IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8300 OF 2016

SANJAY SINGH & ORS. ... APPELLANT(S)

VERSUS

STATE OF UTTAR PRADESH & ORS. ... RESPONDENT(S)

WITH

SLP(CIVIL)Nos.26701/2019, 2644/2020, 5859/2020, 8484/2020
11074/2017,19561-19562/2019, 19559/2019, 25118/2019,
7176-7177/2019, 15087/2017, CIVIL APPEAL NOS.7403/2018,
1655-1656/2019, 8301/2016, 10454/2016, 2827/2017, 7849/2017

O R D E R

1. The present dispute is a reflection of the mess in the education system where starting from the primary level to the highest level adhocism seems to prevail in the appointment of teachers and lecturers in turn having consequences for the students who need to benefit from the best education process. That has not been so.

2. It is in the aforesaid circumstances that the impugned judgment (Writ Petition No.655 of 2014 Abhishek Tripathi vs. State of U.P. through Secy.Secondary Education, Lko. & Ors. decided on 17th December, 2015) has been rendered to bring an end to the adhocism which was prevailing. The impugned judgment recognizes the mess which is created to which all are contributory but ultimately deemed it proper to decline relief.

3. We have been hearing this matter from time to time to find the solution. We may say at the inception that we are not in disagreement with what has been set out in the impugned judgment but then this Court has the benefit of Article 142 of the Constitution of India to do complete justice between the parties and we are taking recourse to this to deal with the mess which is before us i.e. a complete adhocism in the working of the education system whereby TGTs and lecturers have been working for years and decades without a regularization. We do find that everyone is to blame for this scenario as what was an adhoc arrangement never fructified in the proper regularization or by holding examination in which recruitment could take place. If the recruitments did take place, that was periodic in terms of examination held after long period of time.

4. We have heard learned counsel for the parties at length earlier and even today to find a solution to the problem. Our attention has also been drawn to the last additional affidavit filed by the State of Uttar Pradesh and what emerges is that the State proposes to hold a competitive examination for recruitment of 15000 TGTs and lecturers both (if there are more existing vacancies reported as per rules, the Commission should take care to advertise even for those vacancies). Insofar as the parties before us are concerned, whether as appellants/petitioners or as interventionist, on verification it was found that there are 659 persons before this Court and out of them information regarding 112 persons could not be traced out in absence of details. The details are available only for 547 adhoc teachers (in view of appellants disputing, this

is subject to further verification) being 84 lecturers and 463 TGT grade teachers as set out in paragraph 11 of this affidavit.

5. We did debate the issue whether a separate examination should be held for such persons or whether they should participate in the prospective examination process. Normally the difficulty arises on account of the age bar but i.e. undisputedly not a factor in the present case as everybody will be permitted to appear. At times separate examinations have been held in different situations but in the present case we are not concerned with persons who are working at a trade and have been away from the academics since the very nature of job of teaching envisages a continued academic pursuit and improving your skills in teaching.

6. A concern has been expressed by learned counsel for the appellants and applicants that there may be persons who may have rendered long period of service as adhoc and if they really participate in the examination and are even successful, they may not get benefit of the past service, specially retirement benefits, as some of them may be near the age of retirement than the fresh candidates.

7. It is in the conspectus of all the aforesaid circumstances that we consider appropriate to issue the following directions in exercise of power under Article 142 of the Constitution of India:

(a) **All the petitioners/appellants and applicants before us and for that matter all persons eligible under the advertisement will be permitted to appear for one single examination.**

(b) **Such of the persons who are successful, would have to go through a process of interview insofar as the post of lecturers is concerned, as we are informed that the post of TGTs the interviews have been dispensed with.**

(c) We **are inclined to give some weightage to the persons who have worked as TGT and lecturers depending on the period of service rendered. It is respondent No.3-Commission which will have to tweak this aspect and work out giving some weightage to both TGT and lecturers depending on the period of service rendered. In the case of TGTs, such weightage will have to form a part of the total marks while in case of the lecturers such weightage can be given in the process of interview.**

(d) **The advertisement to be issued should contain the terms of these directions issued by us today.**

(e) We **make it clear that the decision as aforesaid will be final of the Commission and no further litigation will be entertained in respect thereof.**

(f) **Insofar as the verification of past service is concerned, the concerned teachers/lecturers would give the particulars and details to the Commission**

for obtaining such weightage and that aspect will be verified by the Commission in consultation with the State Government as we are told that it is the State Government which would have the wherewithal to do the needful. Needless to say that aspect will also be final without any further litigation being entertained in that behalf.

(g) In view of the weightage given, for the same the examination process can be completed.

(h) The other aspect is that apart from the weightage, the period which has been verified as having been spent in teaching as adhoc, would be counted for purposes of retiral benefits of the TGTs and Lecturers.

8. On having considered and on having issued the aforesaid directions, we also feel it is necessary to direct that we are not faced with such a situation in future. We would thus like to direct the State and the Commission to lay down a schedule for periodically holding examinations so that it creates employment opportunities and also the students are benefitted. We would require the Commission to not only take into consideration the existing but also future vacancies reported as per rules for purposes of holding such examinations in future. This should be strictly followed. The learned Advocate General states that this aspect is being taken care of.

9. In view of the petitioners/appellants in their own case having made the ground on the basis of Section 16-E(sub-section 11) of the Intermediate Education Act, 1971 that where teachers have been working for period against substantive vacancies temporarily, there is a provision to give benefits to them, we consider appropriate that the benefits of past service would be rendered only to such of the persons who have been appointed temporarily in accordance with the provisions of this Section. We expect the State to be fair in this matter in recognizing the various nature of vacancies which may have arisen.

10. We have also considered the prayer made in IA No.48618 of 2020 in SLP(Civil)Nos.19561-19562 of 2019. We have heard learned counsel for the parties on this aspect and have taken cognizance of the fact that there may be teachers/lecturers who are working and not paid for almost two years. The second concern is that till this examination process is completed, a prayer is made on behalf of the petitioners/appellants and the applicants that they should be permitted to continue.

11. On having examined the issue, we feel it will be appropriate to direct that the teachers/lecturers who are employed at present the TGTs and lecturers would continue to be so employed till the aforesaid process is completed and to the extent the financial benefits are given by the State Government to the institutions, against appointments made in compliance with Section 16-E (sub-section 11) of the Act, the same will also be given to provide succour to the TGT/lecturers.

12. We end with the hope that we will never be faced with the aforesaid situation again and the State Government and the Commission will also make every endeavour to ensure that the order is complied in its true intent and spirit and specially the aspect of holding examinations for the future taking into consideration all current and future vacancies reported as per rules is followed in times to come. We need not emphasize that education in a very important role performed by a State apart from the area of medical assistance to citizens and thus it is necessary that the full benefit is extended to the students which can only take place if the full strength of teachers is available at the requisite time. This in turn requires compliance with the aforesaid directions for the future.

13. Since there is always hope, we hope for a better future.

14. The aforesaid exercise by the Commission in consultation with the State Government should be completed well in time to ensure that at least in the session commencing in July, 2021 all teachers up to date are in place.

15. All the appeals and special leave petitions are disposed of in terms aforesaid.

16. All pending applications also stand disposed of.

.....J.
[SANJAY KISHAN KAUL]

.....J.
[K.M.JOSEPH]

NEW DELHI;
August 26, 2020.

ITEM NO.301 Court 6 (Video Conferencing) SECTION III-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 8300/2016

SANJAY SINGH & ORS. Appellant(s)

VERSUS

STATE OF UTTAR PRADESH & ORS. Respondent(s)

(IA No. 74387/2020 - CLARIFICATION/DIRECTION
IA No. 74389/2020 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 26240/2020 - MODIFICATION OF COURT ORDER)

WITH SLP(C) No. 26701/2019 (FOR ADMISSION and I.R.)

SLP(C) No. 2644/2020 (FOR ADMISSION and I.R.)

SLP(C) No. 5859/2020
(IA No. 57523/2020 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 65605/2020 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 57522/2020 - INTERVENTION/IMPLEADMENT
IA No. 12129/2020 - INTERVENTION/IMPLEADMENT
IA No. 3302/2020 - INTERVENTION/IMPLEADMENT
IA No. 65604/2020 - INTERVENTION/IMPLEADMENT
IA No. 3644/2020 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

SLP(C) No. 8484/2020
(IA No. 65610/2020 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 55043/2020 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 65612/2020 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 65224/2020 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 63658/2020 - EXEMPTION FROM PAYING COURT FEE
IA No. 63908/2020 - INTERVENTION/IMPLEADMENT
IA No. 63655/2020 - INTERVENTION/IMPLEADMENT
IA No. 65608/2020 - INTERVENTION/IMPLEADMENT
IA No. 65223/2020 - INTERVENTION/IMPLEADMENT
IA No. 55034/2020 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

SLP(C) No. 11074/2017
(IA No. 4273/2019 - APPROPRIATE ORDERS/DIRECTIONS)

SLP(C) No. 19561-19562/2019
(IA No. 48618/2020 - APPROPRIATE ORDERS/DIRECTIONS)

SLP(C) No. 19559/2019
(FOR ADMISSION and IA No.114322/2019-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

SLP(C) No. 25118/2019

C.A. No. 7403/2018
(IA No. 100424/2018 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT
IA No. 100425/2018 - EXEMPTION FROM FILING O.T.)

C.A. No. 1655-1656/2019
(IA No. 127971/2018 - EXEMPTION FROM FILING O.T.)

SLP(C) No. 7176-7177/2019

SLP(C) No. 15087/2017
(FOR EXEMPTION FROM FILING O.T. ON IA 39859/2017)

C.A. Nos. 8301/2016, 10454/2016, 2827/2017 and 7849/2017

Date : 26-08-2020 These matters were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE K.M. JOSEPH

For Appellant(s) **Mr. Ajay Kumar Mishra,Sr.Adv./AAG**
Mr. Tanmaya Agarwal, AOR
Mr. Wrick Chatterjee,Adv.
Mr. Harsh Pratap Shahi,Adv.

Mr. Satyajeet Kumar, AOR

Mr. Anoop Kr. Srivastav, AOR

Mr. Kailash Vasdev,Sr.Adv.
Mr. Shantanu Sagar, AOR

Mr. Rohit Amit Sthalekar,Adv.
Mr. T. Mahipal, AOR

Mr. Neeraj Kumar Sharma, AOR

Mr. Shail Kumar Dwivedi, AOR

Ms. Preetika Dwivedi, AOR

Mr. Prakash Kumar Singh, AOR

For Respondent(s) Mr. Raghvendra Singh,Sr.Adv./AG
Mr. Harish Pandey, AOR
Mr. Ajay Pandey,Adv.
Ms. Harshita Raghuvanshi,Adv.

Mr. R.K.Raizada,Sr.Adv.
Mr. Sarthak Raizada,Adv.
Ms. Divya Roy, AOR

Mr. V.K.Shukla,Sr.Adv.
Ms. Parul Shukla, AOR

Ms. V.Mohana,Sr.Adv.
Ms. Parul Shukla, AOR
Ms. Nikita Capoor,Adv.

Mr. Rakesh Khanna,Sr.Adv.
Mr. Sunil Kumar,Adv.
Mr. A.V.Shukla,Adv.
Mr. Raghvendra Shukla,Adv.
Mr. Ramjee Pandey, AOR

Mr. Lokesh Kumar Choudhary, AOR

Ms. Preetika Dwivedi, AOR

Mr. Vinay Garg, AOR

Mr. Santosh Krishnan, AOR

Mr. Mareesh Pravir Sahay, AOR

Mr. Deepak Anand, AOR

Ms. Nidhi Agarwal,Adv.
Mr. Pankaj Sharma,Adv.
Mr. Nirdesh Bidhuri,Adv.
Mr. Neeraj Kumar Sharma, AOR

Ms. Manju Jetley, AOR

Mr. Shantanu Sagar, AOR

Mr. Pankaj Kumar Singh,Adv.
Mr. Manish Shankar Srivastava,Adv.
Mr. Raj Singh Rana, AOR

Mr. Harsh Mahan,Adv.
Mr. Gaurav Yadav,Adv.
Mr. O.P.Singh,Adv.
Mr. Prakash Kumar Singh, AOR

Mr. Ashutosh Yadav,Adv.

Mr. Vijay Kumar Sharma,Adv.
Mr. Yadav Narender Singh, AOR

Mr. Robin Khokhar, AOR

Ms. Deepika Mishra,Adv.
Ms. Avishi Dhaka,Adv.
Mr. Shrish Kumar Misra, AOR

Ms. Rajkumari Banju, AOR

Mr. Prashant Shukla,Adv.
Mr. Satyajeet Kumar, AOR

Mr. Prashant Shukla,Adv.
Mr. Piyush Dwivedi, AOR

Mr. Pawan Kumar Shukla,Adv.
Mr. Kamal Kumar Pandey,Adv.
Mr. Abhishek Kumar Singh, AOR

Ms. Archana Mishra,Adv.
Mr. Ashutosh Kumar Sharma, AOR

Mr. Arvind Gupta, AOR
Mr. Sanjay Kumar Chaurasia,Adv.

Mr. Rakesh Mishra, AOR

Mr. Dushyant Parashar, AOR
Mr. Dinesh Pandey,Adv.
Mr. Manu Parashar,Adv.

UPON hearing the counsel the Court made the following

O R D E R

Heard learned counsel for the parties.

All the appeals and special leave petitions are disposed of in terms of the signed order.

Pending applications shall also stand disposed of.

(ANITA MALHOTRA)
COURT MASTER

(ANITA RANI AHUJA)
ASSISTANT REGISTRAR

(Signed order is placed on the file.)

JUDGMENT OF HIGH COURT

Chief Justice's Court
AFR

Writ Petition No.655 (S/S) of 2014

Abhishek Tripathi

Vs

State of U.P. through Secy. Secondary Education, Lko. & Ors.

Appearance

For the petitioner : Sri Jay Krishna Shukla,
Sri Rama Pati Shukla
Sri H G S Parihar, Sr Advocate assisted by
Ms Meenakshi Singh
Sri Ramesh Pandey

For the respondent : C.S.C.
Sri S.K.Yadav Warsi
Sri H P Srivastava, Additional Chief Standing Counsel assisted by Sri Vivek Kumar Shukla Additional Chief Standing Counsel.

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Shri Narayan Shukla,J.

(Per: Dr Justice D Y Chandrachud, Chief Justice)

The reference

The present reference before the Division Bench has arisen from a referring order dated 3 February 2014 of a learned Single Judge. Noticing a conflict between two judgments of the learned Single Judges of this Court, while construing the provisions of the Uttar Pradesh Intermediate Education Act, 1921[1] and the Uttar

1 Act of 1921

Pradesh Secondary Education Services Selection Board Act, 1982[2], the learned Single Judge referred the difference of opinion that has arisen for being resolved by a Division Bench. The two judgments of the learned Single Judges in which the difference of opinion has arisen are:

(i) Sanjay Singh Vs State of Uttar Pradesh & Ors.[3]; and

(ii) Pradeep Kumar Vs State of Uttar Pradesh & Ors.[4]

Facts

Briefly stated, the facts in the referring judgment are that Lokmanya Tilak Inter College, Pratapgarh is a non-government recognized and aided institution governed by the provisions of the Act of 1921 and the Act of 1982. The College is on the grant-in-aid list of the State Government and salaries are paid under the provisions of the Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries to the teachers and other staff of the College) Act, 1971[5]. A post of a Lecturer in Hindi fell vacant on the retirement of a substantively appointed teacher on 30 June 2013. On 1 July 2013, the institution sent a request to the District Inspector of Schools to make an appointment on the post. The Manager of the College, finding that no teacher was made available, decided to fill up the post on a temporary or *ad hoc* basis invoking the provisions of Section 16-E

2 Act of 1982
3 (2013) 1 UPLBEC 758
4 Writ-A No.22520 of 2013 (decided on 1 May 2013)
5 Act of 1971

(11) of the Act of 1921. After the vacancy was advertised by the Committee of Management, the petitioner was selected by a selection committee and was appointed as a Lecturer in Hindi until a regularly selected candidate was made available by the Uttar Pradesh Secondary Education Services Selection Board[6]. The petitioner, who is working since then, sought a writ of mandamus requiring the State to allow him to continue to work and to pay his salary for the post of Lecturer in Hindi from the State exchequer until a regularly selected candidate provided by the Board is made available.

Rival positions

In support of the case, the petitioner has relied upon the judgment of a learned Single Judge of this Court in **Sanjay Singh** (supra). The issue which arose before the learned Single Judge was in respect of persons who are appointed as Assistant Teachers or Lecturers against substantive vacancies or against short term vacancies which were subsequently converted into substantive vacancies in the Inter Colleges across the State of Uttar Pradesh.

The contention of the State is that after the enforcement of the Act of 1982 in the State of Uttar Pradesh, the Committee of Management had no right to select or appoint candidates against substantive vacancies in the posts of Assistant Teachers or Lecturers. On the other hand, the case of the Managements is that since the Board constituted under the Act of 1982 has not been able to send

6 Board

selected candidates, the institutions were entitled to appoint persons on an *ad hoc* basis until regularly selected candidates become available and the State would be liable to pay salaries to these teachers out of the grant made available to the institutions.

The decision in Sanjay Singh

The learned Single Judge in **Sanjay Singh** (supra) accepted the submission which was urged on behalf of the Management. The learned Single Judge observed that there was no dispute about the legal position that after the enforcement of the Act of 1982, no Committee of Management would have the power to make an appointment against a permanent vacancy. This position of law which, as we shall notice is not in dispute, has been set out in the following observations of the learned Single Judge:

> "Broadly speaking there is consensus in all the judgments that after the enactment of U.P. Secondary Education Services Selection Board Act, 1982, the committee of management does not have any power to make appointment on a permanent vacancy.
>
> ... ...
>
> Petitioners have taken various contentions to prove that committee of management has power to appoint teachers but since this controversy has been settled by Division Bench in **Daya Shankar Mishra's** case[7] which is authoritative on this subject; no contention can be entertained by this Court. Thus, committee of

7 2010 (28) LCD 1375

> management do not have any power to appoint as it is law laid down by Division Bench (supra).”

(The reference to the decision of the Division Bench in the aforesaid extract is to the judgment in **Daya Shankar Mishra Vs District Inspector of Schools, Allahabad** (supra) which arose upon a reference by a learned Single Judge). However, having held that the Committee of Management would not have the power to make an appointment against a substantive vacancy, the learned Single Judge was of the view that some modalities had to be worked out to deal with a situation where the Board was unable over a long period to provide selected candidates for filling up substantive vacancies. In the view of the learned Single Judge, no steps have been taken by the State either to bring in legislation or an executive direction. The learned Single Judge formulated the issue for consideration before the Court in that regard in the following terms:

> “(4) Lastly, should not the Court try to device (sic) some methodology by which the bleeding ignorance can be arrested in time to help 'knowledge and education' which are gasping for help at the hands of careless caretakers.”

The view which was formulated by the learned Single Judge was as follows:

> “The question which is troubling the conscience of the Court is reflected in above preposition (sic). The

> State has miserably failed in providing teachers to the institutions to fill up a permanent vacancy in less than three to four years. The same State through its legislation denies power to the committee of management to appoint qualified teachers to impart education in their institutions. Petitions are filed before the Courts for payment of salary to the teachers who in exigency of the situation are appointed by the committee of management as a last resort to salvage the situation. To keep the torch of knowledge burning lest it fades out and merges in darkness of ignorance. The moot question remains:- what is the step to be taken by the Court? Should This Court close its eyes to the situation and once again leave the matter by direction to the State Government to provide remedy (this experiment of the judiciary has failed in last ten years) or some method should be formulated to keep the work of education going and to save the students from ignorance, non-education and illiteracy. The Court chooses the second option."

Accordingly, the following conclusion was arrived at:

> "The Court comes to the conclusion that in case the Board has failed to provide selected candidates even after three months of requisition and the committee of management has appointed a duly qualified teacher after due advertisement in two newspapers, evaluated by a selection committee, permanent post is available, laws of reservation have been followed and qualification is not in doubt then salary should be paid to such teacher till the time regularly selected candidate is sent by the Board. The Court hastens to add that appointment of such a

> teacher is not to be validated in any manner. He does not acquire any right of a regularly selected candidate. This order also does not allow the committee of management to think that they have been given any power of appointment by this order. The order of the Court is being passed only as a desperate measure to keep the education of the students available to them as guaranteed by the Constitution of India."

The District Inspector of Schools was directed to make the payment of salary to the petitioner whose *ad hoc* appointment was to continue until a regularly selected candidate was made available by the Board.

The decision in Pradeep Kumar

Subsequently, in a judgment rendered on 1 May 2013 in **Pradeep Kumar** (supra), a writ of mandamus was sought to the State to ensure the payment of salary to an assistant teacher in an Intermediate College governed by the Act of 1921 and the Act of 1982. In that case, upon retirement of an assistant teacher, the Management made a requisition to the Board. Since the Board did not provide a candidate, the Management proceeded to advertise the vacancy and made a selection which was forwarded to the District Inspector of Schools for approval. Not having obtained an approval, the Management filed a writ petition in which reliance was placed on the decision in **Sanjay Singh** (supra). The learned Single Judge took notice of the provisions of Section 16 of the Act 1982 under which, an

appointment of a teacher, after the enforcement of the provisions, can be made only on the recommendation of the Board failing which the appointment made would be void. In the view of the learned Single Judge, an appointment by the Committee of Management against a substantive vacancy was without any authority and hence, a direction for the payment of salary from the public exchequer could not be issued. The conclusion of the learned Single Judge was in the following terms:

> "Appointment on substantive vacancy in a recognized intermediate college is regulated by the provisions of Act,1982. Section 16 of Act, 1982 declares that appointment shall only be made on the recommendation of the Selection Board and any appointment otherwise would be void. The Act as on date contains no provision for any ad-hoc/temporary appointment being made. Consequently, so far as the Act, 1982 is concerned, no selection for appointment can be made by the Committee of Management.
>
> This Court may record that Section 16-E (11) of Act, 1921 permits appointment on temporary vacancy by the Committee of Management only for a period not exceeding six months or till the end of academic session, otherwise, Act, 1921 does not contemplate any ad-hoc/temporary appointment.
>
> In view of the aforesaid, there being no statutory provision permitting such appointment as has been made by the Committee of Management of the institution, against the substantive vacancy. There cannot be a

> direction to the State Government to make payment of salary through public exchequer."

The learned Single Judge held that if a delay occurs in making a selection by the Board and there is a shortage of teachers in the institution, the Management cannot adopt its own procedure for appointment and the proper remedy available to the Management is to approach the High Court for a mandamus against the Board to make an appointment at the earliest possible. However, if the Management makes an appointment on its own accord, that would be contrary to law and in the view of the learned Single Judge, the liability for payment of salary to such a teacher would fall only upon the Management. In the decision in **Pradeep Kumar** (supra), the learned Single Judge took notice of the earlier judgment in **Sanjay Singh** (supra), but held that the decision does not provide what procedure is to be followed and what method is to be adopted for selection nor can the High Court issue such a direction under Article 226 of the Constitution. The conclusion of the learned Single Judge was in the following terms:

> "In these circumstances, merely because the management has made appointment of a person, who is qualified in terms of the Appendix-A, it will not mean that the said appointment is in accordance with law. In view of Section 16 of Act, 1982, it would be a nullity. No appointment against substantive vacancy can be made except on the recommendation of the Selection Board in

> view of the law as it stands today. Reference Smt. Prameela Mishra vs. State of U.P. & others; 1997 (2) UPLBEC 1329 and Surendra Kumar Srivastava vs. State of U.P. & others; 2007 (1) ESC 118."

The petition was, accordingly, dismissed.

The referring judgment

In the referring order of 3 February 2014, the learned Single Judge has adverted to the provisions of Section 16 of the Act of 1982 under which, notwithstanding anything contrary contained in the Act of 1921, an appointment of a teacher shall be made by the Management only on the recommendation of the Board. The learned Single Judge held thus:

> "The law as has been evolved over the years clearly demonstrates that the legislature as well as the executive has gradually taken over the appointment of teachers both temporary/ad-hoc as well as permanent from the Committee of Management and has placed it in the hands of Selection Board by providing for a detailed mechanism for selection which meets the test under Articles 14 and 16 of the Constitution of India. The burden of salary is upon the State Exchequer. Permitting the Committee of Management to make appointments till the selection of regularly selected candidates or recommended by the Selection Board without following any procedure prescribed and without the education officers having any control, the selections even if temporary would be violative of Articles 14 and 16 of the

> Constitution of India as well as reservation laws. Purpose of Article 21-A of the Constitution can be enforced only by a procedure established by law and any appointment made in violation of the provisions of the law cannot be held to sub-serve the purpose of Article 21-A."

In the view of the learned Single Judge, the decision in **Sanjay Singh** (supra) would virtually amount to re-writing legislation, which is impermissible. On this foundation, the following questions have been referred for adjudication by the Division Bench:

> "1. Which of the two cases namely Sanjai Singh Versus State of U.P. and others in Writ Petition No. 3348 of (SS) of 2012 or Pradeep Kumar Versus State of U.P. and others in Writ Petition No. 22520 of 2013, lays down the correct law.
>
> 2. Scope of Section 16-E(11) of the Intermediate Act, 1921 read with Sections 16, 22, 32 and 33-E of the U.P. Secondary Education Service Selection Board Act, 1982."

The second issue is one of interpretation.

Before we turn to the submissions which were urged on behalf of the petitioner by learned counsel, it would be necessary to advert to the provisions of the relevant legislation on the subject. In the present case, the three enactments of the State legislature, which have a bearing on the subject matter, are:

(i) The Uttar Pradesh Intermediate Education Act, 1921 ("The

Intermediate Education Act, 1921");

(ii) The Uttar Pradesh Secondary Education Services Selection Board Act, 1982 ("Act of 1982"); and

(iii) The Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries to the Teachers and Other Staff of the Colleges) Act, 1971 ("Payment of Salaries Act, 1971").

The Intermediate Education Act, 1921

The Intermediate Education Act, 1921 is *inter alia* intended to govern recognized Intermediate colleges, higher secondary schools or high schools. The Act constituted the Board of High School and Intermediate Education. Section 16-E provides for the procedure for selection of teachers and heads of institutions. Under sub-section (1) of Section 16-E, the head of an institution and teachers are to be appointed by the Committee of Management in the manner thereafter provided. Sub-section (11) provides for appointments to be made against temporary vacancies caused by the grant of leave to an incumbent for a period not exceeding six months or by death, termination or otherwise. Sub-section (11) of Section 16-E is in the following terms:

> "(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 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."

Regulations have been framed under the Act and insofar as is material, Regulation 13 of Chapter I empowers the Committee of Management to make appointments, confirmations, promotions and to decide disciplinary matters, including removal and dismissal of the heads of institutions and teachers therein. Chapter-II of the Regulations provides for the appointment of the heads of institutions and teachers. Regulation 9 of Chapter-II provides for filling up a vacancy in the post of a teacher for a period exceeding six months where a vacancy has arisen by grant of leave or where a teacher is placed under suspension duly approved in writing by the Inspector and the period of suspension is likely to exceed six months from the date of approval. Regulation 19 of Chapter-II provides that where any person is appointed as, or any promotion is made on any post of head of the institution or teacher in contravention of the provisions of the Chapter or against any post other than a sanctioned post, the Inspector shall decline to pay salary and other allowances, if any, to such person where the institution is covered by the provisions of the Act of 1971,

and in other cases shall decline to give any grant for the salary and allowances in respect of such person.

Secondary Education Services Selection Board Act

In 1982, the State legislature enacted the Uttar Pradesh Secondary Education Services Selection Selection Board Act. The Statement of Objects and Reasons accompanying the introduction of the Bill in the State legislature contains the following rationale for the enactment of the law:

> "The appointment of teachers in secondary institutions recognised by the Board of High School and Intermediate Education was governed by the Intermediate Education Act, 1921 and regulations made thereunder. It was felt that the selection of teachers under the provisions of the said Act and the regulations was some times not free and fair. Besides, the field of selection was also very much restricted. This adversely affected the availability of suitable teachers and the standard of education. It was therefore, considered necessary to constitute Secondary Education Service Commission at the State level, to select Principals, Lecturers, Head-masters and L.T. Grade teachers, and Secondary Education Selection Boards at the regional level, to select and make available suitable candidates for comparatively lower posts in C.T./J.T.C./B.T.C. Grade for such institutions."

The Board came to be constituted under Chapter II of the Act and its powers in Section 9 include under clause (d), the power to

make recommendations regarding the appointment of selected candidates. Section 16 of the Act of 1982 is in the following terms:

> "16. **Appointment to be made only on the recommendation of the Board**.-- (1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder but subject to the provisions of Sections 12, 18, 21-B, 21-C, 21-D, 21-E, 21-F, 33, 33-A, 33-B, 33-C, 33-D and 33-F, 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.
>
> Provided that in respect of retrenched employees, the provisions of Section 16-EE of the Intermediate Education Act, 1921, shall *mutatis mutandis* apply.
>
> Provided further that the appointment of a teacher by transfer from one Institution to another, may be made in accordance with the regulations made under Clause (c) of sub-section (2) of Section 16-D of the Intermediate Education Act, 1921.
>
> Provided also that the dependent, of a teacher or other employee of an Institution dying in harness, who possesses the qualification prescribed under the Intermediate Education Act, 1921 may be appointed as teacher in Trained Graduate's Grade in accordance with the regulations made under sub-section (4) of Section 9 of the said Act.
>
> (2) **Any appointment made in contravention of the provisions of sub-section (1) shall be void**."
>
> (*emphasis supplied*)

Section 16 contains a *non-obstante* provision which gives it overriding force and effect notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made under it. Under the provision, on and after the commencement of the Amending Act 2001, every appointment of a teacher must be made by the Management only on the recommendation of the Board. Any appointment, which is made in contravention of the provisions of sub-section (1) is declared to be void by sub-section (2).

In several decisions of this Court, the law has been settled to the effect that the power to make an appointment against a substantive vacancy does not vest with the Management by and as a result of Section 16. In **Daya Shankar Mishra's** case (supra), the Division Bench, while considering the reference made by the learned Single Judge, placed the position in law beyond any doubt in the following terms:

> "We are also of the considered view that vacancies whether substantive or short term, should be filled up at the earliest to maintain our Constitutional goal of imparting quality secondary education. **However, as long as the statutes create a bar, the management cannot be conferred with any power to make ad hoc appointment against substantive vacancy**."

(*emphasis supplied*)

Payment of Salaries Act, 1971

It would now be necessary to turn to the provisions of the

Payment of Salaries Act, 1971. Section 2 (b) of the Act defines the expression 'institution' to mean a recognised institution for the time being receiving a maintenance grant from the State Government. Section 2 (e) defines the expression 'teacher' in the following terms:

> "(e) 'teacher' of an institution means a Principal, Headmaster or other teacher in respect of whose employment maintenance grant is paid by the State Government to the institution and includes any other teacher employed in fulfillment of the conditions of recognition of the institution or its recognition in a new subject or for a higher class or as a result of the opening with the approval of the Inspector of a new section in an existing class."

Section 3 requires the payment of salary to a teacher or other employee to be made on or before the stipulated date without any deduction of any kind except a deduction which is authorized by the regulations or rules made under the Act, or by any other law for the time being in force. Under Section 9, no institution shall create a new post of a teacher or other employee except with the previous approval of the Director, or such other officer as may be authorized. Section 10 (1) imposes a liability on the State Government for the payment of salaries of teachers and other employees of every institution due in respect of any period after March 31, 1971.

Submissions

Now, it is in the background of these provisions that it would be

necessary to consider the submissions, which have been urged on behalf of the petitioner by the learned counsel. Broadly, these submissions can be summarized thus:

(i) The posts against which the teachers have been appointed, albeit against substantive vacancies on an *ad hoc* basis, are sanctioned posts in respect of which grant-in-aid has been extended;

(ii) Under Section 9 of the Payment of Salaries Act, 1971, there is only an embargo against the creation of a new post by an institution except with the previous approval of the Director, while under Section 10, the State Government is under a mandatory duty and obligation to pay the salary of teachers and employees; the expression 'teacher' being defined in Section 2 (e). Section 16-E of the Intermediate Education Act, 1921 specifically confers a power to make appointments against temporary vacancies under sub-section (11).

(iii) Section 16 of the Act of 1982 falls in Chapter-IV where there is a selected teacher, since the chapter heading of the provision deals with the appointment of selected teachers. Hence, Section 16 of the Act of 1982 is not an embargo on the making of *ad hoc* appointments against substantive vacancies;

(iv) Alternatively, if Section 16 is to be read as placing an embargo on the management for making appointments of an *ad hoc* nature against substantive vacancies, this embargo should be 'tackled and set aside' by the Court in a situation where a recommendation of duly selected

candidates is not made by the Board;

(v) *Ad hoc* appointment against substantive vacancies need to be protected until a regularly selected candidate is made available by the Board;

(vi) The interpretation which is placed by the Court on the provisions of Section 16 of the Act of 1982 must be such as would foster the implementation of the provisions of Articles 21 and 21-A of the Constitution;

(vii) The decision in **Sanjay Singh's** case (supra) is intended to deal with a situation where the legislation has remained silent. As a result of the amendment which was made to Section 18 of the Act 1982, the provision which existed earlier for making of *ad hoc* appointments of teachers has been substituted. As a result of this, Section 18, in its present form, does not contain any provision in relation to *ad hoc* appointments. Moreover, as a result of the introduction of Section 33-E with effect from 25 January 1999, the Removal of Difficulties Orders were rescinded. Section 32 provides that the Intermediate Education Act, 1921 and its regulations, shall continue to be in force for the purposes *inter alia* of selection, appointment and promotion insofar as they are not inconsistent with the provisions of the Act of 1982. Consequently, the power to make *ad hoc* appointments which is recognized by Section 16-E of the Act of 1921 would survive notwithstanding the provisions of Section 16 of the Act of 1982 and in consequence, the State cannot deny its liability to pay salaries out of

the public exchequer; and

(viii) The judgment of the learned Single Judge in **Sanjay Singh's** case (supra) has provided a practical modality for the disbursal of the salary of teachers who have been appointed on an *ad hoc* basis albeit against substantive vacancies so as to foster the attainment of the right to education. In these circumstances, the decision in **Sanjay Singh's** case (supra) which has taken a practicable and realistic view of the matter should be affirmed as laying down the correct position in law.

On the other hand, it has been urged on behalf of the State that:

(i) The decision in **Sanjay Singh's** (supra) has re-written the legislation since the consequence of the judgment is that notwithstanding the embargo which is imposed by Section 16 of the Act of 1982, managements have been permitted to make appointments on *ad hoc* basis even against substantive vacancies and to require that the salaries of the teachers who have been appointed should be disbursed by the State out of its grant-in-aid funds. This function, it has been submitted, is clearly not open to the Court in the exercise of the power of judicial review since it is well settled that a writ of mandamus cannot be issued contrary to a specific provision contained in law;

(ii) The decision in **Sanjay Singh's** case (supra) is erroneous insofar as it has relied upon a concurring judgment of one learned Judge of

the Supreme Court in **B C Chaturvedi Vs Union of India & Ors.**[8] holding that though there is no provision parallel to Article 142 of the Constitution in relation to the High Court, that would not be a ground to postulate that the High Court would not have a power to issue such directions as are necessary to do complete justice. This observation of the learned Judge in **B C Chaturvedi** (supra), which has been relied upon by the learned Single Judge, cannot be pressed in aid having due regard to the subsequent enunciation of law by the Supreme Court. The Supreme Court has held that the power even under Article 142 itself would not ordinarily be exercised contrary to statutory provisions;

(iii) In view of the specific embargo, which is imposed upon the management for making an appointment of a teacher except on the recommendation of the Board and overriding effect given in Section 16 of the Act of 1982 over the Intermediate Education Act, 1921 and its regulations, the view of the learned Single Judge in **Sanjay Singh's** case (supra) cannot be sustained;

(iv) The provisions of Section 16-E (11) of the Act of 1921 have been construed in the judgment of a Full Bench of this Court in **Santosh Kumar Singh Vs State of Uttar Pradesh and Ors.**[9] as conferring a power in regard to the making of 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, or termination or

8 (1995) 6 SCC 749
9 2015 (33) LCD 2402

otherwise and, even this appointment is not continued beyond the end of the educational session during which the appointment was made;

(v) In view of the judgment of a Full Bench of this Court in **Smt. Pramila Mishra Vs Deputy Director of Education & Ors.**[10], it is a well settled position of law that an *ad hoc* appointment, even on a short term vacancy, cannot continue after the vacancy has ceased to exist and a substantive vacancy has arisen in its place. In other words, where the management has made an *ad hoc* appointment against a substantive vacancy of its own accord, such an appointment, being contrary to the provisions of Section 16 of the Act of 1982, would have to be regarded as void having regard to the provisions of sub-section (2) and the liability to make payment of salary cannot be foisted on the State exchequer.

These submissions fall for consideration.

Analysis

Under the Intermediate Education Act, 1921, as it was enacted, the power to make appointments of teachers of institutions was vested in the Committee of Management under sub-section (1) of Section 16. Sub-section (2) and the succeeding provisions of Section 16-E regulated the procedure for making of appointments by stipulating the intimation of vacancies to the Inspector, advertising of vacancies, the convening of a Selection Committee, the award of quality points by the inspector and the preparation of the select list by the Selection

10 (1997) 2 UPLBEC 1329

Committee in order of preference. Sub-section (11) of Section 16-E specifically deals with appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. Under sub-section (11), it is stipulated that temporary vacancies of that nature would be filled up by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed. Under the proviso to sub-section (11), it has been stipulated that no appointment which is made under this sub-section shall, in any case, continue beyond the end of the educational session during which the appointment was made. In other words, the end of the educational session is marked under sub-section (11) as the terminal date upon which an appointment which is made either by direct recruitment or by promotion against a temporary vacancy of the nature prescribed in sub-section (11) will cease to exist.

The object of enacting the Act of 1982 was to deal with a situation where it was felt by the legislature that the selection of teachers under the provisions of the Intermediate Education Act, 1921 and its regulations had not been free and fair. The field of selection was restricted which, in the view of the legislature, had adversely affected the availability of suitable teachers and the standards of education. Hence the Secondary Education Services Selection Board came to be constituted. Under the provisions of Section 16, it came to

be stipulated that notwithstanding anything contained in the Intermediate Education Act, 1921 or the regulations made thereunder, every appointment of a teacher shall be made only on the recommendation of the Board by the management. The position that an appointment made otherwise than on the recommendation of the Board cannot be permissible is elucidated in sub-section (2) which provides that an appointment made in contravention of the provisions of sub-section (1) shall be void. Section 22 provides specifically for punishment in respect of appointment of teachers in contravention of the provisions of the Act. Section 22 provides as follows:

> "**22. Punishment for appointment of teachers in contravention of the provisions of the Act.** – Any person who fails to comply with the recommendations of the Board or fails to comply with the order or direction of the Director under section 17, or appoints a teacher in contravention of the provisions of this Act shall on conviction, be punished with imprisonment for a term which may extend to three years or with fine which may extend to five thousand rupees or with both."

Prior to 1999, the matter relating to the selection and appointment of teachers on an *ad hoc* basis was provided for in various Removal of Difficulties Orders which were issued by the State Government. At that stage and particularly, in the absence of a detailed procedure for making *ad hoc* appointments under Section 18

of the Act of 1982, these Removal of Difficulties Orders governed the procedure for making *ad hoc* appointments against substantive vacancies or short term vacancies, as the case may be, respectively. In the decision of this Court in **Radha Raizada Vs Committee of Management, Vidyawati Darbari Girls Inter College and Ors.**[11], the Full Bench held that appointments which were made *de hors* the First and the Second Orders would be void *ab initio* and would not confer any right on the appointees to claim their salary.

In **Prabhat Kumar Sharma Vs State of Uttar Pradesh**[12], the Supreme Court upheld the view taken by the Full Bench of this Court in **Radha Raizada** (supra). The Supreme Court held that any *ad hoc* appointment of teachers under Section 18 of the Act of 1982 pending the allotment of a teacher selected by the Commission and recommended for appointment, was required to be made in accordance with the procedure prescribed in Paragraph 5 of the First Order of 1981 and any appointment made in transgression thereof, is an illegal appointment and being void, would confer no right on the appointees. The Supreme Court held that:

> "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 inbuilt procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any posts in an aided institution. It is**

11 1994 (3) UPLBEC 1551
12 (1996) 10 SCC 62

> **obvious that when the salary is paid by the State to the government-aided private educational institutions, public interest demands that the teachers' selection must be in accordance with the procedure prescribed under the Act read with the First 1981 Order**."
>
> (*emphasis supplied*)

The principle which was laid down by the Supreme Court was that an appointment which was made in contravention of the procedure prescribed, would render the appointment void and since salary is paid by the State to government aided private educational institutions, the public interest demands that the selection of teachers must be strictly in accordance with the procedure prescribed under the Act of 1982.

Since the decision of the Full Bench of this Court in **Smt Pramila Mishra** (supra), it has been a well settled principle of law that a clear distinction has been maintained between a substantive vacancy and a short term vacancy on the post of a teacher. After construing the provisions of the relevant Acts, rules and regulations and Removal of Difficulties Orders, the Full Bench, while emphasizing this distinction, held that the procedure to be followed in making appointments and the considerations to be borne in mind in making such appointments in the two cases are distinct and different from each other.

Section 18 of the Act of 1982, prior to its amendment which

came into effect on 30 December 2000 by U P Act 5 of 2001, laid down a detailed procedure for making *ad hoc* appointments. Section 18 has traversed a considerable legislative history from the originally enacted provisions of the Act of 1982 to the subsequent amendments which took place by U P Act 24 of 1992, U P Act 1 of 1993, U P Act 15 of 1995, and U P Act 25 of 1998. Finally, by U P Act 5 of 2001 with effect from 30 December 2000, *ad hoc* appointment of teachers was done away with. The substituted provisions of Section 18, as they stand now, only provide for appointment of *ad hoc* Principals and Headmasters. The effect of this provision was considered by a Division Bench of this Court in a reference which arose from a learned Single Judge's order in **Daya Shankar Mishra** (supra). The Division Bench held that consequent upon the provisions of Section 32 of the Act of 1982, the provisions of the Intermediate Education Act 1921 and its rules and regulations would, *inter alia*, continue to be in force for the purpose of selection, appointment and promotion insofar as they are not inconsistent. In the view of the Division Bench, selection, appointment and promotion would include both substantive as well as short-term vacancies. Since there is no provision under the Act of 1982 for making selection and appointments against short-term vacancies, the Division Bench held, placing reliance on the provisions of Section 16-E, that the power of the management to make *ad hoc* appointments to fill up a short term vacancy is preserved. Consequently, it was held, taking the aid of Section 32 of the Act of

1982, that the power of the management to take steps to make *ad hoc* appointments against temporary vacancies till the end of the academic session would stand preserved.

In a recent decision of a Full Bench of this Court in **Santosh Kumar Singh** (supra), the judgment of the Division Bench in **Daya Shankar Mishra's** case (supra) was taken note of and it was held as follows:

> "19. 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; (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."

While answering the reference, the Full Bench held that:

> "20. (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...."

Now, it is in this background, that it would be necessary to elucidate the provisions of the Payment of Salaries Act 1971. The expression 'teacher' in Section 2 (e) of the Act is defined to mean a Principal, Headmaster, or other teacher "in respect of whose employment" the maintenance grant is paid by the State Government to the institution. In other words, the definition of the expression 'teacher' is related to the person in respect of whose employment the maintenance grant is paid. The definition relates not to the post as much as the person in respect of whose employment the maintenance grant is paid.

The issue before the Court is whether a writ of mandamus can, as a matter of first principle, be issued for directing the payment of salary by the State to a teacher appointed without complying with

mandatory legal provisions. The principle of law which must govern is settled by the judgment of the Supreme Court in **Government of Andhra Pradesh Vs K Brahmanandam**[13], where it has been held that:

> "14. The liability of the State to pay salary to a teacher appointed in the recognized schools would arise provided the provisions of the statutory rules are complied with, subject to just exception. The right to claim salary must arise under a contract or under a statute. If such a right arises under a contract between the appointee and the institution, only the latter would be liable therefor. Its right in certain situation to claim reimbursement of such salary from the State would only arise in terms of the law as was prevailing at the relevant time. If the State in terms of the statute is not liable to pay the salary to the teachers, no legal right accrues in favour of those who had been appointed in violation of mandatory provisions of the statute or statutory rules."

The Supreme Court observed that where an appointment is made in violation of a mandatory provision of a statute, it would be illegal and void and such an illegality cannot be ratified or regularized.

The same principle has been emphasized in a later decision of the Supreme Court in **State of West Bengal Vs Subhash Kumar Chatterjee**[14] in the following observations:

> "30. ...Neither the Government can act contrary

13 (2008) 5 SCC 241
14 (2010) 11 SCC 694

> to the rules nor the court can direct the Government to act contrary to rules. No mandamus lies for issuing directions to a Government to refrain from enforcing a provision of law. No court can issue mandamus directing the authorities to act in contravention of the rules as it would amount to compelling the authorities to violate law. Such directions may result in destruction of rule of law."

In **Shesh Mani Shukla Vs District Inspector of Schools, Deoria**[15], the Supreme Court dealt with a claim of equity at the behest of a person whose appointment was not in accord with the provisions of the First Removal of Difficulties Order 1981. Rejecting the submission, based on equity, the Supreme Court held that:

> "19. 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. (*See Food Corpn. of India v. Ashish Kumar Ganguly, (2009) 7 SCC 734.* Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ of or in the nature of mandamus. (*See State of M.P. v. Sanjay Kumar Pathak, (2008) 1 SCC 456)I."*

15 (2009) 15 SCC 436

A similar view has been adopted by the Supreme Court in **Pramod Kumar Vs U P Secondary Education Services Commission**[16], where it has been held that:

> "18. ...An appointment which is contrary to the statute/statutory rules would be void in law. An illegality cannot be regularized, particularly, when the statute in no unmistakable term says so. Only an irregularity can be. [*See Secy., State of Karnataka v. Umadevi (3), (2006) 4 SCC 1, National Fertilizers Ltd. v. Somvir Singh (2006) 5 SCC 493 and Post Master General, Kolkata v. Tutu Das (Dutta), (2007) 5 SCC 317.*]"

The learned Single Judge, in the course of the judgment in **Sanjay Singh's** case (supra), has specifically held that in view of the consistent position of law laid down in the judgments of this Court, and particularly having regard to the judgment of the Division Bench in **Daya Shankar Mishra's** case (supra), the Committee of Management does not have any power to make an appointment against a permanent vacancy. Moreover, it would also be necessary to note that the Act of 1982 has undergone two important changes of consequence in regard to the appointment of *ad hoc* teachers. The first relates to the substitution of Section 18 by U P Act 5 of 2001 with effect from 30 December 2000 by which, the ambit of the Section has now been confined to the appointments of *ad hoc* Principals and headmasters. The second important legislative development is Section 33- E as a result of which, the Removal of Difficulties Orders came to

16 (2008) 7 SCC 153

be rescinded. In consequence, and founded on the principle, it has been laid down by the Division Bench in **Daya Shankar Mishra** (supra) and by the Full Bench in **Santosh Kumar Singh** (supra), that any appointment to a temporary vacancy would have to meet the requirements as spelt out in Section 16-E (11) of the Intermediate Education Act 1921 and the regulations framed thereunder. There is no other source of power or provision that would enable the management to make an appointment where the field is completely regulated by the aforesaid statutory provisions.

The judgment of the learned Single Judge in **Sanjay Kumar Singh's** case (supra) seeks to derive sustenance for the view which was taken on the hypothesis that there vests in the High Court, a power analogous to Article 142 of the Constitution for the purpose of rendering complete justice. In fact, as we notice from the decision of the learned Single Judge, reliance has been placed on the observations in the judgment of Hon'ble Mr Justice Hansaria in **B C Chaturvedi** (supra). This issue is no longer *res integra* and has now been dealt with in several successive judgments of the Supreme Court, including in **State of Jharkhand Vs Bijay Kumar**[17]. Dealing with the aspect of whether it is open to the High Court in the exercise of its jurisdiction under Article 226 of the Constitution to issue directions analogous to those which are within the jurisdiction of the Supreme Court under Article 142 of the Constitution, the Supreme Court held thus:

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17 (2008) 17 SCC 617

> "17. **The Constitution of India conferred a special jurisdiction on this Court only. Although power of judicial review has been conferred on the High Courts, it had not been given any special jurisdiction as has been done on the Supreme Court in terms of Article 142** of the Constitution of India. It is, therefore, very difficult to comprehend that the High Court could issue the impugned direction which, in effect and substance, would be violative thereof."
>
> (*emphasis supplied*)

This was followed in the judgment of the Supreme Court in **Manish Goel Vs Rohini Goel**[18].

Finally, we may also refer to the judgment of the Supreme Court in **A B Bhaskar Rao Vs Inspector of Police, CBI Vishakapatnam**[19] where the principles of law were formulated. Among them, the following principles have a bearing on the present case:

> "30. ...
>
> (*f*) An order, which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but also it cannot even be inconsistent with the substantive provision of the relevant statute. In other words, this Court cannot altogether ignore the substantive provisions of a statute.
>
> (*g*) In exercise of the power under Article 142 of

18 (2010) 4 SCC 393
19 (2011) 10 SCC 259

> the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provision nor is the power exercised merely on sympathy.
>
> (*h*) The power under Article 142 of the Constitution is a constitutional power and not restricted by statutory enactments. However, this Court would not pass any order under Article 142 which would amount to supplanting the substantive law applicable or ignoring statutory provisions dealing with the subject. In other words, acting under Article 142, this Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case.
>
> (*i*) The powers under Article 142 are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

We hence, find merit in the contention which has been urged on behalf of the State that the general considerations which weighed with the learned Single Judge in the decision in **Sanjay Singh** (supra) cannot form the foundation of a sustainable direction in law, that the State can be issued a writ of mandamus to pay salaries from the public exchequer in respect of an appointment made by the management against a substantive vacancy on an *ad hoc* basis. The scope and ambit of the power of the management to fill up temporary vacancies is clearly defined by the provisions of Section 16-E (11) of the Act of 1921 and its regulations. The legislature in its wisdom has

enacted the Act of 1982 so as to provide in Section 16 that notwithstanding anything contained in the Act of 1921, an appointment shall be made by the management only on the recommendation of the Board. The legislature further specified that any appointment made in contravention of the provisions of sub-section (1) of Section 16 would be void. During the period when the Removal of Difficulties Orders held the field, which contained a provision for making *ad hoc* appointments, the law was well settled both by the Supreme Court and by this Court that any appointment made in violation of the provisions contained in those orders would be void and that a direction for the payment of salary could not be sustained on the basis of such an appointment. After Section 18 was amended successively, a procedure was provided initially for making *ad hoc* appointments but, as we have noticed, Section 18, in its present form is confined only to Principals and Headmasters. The only source of power then for making appointments of an *ad hoc* nature is relatable to the provisions of Section 16-E (11) of the Act of 1921 read with regulations. Any appointment which is *de hors* the provisions of the Act of 1921 and the regulations cannot be countenanced in law. A mandamus cannot be issued to the State for the payment of salary where the appointment by its very nature is in contravention of law and void.

There can be no dispute about the basic principle of interpretation which was sought to be emphasized by the petitioner

that, in the course of interpreting a statute, it would be open to the Court to adopt an interpretation which, while being in accord with the terms of the statute, makes the statute workable. But equally in this process, it would not be open to the Court to re-write statutory provisions or to mandate an act such as the payment of salary in respect of an appointment which is made otherwise than in accordance with the statutory provisions and the rules. Article 21-A of the Constitution upon which reliance has been placed by the learned Single Judge in **Sanjay Singh's** case (supra) mandates that the State shall provide free and compulsory education to all children between ages of six to fourteen in such manner **as the State may, by law, determine.** The law undoubtedly, has to be fair, just and reasonable.

This Court in repeated judgments has drawn the attention of the State to the need to streamline the procedures in a line of precedent from this Court culminating in the judgment of the Full Bench in **Santosh Kumar Singh** (supra). The observations of this Court shall be taken up by the State with a sense of the highest priority and with all seriousness to ensure that a situation does not emerge where vacancies of a substantive nature are left unfilled over a long period of time to the detriment of education. The State Government must take up the matter with necessary alacrity and immediacy.

Conclusion

For these reasons, we have come to the conclusion that the view of the learned Single Judge in **Sanjay Singh's** case (supra)

cannot be upheld as laying down the correct position in law. The view of the learned Single Judge shall stand, accordingly, overruled. The judgment in **Pradeep Kumar** (supra) is upheld subject to the principles which, we have enunciated in this judgment.

The second issue which has been referred for decision before the Division Bench is the scope of Section 16-E (11) when read in the context of Sections 16, 22, 32 and 33-E of the Act of 1982. We have already dealt with the interpretation of these provisions in the course of the judgment.

The reference to the Division Bench shall stand answered in the aforesaid terms. The record of these proceedings shall now be remitted back to the learned Single Judge, according to roster, for disposal in the light of the questions answered.

Order Date :- 17.12.2015
RKK/-

(Dr D Y Chandrachud, CJ)

(S N Shukla, J)