of writ of Mandamus.

18. For the foregoing reasons, the appeal deserves to be allowed and is allowed accordingly. The order passed by the High Court is set aside and the writ petition filed by the writ petitioner (respondent No. 1 herein) is ordered to be dismissed. In the facts and circumstances of the case, however, there shall be no order as to costs.