

**Court No. - 4**

**Case :-** WRIT - A No. - 111 of 2015

**Petitioner :-** Yatendra Kumar

**Respondent :-** State Of U.P. And 5 Ors

**Counsel for Petitioner :-** R.C. Dwivedi

**Counsel for Respondent :-** C.S.C.,Aklank Jain

**And**

**Case :-** WRIT - A No. - 37618 of 2014

**Petitioner :-** Yatendra Kumar

**Respondent :-** State Of U.P. And 3 Others

**Counsel for Petitioner :-** V.K. Singh, Sanjeev Kumar Pandey

**Counsel for Respondent :-** C.S.C.,Aklank Jain

**Hon'ble Abhinava Upadhya,J.**

Both the writ petitions involve common questions of law, hence they are decided together by a common order.

By means of this writ , the petitioner has challenged the order dated 14.10.2014 which is an order by which the claim of the petitioner with regard to his seniority and for being appointed as adhoc Principal has been decided pursuant to a direction of this Court in writ petition No.33807 of 2014 filed by the petitioner. The DIOS giving reasons has held that respondent No.5 is senior to the petitioner.

Brief facts of the case are that respondent No.5 Jogendra Pal Singh was for the first time appointed on 1.10.1981 on adhoc basis in C.T.Grade . His appointment was approved by the then DIOS by the order dated 11.1.1982 and since then he has been continuing in the institution from the initial appointment. Since C.T.Grade was declared a dying cadre in 1989, in the year 1991 after completing 10 years of service in C.T.Grade Jogendra Pal Singh was allowed L.T.Grade and since 1991 he is continuing in L.T.Grade. The petitioner was for the first time appointed substantively in L.T.Grade on 1.7.2005. In the institution, the post of

Principal was held by one Satish Chandra Sharma who was an adhoc Principal . Satish Chandra Sharma retired on 30.6.2014. Since there was authorized controller in the institution, the authorized controller directed the outgoing Principal to hand over charge to senior most teacher in the Institution. The outgoing Principal, however, thought the petitioner senior most teacher and gave him charge on 4.7.2014. The signature of the Principal were not being attested, therefore, it appears that the petitioner requested the DIOS to attest the signature. In the meantime, the DIOS passed the order dated 11.7.2014 and determined his seniority holding Jogendra Pal Singh to be senior to the petitioner and asked the petitioner to hand over charge to Jogendra Pal Singh and subsequently his signature was attested. The petitioner filed writ petition challenging the aforesaid order by which Jogendra Pal Singh was held to be senior to the petitioner. In that writ petition a counter affidavit was called and it was directed that the parties shall abide by the final decision in that writ petition. The writ petition No.37618 of 2014 is before me and is being considered along with this writ petition. During the pendency of the aforesaid writ petition, by the impugned order the DIOS in the present writ petition has reiterated his stand that Jogendra Pal Singh was senior and declined to attest the signature of the petitioner.

Heard R.C.Dwivedi, learned counsel for the petitioner Yatendra Kumar and Sri Ajay Bhanot for the petitioner in writ petition No.37618 of 2014. The argument on behalf of the petitioner is that the appointment of Jogendra Pal Singh was an adhoc appointment in 1981 which was although approved in 1982 but it continued to be adhoc appointment . The order of the DIOS granting him regularization by the dated 7.9.2013 (Annexure -4 to the writ petition) purports to be an order passed under section 33-A of the

U.P. Secondary Education Selection Board Act, 1982 which provides for regularization of the teacher in the institution who were appointed in the institution in terms of the U.P. Secondary Education Service Commission First (Removal of Difficulties) Order, 1981. The counsel appearing for the petitioner submits that the appointment of Jogendra Pal Singh could not have been regularized as Jogendra Pal Singh was never appointed following the procedure provided under the First Removal of Difficulty Order and , therefore, there is no application of section 33-A of the 1982 Act.

Sri Dwivedi submits that if it is to be taken that Jogendra Pal Singh was regularized then too he was regularized on 7.9.2013 whereas the petitioner was appointed in substantive capacity which is a regular appointment on 1.7.2005 and , therefore, the petitioner has to be treated to be senior to Jogendra Pal Singh .

Sri Ajay Bhanot, learned counsel appearing for the petitioner in another writ petition submits that the appointment of Jogendra Pal Singh was void abinitio as the procedure of first removal of difficulty order was never adhered to and a void appointment although continued for a long period of time will not entail any other benefit if such appointment in itself was void and continuation for long period would not cure the illegality committed at the time of the initial appointment .

Sri Dwivedi has relied upon a decision in the case of Smt. Vijay Rani Vs. Regional Inspectress of Girls School, Meerut **2007 (2) ESC 987** wherein it was held that the benefit of section Section 33A of the U.P. Act No.1982 would be available only to such candidate or appointee whose appointment was under the U.P. Secondary Education Service Commission First (Removal of Difficulties) Order, 1981 and it will not be available if it can be proved that the

appointment was not under U.P. Secondary Education Service Commission First (Removal of Difficulties) Order, 1981.

Sri R.C.Dwivedi has also relied upon another decision of this Court in the case of Haripal Singh Vs. State of U.P.& others **2012 (2) ESC 735(AII)**. In the said judgment this Court has held that even in a dispute of seniority if initial appointment of one of the claimants for seniority was not in accordance with law or it was a void appointment , no seniority can be counted upon his continuance for a long period of time . Sri R.C.Dwivedi has further relied upon a decision of this Court in the case of Ram Pal Singh Vs. State of U.P.&others **2013 (8) ADJ 384 (DB)** wherein it has been held that the seniority of teachers in an Intermediate college would be counted from the date of their substantive appointment or from the date of their regularization. Similarly Sri Ajay Bhanot learned counsel for the petitioner appearing in another writ petition has relied upon another decision of this Court in the case of Ajay Kumar Singh Vs. DIOS and another **2013 (2)ESC 1069**. In the aforesaid judgment, it has been held in para 22 that any appointment made in violation of the provisions of the U.P. Secondary Education Service Commission First (Removal of Difficulties) Order, 1981 is a void appointment and no benefit would accrue upon such incumbent in service.

Refuting the claim of the petitioner Sri Asdhok Khare, learned Senior Advocate appearing for respondent No.5 Jogendra Pal Singh submits that appointment of respondent No.5 was way back in 1981. The said appointment was also approved by the relevant authority at that time and the respondent was being paid salary throughout from the State Exchequer and by virtue of being appointed in 1981 in CT Grade Jogendra Pal Singh after completion of 10 years of

satisfactory service was also granted L.T.Grade and ever since he continued and admittedly the petitioner was appointed on 1.7.2005 in L.T.Grade and , therefore, the petitioner cannot in any manner be held to be senior to Jogendra Pal Singh who in any case was granted L.T. Grade in the year 1991. Sri Khare further submits that regularization under section 33-A(1) is automatic and no orders are required to be passed by any authority much less the DIOS. He submits that the petitioner merely by taking support of a superfluous order passed by the DIOS regularizing the service of Jogendra Pal Singh has claimed that since the regularization has been granted in 2013 whereas the petitioner was appointed in substantive capacity in 2005 then the petitioner has to be held senior to Jogendra Pal Singh. Sri Khare has relied upon a decision of Division Bench in the case of Rama Kant Chaturvedi Vs. State of U.P.&others **2011(1) AWC 430**.By the aforesaid judgment it has been held that in a dispute of seniority challenge to the initial appointment cannot be allowed. Similarly initial appointment of the respondent No.5 now cannot be questioned at the time of grant of regularization . He submits that respondent No.5 was appointed on 1.10.1981 as adoc teacher . There was no other method of appointment for C.T.Grade at that point of time except under First Difficulty Removal Order and , therefore it is submitted that the appointment of respondent No.5 was under the U.P. Secondary Education Service Commission First (Removal of Difficulties) Order, 1981 which was approved by the competent authority, that is, DIOS in 1982 and he continued as such for 10 years in C.T.Grade and thereafter he was allowed L.T.Grade and thereafter he continued as such and is paid paid regular salary from the State. The petitioner has no right to challenge his initial appointment which in any case has been held to be valid .

I have considered the submissions of Sri R.C.Dwivei, Sri R.C.Bhanot, learned counsel for the petitioners and Sri Ashok Khare, learned counsel for the respondents.

It is not disputed by the petitioners that Jogendra Pal was appointed in C.T.Grade in 1981 . He was granted L.T.Grade upon completion of 10 years satisfactory service in 1991 whereas the petitioner was for the time was appointed on 1.7.2005 and , therefore, apparently respondent No.5 who was appointed on 1.10.1981 has to be held to be senior but the question raised in this writ petition is that the regularization was granted to the Jogendra Pal Singh in the year 2013 with effect from 6.4.1991 and as per decision of Ram Pal Singh (Supra), the seniority has to be counted from the date of regularization, as such the regularization being in 2013 whereas the petitioner has been appointed in 2005 in substantive capacity is a regular appointment , therefore, the petitioner has to be held senior to Jogendra Pal Singh .

I am unable to accept the contention of the learned counsel for the petitioner that the fact that Jogendra Pal Singh was appointed on 1.10.1981, it has not been pointed out whether in C.T. Grade, in 1981, there was any other method for making appointment apart from the fact, in which manner the petitioner was appointed and , therefore, it has to be treated that the appointment was made under the U.P. Secondary Education Service Commission First (Removal of Difficulties) Order, 1981 which appointment was subsequently approved by the competent authority, i.e. DIOS. Jogendra Pal Singh by virtue of serving satisfactorily for 10 years in C.T.Grade was allowed L.T.Grade in 1991 and , therefore, he has to be treated senior to the petitioner who was appointed for the first time in L.T.Grade in 2005. So far as the contention of the learned counsel for the petitioner that regularization was granted on 7.9.2013 and , therefore, his seniority has to be counted from 2013 cannot be

accepted for the fact that according to section 33-A an incumbent who has been appointed contemplates deemed regularization, i.e. from 6.4.1991. Since the regularization is deemed regularization , therefore, whether any order is passed to regularize an incumbent or not is not very relevant because by operation of law by necessary implication on 6.4.1991 an incumbent holding post shall be deemed to be regularized and ,therefore, the contention of Sri Dwivedi that since the order was passed in 2013 whereas the petitioner was appointed in 2005 and , therefore, from the date of the order seniority would not be counted cannot be accepted . Under the aforesaid facts and circumstances, the respondent No.5 has to be treated to be senior than the petitioner and by virtue of his seniority if there is no other legal impediment he is also entitled to officiate on the post of Principal in the Institution.

Subject to the aforesaid direction, both the writ petitions are dismissed.

**Order Date :- 24.4.2015**

VPC