

PETITIONER:
KAMLESH KUMAR SHARMA

Vs.

RESPONDENT:
YOGESH KUMAR GUPTA & ORS.

DATE OF JUDGMENT: 09/02/1998

BENCH:
K. VENKATASWAMI, A.P. MISRA

ACT:

HEADNOTE:

JUDGMENT:

THE 9TH DAY OF FEBRUARY, 1998

Present:

Hon'ble Mr Justice K. Venkataswami

Hon'ble Mr. Justice A.P. Misra

Shrish Kumar Misra, Adv. for the appellant

Sunil Kumar Jain, T.N. Singh, Misra and B.M. sharma, Adv.
for the Respondents.

J U D G M E N T

The following Judgment of the Court was delivered:
MISRA, J.

The question raised in this appeal is the interpretation of Section 13(4) of the U.P. Higher Education Services Commission Act, 19980 (hereinafter referred to as 'the Act') as amended in 1992.

The appellant interprets that the vacancies to be filled in under this sub-section are not only those which occur on account of death or resignation but would include any other vacancy occurring till another list is sent by the commission under Section 13(2) of the Act. In other words, it would also include vacancies not advertised but occurring even for the subsequent academic year. If order to appreciate the question raised, the background and the facts would be useful, which are stated:

Prior to the aforesaid Act, the appointment to the post of teachers in the Non-Governmental Colleges affiliated to the various Universities in the State of Uttar Pradesh was made by the Selection Committee of the management of the concerned college. For various reasons, the said process was not found to be congenial and the aforesaid Act was enacted. Sections 12 or 14 of the Act contained procedure for appointment of teachers as well as Principals. Section 14 provided for the appointment of teachers on ad hoc basis. Since this provision was widely abused and mis-used, as large number of teachers were appointed on the basis of favouritism and not on merits, this was deleted in 1992, wherein both Sections 12 to 14 were substituted by the U.P. Act. No. 2 of 1992. In fact by this, Section 12 of 14 were drastically amended. Amended Section 1(1) provided, every appointment of a teacher is to be made by the management in accordance with the provisions or the Act and any

appointment made in contravention thereof is void. Under Sub-section (2), the management has to intimate the existing vacancies and the vacancies, likely to be caused during the course of the academic year, to the Director at such time and in such manner as may be prescribed. Though prescribed under rules but not satisfactorily. The academic year is also defined through the Explanation of the same section to mean "period of 12 months commencing on July 1". Under sub-section (3), the Director notifies to the commission subjectwise consolidated list of vacancies intimated to him from all colleges. Under proviso to sub-section (4), the commission has to give wide publicity in the State to the vacancies notified to draw talented persons. Under Section 13, the commission recommends the names of the candidates found most suitable in each subject and such names have to be arranged in the order of merit. The recommendation has to be 25% more than the number of vacancies in that subject. Sub-section (2) of section 13 enables the validity of such a list till the receipt of the new list from the commission. This is departure from the old provision under which the period was only for one year. Sub-section (4) refers to the appointment to be made from the persons in the said list in case of vacancy occurring due to death, resignation or otherwise. For ready reference, Sections 12, 13 and 14 of the Act are reproduced below:

"12. Procedure for appointment of teachers-

(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 the 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 regulation:

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 have due regard in the prescribed manner, to the order of preference 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 or 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.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period or 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 foregoing provision, 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 (3) to the Candidate concerned.

14. Duty of management (1) the management shall, within a period

of one month from the date of receipt of intimation under sub-section (3) or sub-section (4) or sub-section (5) of Section 13, issue appointment letter to the person whose name has been intimated.

(2) Where the person referred to in sub-section (1) fails to join the post within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such person is otherwise not available for appointment, the Director, shall on request of the management intimate fresh name from the list sent by the commission under sub-section (1) of Section 13 in the manner prescribed."

The case of the appellant is that he holds doctorate degree, Ph.D in Physics; Degree as High Level fellow from Government of France and I.C.I.P. Fellow from UNESCO. The appellant is working as a Reader in R.K. College, Shamli, Muzaffar Nagar. On 20th April, 1992, pursuant to the advertisement No. 18 issued by the U.P. Higher Education Service Commission, through which applications were invited for the post of Principals for non-governmental colleges in different Universities within the State of Uttar Pradesh, the appellant applied for the same. The appellant was interviewed and on the basis of the list prepared by the said commission, the Director intimated the names of the various selectees to the managements of various colleges for being appointed as Principals. As per the policy existing at the relevant time, the appointment could only be of an incumbent in case the subject in which he is specialised is taught in the said institution. In the present case, the subject of study of the appellant is "Physics". Incidentally, there were only four colleges where Physics was being taught and four selectees of different subjects, who were higher in the order of merit and whose subjects of studies were also available in the colleges, were appointed in those four colleges. Hence, the appellant could not be appointed in the absence of Physics being taught as one of the subjects therein. Because of this, thereafter the selectees, who were placed below the appellants in the merit list, were also appointed as Principals in the merit list, were also appointed as Principals in respective colleges where their subjects of studies were being taught.

On the 1st July, 1993, a post of Principal in Maharaj Singh D.G. College, Saharanpur fell vacant on the retirement of Mr. R.P. Sharma, who was a regular Principal of the college. The Director or Higher Education on 20th July, 1993, while exercising power under Section 13(4) of the Act, directed the management of the said college to appoint the appellant as Principal. Against this direction, respondent No.1 herein, namely, Dr. Yogesh Kumar Gupta, filed a writ Petition in the High Court for quashing of the same. Respondent No.1 exerted therein that in fact he is working in the said college as Lecturer in Physics since 1956. He claimed that when the post of Principal fell vacant, by virtue of statute 13.20 of the Meerut University Act, he was appointed as Officiating Principal of the aforesaid college and he assumed charge as Principal of the College. On 19th June, 1995, the High Court allowed the writ petition and

quashed the said order of the Director. Against that judgment, the present appeal by special leave is preferred.

The High Court, in accepting the contention of respondent No.1 relied upon the case of State of Bihar and another Vs. Madan Mohan Singh and others : AIR 1994 SC 765 and held the present case to be similar to the facts of that case. It was held that there was no occasion for the Director to exercise power under Section 13(4) when a regular vacancy has arisen after superannuation of the Principal in the concerned college. The Director took wrong recourse under the said provisions by sending the name of the appellant which is not contemplated therein. Since there was no advertisement which is necessary for such vacancy, hence the said order was bad and was quashed.

Learned counsel for the appellant vehemently argued that the vacancies under Section 13(4) when it refers to "occurring due to death, resignation or otherwise", the word "otherwise" be not read as a ejusdem generis but in a wider connotation covering all vacancies, it would cover all vacancies including the vacancies referred to under Section 12(2) but prior to the intimation by the management may be for the subsequent academic year. It is not in dispute that the appellant applied for the vacancies published on 20th April, 1992. As aforesaid, it covered all the vacancies of the academic year which would be from 1st July, 1991 to 30th June 1992. In other words, not only the existing vacancies on the date of publication of the advertisement, i.e., 20th April, 1992, but till 30th June, 1992. Section 12(2) empowers filling of the vacancies likely to be caused during the course of ensuing academic year. The academic year is defined under explanation of that sub-section as the period of 12 months commencing on July 1. The appellant contends, in view of Section 13(2), that the life of the list sent by the commission is extended till the next new list is received from the commission, the list in question would be alive, even beyond one year. The vacancy as aforesaid, hence occurring on 1st July, 1993, even though falling in another academic year would also be covered by the word "otherwise" and hence appointment of the appellant by means of the order of Director is valid.

The contention is that the purpose for amending the old law was to remove the adhocism hence the word "otherwise" should not be interpreted in a restricted sense. If interpreted in a wide sense, any vacancy accruing till the next list by the Commission would be absorbed and hence no vacancy would remain unfilled for long. There should be no difficulty to make appointment from the duly selected persons who are in the panel of the select list, even if there is any delay in making selection for the subsequent academic year.

On behalf of the State, supporting appellant's case, learned counsel emphasised that the purpose of 25% more than the vacancies advertised under sub-section (1) of Section 13 is only to cover such exigencies, namely to appoint such persons from the said list for any subsequent vacancies occurring not only for the vacancy advertised but which may occur in any subsequent academic year in question.

Learned counsel for the appellant referred to Surinder Singh and Others Vs. State of Punjab and another : (1997) 8 SCC 488. Reliance is placed on paragraph 13:

"State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and

that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment."

He also relied on the following words in paragraph 14:

"A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules."

The contention is that the other observations in the said decision even though may be said to be contrary to contention raised by the appellant but the same is diluted when it approves an appointment in exceptional circumstances. It further approves if there be any relevant rules in this regards. In the present case the appellant contends that under sub-section (4) of section 13, there is a specific provision to include such vacancies, hence it is within the permissible law and rules and as such, the appointment of the appellant is valid.

On the other hand learned counsel for respondent No.1 argued that the word "otherwise" under Section 13(4) is to be read as a ejusdem general and would cover only such vacancies which could be grouped with the like words "death and resignation" that is to say unforeseen vacancies. This would not include the vacancies occurring for succeeding academic years.

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 adhocism and irregular appointment of teachers. This is also to eliminate favoritism, 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 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 it a case be made out which erodes the very foundation of a teaching institution by lowering the teaching standard. It is, keeping this objective, the aforesaid amendments in 1992 were brought in. The relevant portion of Statement of Objects and Reasons of the aforesaid Act in this regard is reproduced below:-

" Prefatory Note Statement of Objects and Reasons. The Uttar Pradesh Higher Education Services (Commission) Act, 1980 (U.P. ACT No. 16 of 1980) has been enacted to

establish a Service commission for the selection of teachers for appointment to the colleges affiliated to or recognised by a University. Section 16 of the ACT empowered the management of Degree Colleges to appoint ad hoc teachers. Under this provision ad hoc teachers were appointed in the non-Government colleges who continued to work from the date of their appointment. These teachers had been demanding regularisation their service. It was decided to amend the aforesaid ACT:

(1) To regularise the qualified and otherwise eligible ad hoc teachers appointed during the period between January 3, 1984 and January 30, 1991;

(2) To abolish system of appointing ad hoc teachers;

(3) To streamline the manner of selection of teachers by providing that subject wise consolidated number of vacancies likely to be caused during an academic year shall be notified to the commission which will send the list of candidates selected for appointment to the Director, who will intimate the names to management for making appointments;"

We find, after giving out 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 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 preceeding 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 for seen 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.

In the aforesaid case of Surinder Singh (supra) relied upon by the appellant, the Court also holds in clear words:

"It is in no uncertain words that this Court has held that it would be an improper exercise of power to make appointments over and above those advertised. It is only in rare and exceptional circumstances and in emergent situation that this rule can be deviated from. It should be clearly spelled out as to under what policy such a decision has been taken. Exercise of such power has to be tested on the touchstone of reasonableness. Before any advertisement is issued, it would, therefore, be incumbent upon the authorities to take into account the existing vacancies and anticipated vacancies. It is not as a matter of course that the authority can fill up more posts than advertised."

It is not necessary to go into the question, to the portion relied upon by the appellant in the aforesaid case of Surinder Singh as that is not the position here, nor set up before the High Court or in the S.I.P. in the pleadings in exceptional circumstances or in an emergent situation and that too by taking a policy decision such appointment could be made. We find that in the present case neither there is any exceptional circumstances, emergent situation or any policy decision in this regard nor there is anything on the record to suggest the same. This apart, in the present case in view of clear provision in the ACT there is no scope from deviating from the clear mandate that is to absorb any vacancy after due advertisement. Hence it would be of no avail to the appellant. Section 12 and 13, as we have found above, lead to inescapable conclusion that the appointment on the regular vacancies occurring under Section 12(2) could only be made by advertisement under the proviso to sub-section (4) of Section 12. This will ensure proper teaching and maintaining the standard of institution.

Of course, the filling of vacancies under sub-section (4) of Section 13 on the vacancies already advertised arises only in case the person does not join or on account of death or resignation or person after joining, becomes invalid or such unforeseen circumstances. In other words, all the circumstances has to be within the vacancies already advertised and not beyond it. The sphere of sub-section (4) of section 13 is within the vacancies for which the Commission took interview or the examination, as the case may be, under sub-section (1) of section 13 sub-section (2) which says that the list from the commission only means that in case there is delay in the next new list and any vacancy occurs on account of the unforeseen reason within the vacancies advertised, the said vacancy can be filled up under sub section (4) of Section 13. The list would not come to an end after a period of one year, as was earlier, and would continue for a limited purpose as explained above till the selection in the next academic year in question is made

and recommendations are sent with a fresh list.

In Hoshiar Singh Vs. State of Haryana and others: 1993 Supp (4) SCC 377, selection of candidates by the selection committee in excess of requisition was held to be illegal. it was held :-

"Since the requisition was for eight posts of inspector of Police, the Board was required to send its recommendations for eight posts only. The Board, on its own, could not recommend names of 19 persons for appointment even though the requisition was for eight posts only."

In Ashok Kumar and others Vs. Chairman, Banking Service Recruitment Board and others : 1996 (1) SCC 283 the Court held :

"Article 14 read with Article 16(1) of the constitution enshrines fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of Constitution. The procedure adopted, therefore, in appointing the persons kept in the waiting list by the respective Boards, though the vacancies had arisen subsequently without being notified for recruitment, is unconstitutional. However, since the appointment have already been made and none was impleaded, we are not anclined to interfere with these matters adversely affecting their appointments, However hereafter the respective Boards should notify the existing and excepted vacancies and Recruitment Board should get advertisement published and recruitment should strictly be made by the respective Boards in accordance with the procedure to the notified vacancies but not to any vacancies that may arise during the process of selection."

The view taken in this case is the same as we have round above.

As per the scheme of the Act and the aforesaid provisions, for each academic year in question, the management has to intimate the existing vacancies and vacancies likely to be caused by the end of the ensuing academic year in question. Thereafter, the Director shall notify the same to the Commission and the Commission, in

turn, will invite applications by giving wide publicity in the State of such vacancies. The vacancies cannot be filled except by following the procedure as contained therein. Sub-section (1) or Section 12 has incorporated in strong words that any appointment made in contravention of the provisions or the ACT shall be void. This was to ensure no back door entry but selection only as provided under the said sections.

We have also perused the Judgment given by the High Court. We find that the order of the Director, under which the appellant claims appointment, was rightly quashed by the High Court.

It was also argued, though not with the same vehemence, that respondent No. 1 has no locus standi to challenge the said order of the Director. Apart from the fact that this question was never raised by the appellant either in the writ petition before the High Court or in the Special leave petition, we find that respondent No.1 has interest, as he was officiating Principal appointed under statute 13.20 of the Meerut University. It was argued by learned counsel for the appellant that the statute contemplates the appointment of a Principal should be of a senior most teacher which respondent No.1 is not. Repelling this argument, respondent No. 1 has pointed out through an affidavit before this Court that since the senior most teacher declined this after, the next senior most, i.e. respondent No.1, was appointed to which there was no denial. For all these reasons, we do not find any substance in the objection of the appellant regarding locus standi of respondent No.1.

For the aforesaid reasons, we do not find any merit in the contentions raised by the learned counsel for the appellant. Hence, the appeal fails and is dismissed. Costs on the parties.