

Special Appeal (Defective) No 215 of 2015

Santosh Kumar Singh

Vs

State of U P & Ors

Appearance:

For the Appellant : Shri R C Dwivedi, Advocate

For the Respondents : Shri C B Yadav, Addl Advocate General
Shri Shashank Shekhar Singh, Addl CSC

Hon'ble Dr Dhananjaya Yeshwant Chandrachud, Chief Justice

Hon'ble Dilip Gupta, J

Hon'ble Pradeep Kumar Singh Baghel, J

(Per Dr D Y Chandrachud, CJ)

The present reference to the Full Bench has been occasioned by a referring order of a Division Bench of this Court dated 20 March 2015. The questions which have been referred for decision by the Full Bench are thus:

(a) Whether even after the rescission of Removal of Difficulties Orders under Section 33-E of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982¹ (U P Act No 5 of 1982), with effect from 25 January 1999, the Committee of Management retains the power to make ad-hoc appointment against short term vacancies only because it had published an advertisement for the purpose prior to 25 January 1999;

(b) Whether on enforcement of Section 33-E of the

Act rescinding the Removal of Difficulties Orders issued earlier, the Committee of Management has lost all powers to make ad-hoc appointment against short term vacancies;

(c) Whether under Section 16-E of the Intermediate Education Act 1921², there is a power with the Committee of Management to make ad-hoc appointment against short term vacancies and if so then for what period; and

(d) Whether the Division Bench in the case of **Subhash Chandra Tripathi Vs State of U P**³ has laid down the correct law.

The Act established the Secondary Education Services Selection Board⁴ for selection of teachers in institutions recognized under the Act of 1921. Section 16 of the Act provides that notwithstanding anything to the contrary contained in the Act of 1921 or the regulations made thereunder but subject to certain specified provisions of the Act, every appointment of a teacher shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the Management only on the recommendation of the Board. Section 32 provides that the provisions of the Act of 1921 and the regulations made thereunder, insofar as they are not inconsistent with the provisions of the Act or its regulations, shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal,

2 Act of 1921

3 Writ-A No 70271 of 2010 decided on 14 July 2014

4 Board

termination or reduction in rank of a teacher. Section 33 of the Act provides that the State Government may, for the purposes of removing any difficulty, by a notified order, direct that the provisions of the Act shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission as it may deem to be necessary or expedient. Section 33-E was introduced into the Act by U P Act No 13 of 1999 so as to provide for the rescission of the Removal of Difficulties Orders made under Section 33 of the Act and is in the following terms:

“ 33-E. Rescission of Orders.– The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Third) Order, 1982 and the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Fourth) Order, 1982 are hereby rescinded.”

Section 33-E was introduced with effect from 25 January 1999. Prior to the introduction of Section 33-E, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981⁵ was issued in exercise of the power conferred by Section 33 to remove difficulties. Para 2 of the Removal of Difficulties Order provided for the vacancies on which ad hoc appointments could be made while Para 3 referred to the duration of

5 Removal of Difficulties Order

ad hoc appointments. The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981⁶ was thereafter notified. Para 2 of Removal of Difficulties (Second) Order provided the procedure for filling up short term vacancies, while Para 3 provided for the duration of ad hoc appointments.

The issue which has been referred to for adjudication before the Full Bench relates to a situation where the process of selection for making an ad hoc appointment had commenced prior to 25 January 1999 when the Removal of Difficulties Orders stood rescinded as a result of the insertion of Section 33-E.

A reference was earlier made to a Division Bench of this Court by a learned Single Judge in **Subhash Chandra Tripathi (supra)** of the following questions:

“(a) Whether in respect short term vacancy, appointment can be made by the Committee of Management subsequent to 25 January 1999 when the power to make ad hoc appointment by the Committee of Management itself has been withdrawn by addition of Section 33-E to U P Act No 5 of 1982; and

(b) Whether initiation of process by an advertisement prior to 25 January 1999 can lead to suggest that even after statutory withdrawal of the substantive power of the Committee of Management to make ad hoc appointment against short term vacancy, it still retains the same after 25 January 1999, merely

⁶ Removal of Difficulties (Second) Order

because the process of selection was initiated earlier.”

The Division Bench, by a judgment dated 12 December 2011 answered the reference in the following terms:

“(a) A short term vacancy for which the process of appointment was started to fill it up by the ad hoc appointment by the Committee of Management of the College prior to 25.1.1999 can be filled up and the appointment can be made by the Committee of management even after the rescission of the Removal of Difficulties Orders by inserting Section 33-E to the U P Act No 5 of 1982.

(b) The initiation of process by an advertisement prior to 25.1.1999 by the Committee of Management to fill up a short term vacancy by ad hoc appointment can be continued and concluded and appointment letters issued even after initiation of Section 33E to the UP Act No 5 of 1982 w e f 25.1.1999.”

In taking this view, the Division Bench relied upon a decision of the Supreme Court in **A A Calton Vs Director of Education**⁷. The Division Bench held that in a situation where the selection process had been initiated prior to the rescission of the Removal of Difficulties Orders on 25 January 1999 by the insertion of Section 33-E, the Committee of Management would have the power to make an ad hoc appointment on short term vacancies. The Division Bench held that, as a matter of interpretation, a

7 (1983) 3 SCC 33

view which has stood the test of time and has been applied consistently to cases coming to the Court should not be easily reconsidered for departure unless it was principally wrong. A large number of teachers were appointed on ad hoc basis on short term vacancies for which the selection process had commenced prior to 25 January 1999 and the endeavour of the Court should not be to unsettle the position of law which had held the field. The Division Bench took note of the fact that the position in law has in **Deshraj Singh Negi Vs State of U P**⁸ been adopted by a learned Single Judge and in other decisions which should not be lightly disturbed.

The reference before the Full Bench is now by a Division Bench of this Court. The questions which have been formulated for decision are principally the same as those which were answered by the Division Bench on a reference being made by a learned Single Judge in **Subhash Chandra Tripathi (supra)**.

In **A A Calton (supra)**, a Selection Committee had been constituted under Section 16-E of the Act of 1921. The selection was not approved by the Regional Deputy Director of Education and the matter was again remitted to the Selection Committee. A second recommendation of the Selection Committee was also disapproved by the Regional Deputy Director after which a third recommendation was made. The appellant, who was one of the recommended candidates but placed below the first candidate, challenged the selection. The High Court allowed the writ

petition holding that the selection made by the Selection Committee on the third occasion was without jurisdiction. As a result of an amendment made with effect from 18 August 1975 by U P Act No 26 of 1975, the power of the Director to make an appointment under Section 16-F (4) of the Act of 1921 was taken away in the case of minority institutions. The Supreme Court held that though the power was expressly taken away by the amending Act, the provisions of the amending Act did not apply to pending proceedings under Section 16-F and the amendment was not made applicable retrospectively either expressly or by necessary implication. The Supreme Court held as follows:

“It is no doubt true that the Act was amended by U P Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment under Section 16-F (4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings under Section 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection under Section 16-F of the Act commencing from the stage of calling for applications for a post upto the date on which the Director becomes entitled to make a selection under Section 16-F (4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as

merely a procedural provision. It is true that the Legislature may pass laws with retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U P Act No 26 of 1975 should have been followed in the present case.”

The decision in **A A Calton (supra)** is, therefore, an authority for the proposition that once a process of selection has been initiated, a subsequent amendment of the law by which the power to make an appointment has specifically been taken away from a statutory authority – in that case from the Director – would have no application to a pending selection process which must be governed by the law as it stood when the selection process was initiated. Undoubtedly, the Legislature does have the power to make a law with retrospective effect but unless the law is made expressly retrospective or retrospective by necessary implication, the position of law as it stood when the selection process was initiated, would govern the selection.

In certain other contexts, the Supreme Court has held, for instance, that a selection process has to be governed by the Rules and Government Orders in existence on the date on which the process is initiated. In **N T Devin Katti Vs Karnataka Public Service Commission**⁹, the Supreme Court held as follows:

“...Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and government orders and any amendment of the rules or the government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended Rules or the amended government orders,

9 (1990) 3 SCC 157

issued in exercise of its statutory power either by express provision or by necessary intendment indicate the amended Rules shall be applicable to the pending selections. See *P Mahendran Vs State of Karnataka*¹⁰.”

In **State of Bihar Vs Mithilesh Kumar**¹¹, the Supreme Court held that a change in the norms of recruitment could be applied prospectively and could not affect those who have been selected for being recommended for appointment after following the norms which were in place at the time when the selection process was commenced. The submission to the contrary was based on the decision in **Shankarsan Dash Vs Union of India**¹² to the effect that mere inclusion in a select panel did not confer indefeasible right to appointment. The Supreme Court explained the position in law as follows:

“The decisions which have been cited on behalf of the respondent have clearly explained the law with regard to the applicability of the rules which are amended and/or altered during the selection process. They all say in one voice that the norms or rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect...While a person may not acquire an indefeasible right to appointment merely on the basis of selection, in the instant case the fact situation is different since the claim of the respondent to be

10 (1990) 1 SCC 411; JT (1989) 4 SC 459

11 (2010) 13 SCC 467

12 AIR 1991 SC 1612

appointed had been negated by a change in policy after the selection process had begun.”

In a subsequent decision in **Government of Andhra Pradesh Vs Sri Sevadas Vidyamandir High School**¹³, the Supreme Court held that a ban on recruitment to grant-in-aid posts had been issued after the school in question had been permitted by the State to fill up vacant posts. The Supreme Court held that in these circumstances, the State could not contend that the process of rationalization which was introduced subsequently, would also apply to private aided schools, where the process of recruitment had already been commenced pursuant to the approval granted earlier.

The judgment in **AA Calton (supra)** has been recently followed in a decision of the Supreme Court in **Kulwant Singh Vs Daya Ram**¹⁴ in the context of the principle that vacancies which had occurred prior to an amendment of rules would be governed by the unamended rules and not by the amended rules where the amended rules are not made retrospective either expressly or by implication.

The judgment of the Division Bench in **Subhash Chandra Tripathi's** case was based on the law laid down by the Supreme Court in **AA Calton (supra)**. In the referring judgment, the Division Bench has doubted the correctness of that view based on a judgment of the Supreme Court in **Shankarsan Dash (supra)**. In the view of the Division Bench, the

13 (2011) 9 SCC 613

14 (2015) 3 SCC 177

Supreme Court has held that even a selection does not confer a right of appointment. Hence, the view which has been taken by the Division Bench is that a mere initiation of the process of selection will not result in the retention of the power of appointment by the authority concerned even when the power of appointment had been withdrawn under a statutory provision, in this case Section 33-E. The decision in **Shankarsan Dash (supra)** of a Constitution Bench of the Supreme Court dealt with the issue as to whether a candidate whose name appears in the merit list on the basis of a competitive examination acquires an indefeasible right of appointment as a government servant merely because a vacancy exists. In that context, the Supreme Court held as follows:

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the

recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*¹⁵, *Miss Neelim Shangla v. State of Haryana*¹⁶, or *Jitendra Kumar v. State of Punjab*¹⁷”

These observations of the Supreme Court would indicate that the issue in **Shankarsan Dash (supra)** was completely distinct. A candidate who is on a select list does not have an indefeasible right to appointment merely because a vacancy exists. That is not the issue in the present case. The issue in the present case is whether a process of selection which was initiated prior to the insertion of Section 33-E which rescinded the Removal of Difficulties Orders must be governed by the law as it then stood at the time when the process was initiated by the issuance of an advertisement. Plainly, the issue is not about the right of a particular candidate to appointment but whether the selection process should be governed by the law as it stood when the selection process was initiated. On this aspect, the consistent position of law has been laid down in the judgment of the Supreme Court in **A A Calton (supra)**.

The Division Bench of this Court, while deciding the case of **Subhash Chandra Tripathi** has also adverted to a judgment of another Division Bench in **Daya Shanker Mishra Vs District Inspector of**

15 (1974) 1 SCR 165 : (AIR 1973 SC 2216)

16 (1986) 4 SCC 268 : (AIR 1987 SC 169)

17 (1985) 1 SCR 899 : (AIR 1984 SC 1850)

Schools¹⁸. In **Daya Shanker Mishra's** case, the Division Bench held that after the insertion of Section 33-E, there should have been some provision for filling up substantive vacancies by making ad hoc appointments. The Division Bench held that if an ad hoc appointment were not to be made at all and an educational institution requires the services of teachers, the interest of students would be seriously prejudiced in the absence of an adequate complement of teachers for imparting education. In **Subhash Chandra Tripathi's** case, apart from following the law laid down by the Supreme Court in **A A Calton's** case, the reasoning in **Daya Shanker Mishra** was pressed into aid as an additional ground for supporting the conclusion. For the purposes of this reference to the Full Bench, it would be appropriate for the Court to answer the issues which have been raised, based on the consistent position of law as it emerges from the decisions of the Supreme Court.

Section 16-E of the Act of 1921 provides for the procedure for selection of teachers and heads of institutions. Sub-section (11) of Section 16-E is to the following effect:

“(11) Notwithstanding anything contained in the foregoing sub-sections, appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or by death, termination or otherwise of an incumbent occurring during an educational session, may be made by direct recruitment or promotion without reference to the

18 [2011 (1) ESC 221 (All) (DB)]

Selection Committee in such manner and subject to such conditions as may be prescribed:

Provided that no appointment made under this sub-section shall, in any case, continue beyond the end of the educational session during which such appointment was made.”

Sub-section (11) of Section 16-E has thus made a specific provision in regard to appointments in the case of temporary vacancies caused by (i) the grant of leave to an incumbent for a period not exceeding six months; or (ii) by death, termination or otherwise of an incumbent occurring during an educational session. The object of the provision is to ensure that where a temporary vacancy arises as a result of fortuitous circumstances, such as leave, death, termination or otherwise, the educational needs of students should not be disturbed. The purpose of making an arrangement in the case of a temporary vacancy is to protect the interest of education so that students are not left in the lurch by the absence of a teacher in the midst of an academic session. The proviso to sub-section (11), however, stipulates that an appointment which is made under the provisions of sub-section (11) shall, in no case, continue beyond the end of the educational session during which the appointment was made. The proviso is intended to ensure that the purpose of appointment against a temporary vacancy caused due to the absence of a teacher in the midst of an academic session is met by continuing the appointment during and until the end of the academic session but not further. This is a provision which has been made by the

state legislature in its legislating wisdom. The statutory provision provides both for the circumstances in which a temporary vacancy can be filled up and the length of an appointment made against a temporary vacancy. The difficulty which arises is because the Board, which has been constituted under the Act, does not fulfill its mandate of promptly selecting teachers for regular appointment. The District Inspector of Schools is in possession of necessary factual data in regard to the dates of appointment and retirement of teachers of aided institutions. This can be summoned by the Board even if the management does not comply with its duty to intimate vacancies. There can be no justification for the Board not to discharge its duties with dispatch and expedition. This is liable to result in a situation where the educational needs of students are seriously disturbed due to the unavailability of duly selected teachers. Ad hoc appointments in temporary vacancies also cause a state of uncertainty for teachers and lay them open to grave exploitation at the hands of certain managements of educational institutions. Thus, considering the matter both from the perspective of the interest of education as well as the welfare of teachers, it is necessary that the Board must take due and proper steps well in advance of an anticipated vacancy to initiate the process of selection. Similarly, the State Government would do well to streamline the procedure for making appointments in respect of temporary vacancies consistent with the mandate of Section 16-E (11) so that, while the interest of students is protected, the teachers are not exposed to exploitation.

We consequently answer the reference in the following terms:

(a) Despite the rescission of the Removal of Difficulties Orders by Section 33-E of U P Act No 13 of 1999 with effect from 25 January 1999, the power of the Committee of Management to make appointments against short term vacancies, where the process of appointment had been initiated prior to 25 January 1999 by the publication of an advertisement, would continue to be preserved;

(b) On the enforcement of the provisions of Section 33-E, the power of a Committee of Management to make ad hoc appointments against short term vacancies would not stand abrogated in a case where the process of selection had been initiated prior to 25 January 1999;

(c) Under Section 16-E of the Intermediate Education Act, 1921, the Committee of Management is empowered to make an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E as provided in the proviso thereto shall, in any case, not continue beyond the end of educational session during which the appointment was made; and

(d) The judgment of the Division Bench in **Subhash Chandra Tripathi (supra)** is affirmed as laying down a correct interpretation of the judgment in **AA Calton (supra)**.

The reference to the Full Bench is answered in the aforesaid terms.
The special appeal shall now be placed before the appropriate Bench for disposal in the light of this judgment.

Order Date :- 22.7.2015

AHA

(Dr D Y Chandrachud, CJ)

(Dilip Gupta, J)

(P K S Baghel, J)