

A.F.R.**Court No. - 1****1. Case :-** SPECIAL APPEAL No. - 423 of 2005**Appellant :-** The State Of U.P Through Secy Edu.In Re W.P 1104s/S 2002**Respondent :-** Sri Gokaran P Tiwari**Counsel for Appellant :-** C.S.C,Birendra Singh**Counsel for Respondent :-** Y.K.Misra**2. Case :-** SPECIAL APPEAL No. - 408 of 2005**Appellant :-** State Of U.P.Through Secy.Education (Secondary),Lko.& 2 Ors**Respondent :-** Shiv Prasad Shukla And 5 Others**Counsel for Appellant :-** C.S.C.**Counsel for Respondent :-** Y.K.Mishra,Ajit Kumar Nishad,Sanjay Misra,Yogendra Kumar Mishra**3. Case :-** SPECIAL APPEAL No. - 52 of 2008**Appellant :-** State Of U.P. Through Secy. Sec. Education & 3 Ors.**Respondent :-** Sanjay Kumar Singh (S/S 7586/2005)**Counsel for Appellant :-** Standing Counsel**Counsel for Respondent :-** Zaheer Ahmad Khan,Gaurav Mehrotra**Hon'ble Ritu Raj Awasthi,J.****Hon'ble Dinesh Kumar Singh,J.**

1. The cases are taken up through Video Conferencing.

2. Since the common questions of law and facts are involved in these three special appeals, they are being heard and decided by a common judgment.

3. Learned Single Judge has allowed the writ petitions filed by the respondents-petitioners and has directed for payment of salary as well as creation of posts, on which they were appointed, *de hors* the statutory Rules.**4. Facts:-**

The facts of each of three cases are stated herein-under:-

(I). Special Appeal No.423 of 2005

i). Shanti Ashram Intermediate College, Saya, District Ambedkar Nagar, Faizabad (Now Ayodhya) (hereinafter referred to as 'the Institution') is a recognized Government aided Institution. It is governed under the provisions of the U. P. Intermediate Education Act, 1921, the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 and Rules and the Regulations framed thereunder. Payment of salaries etc. of employees and Teachers of the Institution are governed under the provisions of Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971.

ii). It was the case of the respondent-petitioner in the writ petition that Committee of Management of the Institution advertised one post of Laboratory Assistant and he applied for the said post in pursuance of the advertisement. He had further stated that he was selected vide resolution dated 22.8.1993, and the Committee of Management of the Institution directed the Principal of the Institution to appoint him on the post of Laboratory Assistant. Respondent-petitioner was issued appointment letter dated 16.9.1993 by the Principal. It was further said that when the appointment of the respondent-petitioner was made, post of Laboratory Assistant was not sanctioned and the Principal of the Institution submitted necessary papers for sanction of the post of Laboratory Assistant in the office of the District Inspector of Schools. Respondent-petitioner had been performing the duties to the utmost satisfaction of the authorities. The post of Laboratory Assistant is a must for imparting

education to the students in science group and, the authorities were under obligation to create the said post. It was submitted that the respondent-petitioner was entitled for payment of salary.

iii). The respondent-petitioner stated that since the Committee of Management approved his appointment on 22nd August, 1999, he had been continuously working as Laboratory Assistant, but no salary was being paid to him. The respondent-petitioner thereafter filed a writ petition before this Court, praying for the following reliefs:-

(i) to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay salary to the petitioner for the post of Laboratory Assistant with effect from 16.9.1993, the date of his joining the said post;

(ii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to provide all the consequential benefits arising out of the appointment and functioning as Laboratory Assistant as admissible for the post of Class IV employee;

(iii) to issue a writ, order of direction in the nature of mandamus commanding the respondents to alternatively adjust the petitioner against the vacancy likely to occur on 1-2-2002 in the event of there being any technical hurdle in granting requisite approval to his present appointment on the post of Laboratory Assistant;

(iv) to issue such other writ, order or direction as the Hon'ble Court circumstances of the case; and

(v) to allow this writ..... to the petitioner."

iv). The learned Single Judge vide impugned judgment and order dated 13th October, 2004 held that denial of payment of salary to the respondent-petitioner and not

creating the post of Laboratory Assistant were not sustainable in the eyes of law. A Mandamus was issued, commanding the authorities to create necessary post of Laboratory Assistant within 90 days from the date of production of certified copy of the impugned judgment and order and, the District Inspector of Schools was directed to make the payment of salary and arrears of salary to the respondent-petitioner with effect from his actual appointment on the post of Laboratory Assistant.

v). Regulations 101 to 107 of Chapter-III, framed under the provisions of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'The Act, 1921") provide for appointment on Class-IV employees in the educational institutions. Regulation 101 of Chapter-III of The Act, 1921 stipulates that without prior approval of the District Inspector of Schools, no post of a non-teaching staff should be filled in. The said Regulation 101 is extracted herein below:-

101 नियुक्ति प्राधिकारी, निरीक्षक के पूर्वानुमोदन के सिवाय किसी मान्यता, सहायता प्राप्त संस्था के शिक्षणेत्तर पद की किसी रिक्ति को नहीं भरेगा प्रतिबन्ध यह है कि जमादार के पद की रिक्ति को निरीक्षक द्वारा भरने की अनुमति दी जा सकती है।

vi). In the present case admittedly, no prior approval of the District Inspector of Schools was obtained for making appointment on nonexistent post of Laboratory Assistant. Further, the said post was not sanctioned by the competent Authority i.e. the Director and, there was no post of Laboratory Assistant existing in the institution when the alleged advertisement was issued and, the respondent-

petitioner was allegedly selected for appointment and, thereafter appointment was given to him.

vii). Section 9 of the U.P. High School and Intermediate Colleges (Payment of Salaries of Teacher and other Employees) Act, 1971 (hereinafter referred to as "The Act, 1971") puts a complete bar for creation of new post of teacher or other employees in an institution without previous approval of the Director or such other officer as may be empowered in that behalf by the Director. Section 9 of The Act, 1971 is extracted herein below:-

"9. Approval for post. - No institution shall create a new post of teacher or other employee except with the previous approval of the Director, or such other officer as may be empowered in that behalf by the Director."

viii). In view of the express bar regarding creation of a post of teacher or other employee, the management of the institution was not authorized to create a post of Laboratory Assistant and appoint the respondent-petitioner on the said post. Admittedly, the post was not created by the Director and the post on which the respondent-petitioner was appointed by the Committee of Management was a nonexistent post. Regulation 19 of Chapter-II of Regulations framed under The Act, 1971 provides that if a teacher or employee is appointed in contravention of the provisions of the Regulations against any post other than a sanctioned post, the District Inspector of Schools shall decline to make payment of salary and other allowance to such a person, if the institution concerned is covered by the provisions of The Act,

1971. Regulation 19 of the aforesaid Regulations is extracted herein below:-

"19. Prohibition on creation of post by the institution. - (1) No institution shall create any post of a teacher or of any employee without the prior approval of the Director not shall it revive a post which has been held in abeyance or ordered to be kept unfilled.

(2) Admissibility of salary against posts indicated from time to time as sanctioned shall be determined by a Committee, which shall consist of the following :

(i) The District Inspector of Schools, who will be the President of the Committee.

(ii) The Account Officer in the office of the Inspector, and

(iii) The District Basic Education Officer.

(3) Any person aggrieved by an order under sub-rule (2) may, within fifteen days of communication of such order, prefer an appeal to the Deputy of Education of the region and the order of the Deputy Director shall be final."

ix). It appears that during the pendency of this appeal, the respondent-petitioner filed contempt petition bearing Criminal Misc. Case No.992 (C) of 2010 in which the notice was issued to the District Inspector of Schools and the District Inspector of Schools was directed to remain present before the Court. Under the pain of contempt, the District Inspector of Schools passed the order dated 11th June, 2010 for the respondent-petitioner's adjustment against vacant post of peon which became available on retirement of peon, Mr. Ayodhya Prasad Tiwari on attaining age of superannuation. It was said that the said adjustment and the payment of salary to the

respondent-petitioner for the said post would be subject to final outcome of the present appeal.

(II). **Special Appeal No.408 of 2005**

i). Sri Lallanji Brahmachari Intermediate College, Bharatpur, Ambedkarnagar (Ayodhya) as well as Acharya Narendra Dev Intermediate College, Gosaiganj, Faizabad (Ayodhya) (hereinafter referred to "Institutions") are recognized government aided institutions and, are governed under the provisions of The Act, 1921 as well as the The U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as "The Act, 1982") and the rules and regulations framed thereunder for the purposes of payment of salary of the employees and teachers of the Institutions. The provisions of The Act, 1971 are also applicable.

ii). Respondent-petitioner, Shiv Prasad Shukla filed Writ Petition No.4089 (S/S) of 1997 before this Court, alleging that he was duly appointed on the post of Clerk by the Manager of the Institution after following the prescribed procedure and, therefore, he was entitled to the salary of the post on which he was appointed and, had been working. He prayed for issuance of a writ of Mandamus to accord financial approval to his appointment and direction for payment of salary to him regularly, including the arrears since the date of his appointment. It was stated in the writ petition that the Committee of Management of the Institution had been demanding for one more post of Clerk since 1992 on increase of strength of more than 900 students, but the District Inspector of Schools did

not pay any heed and did not accord requisite sanction for appointment of a Clerk. Therefore, his appointment was fully covered under the provisions of Government Order dated 20th November, 1977 and the authorities were under a legal obligation to pay salary to him. The Committee of Management, therefore, resolved vide resolution dated 28th October, 1993 to appoint one Clerk in the Institution by direct recruitment through selection. The Manager of the Institution notified one vacancy of Clerk and invited applications to fill up the said post. Respondent-petitioner, Shiv Prasad Shukla applied in pursuance of the said advertisement and after due selection, he was issued appointment letter dated 3rd December, 1993. The respondent-petitioner assumed duties in the Institution on the post of Clerk with effect from 22nd February, 1994. The Principal had submitted necessary papers relating to sanctioning of a post of Routine-Grade-Clerk in the office of the District Inspector of Schools. When payment of salary was not made, he filed the aforementioned writ petition with the prayers, as mentioned above.

iii). In the present case also, the post on which the respondent-petitioner, Shiv Prasad Shukla was appointed was not a sanctioned post.

iv). Respondent-petitioner, Udai Bhan Singh, who was appointed similarly on the post of Junior Clerk filed Writ Petition No.5119 (S/S) of 1997, praying for issuance of a writ of Mandamus commanding the authorities to give salary with creation of post of Junior Clerk and pay the arrears of salary. He was

appointed allegedly on 29th June, 1996 and, since then he had been working continuously but without payment in Acharya Narendra Dev Inter College.

v). During the pendency of the appeal, respondent-petitioner filed Criminal Misc. Case No. 1462 (C) of 2005. The District Inspector of Schools, under the pain of contempt proceedings drawn against him, transferred one post of Assistant Clerk vacant in Manoharlal Motilal Inter College to Acharya Narendra Dev Inter College, Gosaiganj and, ordered the payment of salary to respondent-petitioner, Uday Bhan Singh vide order dated 21st January, 2006. Thereafter, one post of Assistant Clerk fell vacant in Acharya Narendra Dev Inter College and, therefore, the District Inspector of Schools modified his earlier order dated 21st January, 2006 and, directed vide order dated 22nd April, 2006 that the respondent-petitioner, Uday Bhan Singh would be adjusted against the post of Assistant Clerk falling vacant on 31st August, 2006 in Acharya Narendra Dev Inter College and the post of Assistant Clerk, transferred from Manoharlal Motilal Inter College would go back to the same college. However, this modified/amended order dated 22nd April, 2006 passed by the District Inspector of Schools was not complied with by the Manager of Acharya Narendra Dev Inter College and, one *Daftari* was promoted to the post of Assistant Clerk. In view thereof, the respondent-petitioner has been paid salary of the Assistant Clerk to avoid contempt proceedings, subject to final outcome of the special appeal.

vi. Respondent-petitioner, Shiv Prasad Shukla filed contempt petition bearing Criminal Misc. Case No. 713 (C) of 2005 during the pendency of the said special appeal against the impugned judgment and order dated 13th October, 2004 passed by the learned Single Judge. The District Inspector of Schools, in order to avoid the contempt proceedings, passed the order dated 31st October, 2005, creating a temporary post of Assistant Clerk and ordered for payment of salary to the respondent-petitioner.

(III) **Special Appeal No.52 of 2008**

i). Adarsh Krishak Inter College, Khokhotara, Ambedkar Nagar (hereinafter referred to as "Institution") is an aided non-governmental educational institution upto intermediate and is governed by the provisions of The Act, 1921, and regulations framed under the Act, 1971.

ii). The institution was taken under grant-in-aid in the year 1978. Two posts of Clerk, including Head Clerk, were sanctioned in the Institution. Since strength of the students got increased, the Committee of Management requested the authorities for creation of one more post of Clerk. However, no heed was paid to such a request. In view thereof, the Committee of Management, in its meeting held on 27th July, 2005, resolved to constitute a 'selection committee' for appointment on the post of Clerk in the Institution as per standard laid down in the Government Order dated 20th November, 1977, as three Clerks were required in the Institution, but only two posts of Clerk were sanctioned. The Advertisement dated 2nd

August, 2005 was published, inviting applications for appointment on a post of Clerk in the Institution.

iii). The respondent-petitioner applied in pursuance of the said advertisement and after selection, he was issued appointment letter for the post of Clerk. In pursuance of the said appointment letter, the respondent-petitioner assumed the charge of the Assistant Clerk. The Committee of Management of the Institution sent requisite papers to the District Inspector of Schools on 28th June, 2005 for grant of financial approval for the post of Assistant Clerk in the Institution, but no heed was paid. The respondent-petitioner had been working since the date of his appointment but without salary.

iv). The respondent-petitioner thereafter filed Writ Petition No.7586 (S/S) of 2005 before this Court, praying for the following reliefs:-

(i) to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay salary to the petitioner and also accord financial approval to the appointment of the petitioner;

(ii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay arrears of salary to the petitioner also with effect from the date of his initial appointment;

(iii) to issue a writ, order of direction in the nature of mandamus commanding the respondents to create one post of Clerk in the institution against which the petitioner is already working in accordance with the provisions of the Act and Rules;

*(iv) to issue such other.....just and proper;
and*

(v) to allow this writ petition with substantial costs to the petitioner."

v). The learned Single Judge, vide impugned judgment and order 22nd May, 2007 had allowed the writ petition and issued a writ of Mandamus commanding the authorities to create a post of Routine Grade Clerk in the Institution in question and make payment of salary and arrears of salary to the respondent-petitioner with effect from his actual appointment.

vi). During the pendency of this special appeal, the Government passed an order on 14th May, 2013, creating a temporary post of Routine-Grade-Clerk in the Institution and, ordered for payment of salary, however, the same was made subject to final outcome of the special appeal.

5. Heard Mr. Anil Kumar Singh Visen, learned Standing Counsel, representing appellant-State, and Mr. Birendra Singh, Mr. Y.K. Misra and Mr. Sanjay Misra for respondent-petitioners.

6. Contention on behalf of the appellants

It is submitted on behalf of the appellant that there were no sanctioned post(s) available in any of the four Institutions where respondent-petitioners were allegedly appointed; the Committees of Management of the Institutions did not have power to create a post or make appointment without prior approval of the District Inspector of Schools; in none of cases of the respondent-petitioners, prior approval of the District Inspector of Schools was obtained. It is further submitted that power to create a post is vested with

the Director as per Section 9 of the Act, 1971 and in view of specific Regulation 19 of Chapter-II of Regulations framed under The Act, 1921, the District Inspector of Schools does not have mandate to make payment of salary to the respondent-petitioners, who were allegedly appointed by the Committees of Management in contravention of the law. It is further submitted that the Committees of Management never came before the High Court for creation of post, but it is the respondent-petitioners, who filed the writ petitions, after their appointments, for creation of the posts in the Institutions where they were appointed by the Committees of Management; the writ petitions, for creation of post at the instance of the respondent-petitioners, were not maintainable. It is further submitted that the learned Single Judge has fallen in gross error of law in issuing writ of Mandamus for creation of the post and payment of salary for the respondent-petitioners, who were appointed *de hors* the statutory prescription. It is, therefore, submitted that the appeals may be allowed.

7. Contention on behalf of the respondent-petitioners

On the other hand, on behalf of the respondent-petitioners, it is submitted that due to increase in strength of the students in the Institutions, there was requirement of the additional posts on which the respondent-petitioners were appointed, however, despite several requests made by the Committees of Management, the posts were not sanctioned. It is further submitted that in view of the Government Order 20th November, 1977, the Director ought to

have created the posts in question in the four Institutions, but since he did not create the posts and the students were suffering, the Committees of Management had decided to fill up the posts and send the necessary papers for approval of the District Inspector of Schools. It is further submitted that since the respondent-petitioners have been working for such a long time and the posts are available, on which they could be adjusted, it would be against the equity to dispense with their services at this distant point of time. It is, therefore, submitted that this Court may not interfere with the impugned judgment and orders passed by the learned Single Judge.

8. Undisputed facts

A. In all the four Institutions, the posts, on which the respondents-petitioners were allegedly appointed, were not sanctioned one; the posts in question did not exist when the appointments were made.

B. No prior approval of the competent Authority was taken before initiation of process of appointing the respondent-petitioners in the Institutions.

C. As per the statutory prescription prescribed in Regulation-101 of Chapter-II of The Act, 1921, no post of non-teaching staff can be filled in without prior approval of the District Inspector of Schools.

D. As per Section 9 of The Act, 1971, no post of teacher or other employee in an Institution can be created except by the Director. The Director never sanctioned the posts on which the respondent-petitioners were allegedly appointed.

E. Under Regulation-19 of Chapter-II of regulations framed under The Act, 1921, the District Inspector of Schools is mandated to decline payment of salary and other allowances to a person who is appointed by the Committee of Management in contravention of the provisions of the Regulations against any post other than the sanctioned post.

9. **Questions for consideration**

The following questions are for consideration in the three appeals.

i). Whether the learned Single Judge was right in issuing a writ of Mandamus, directing the authorities to create posts on which the respondent-petitioners were appointed *de hors* the statutory prescription?

ii). Whether a writ of Mandamus could be issued on a petition filed by the respondent-petitioners for creation of posts after they were appointed by the Committees of Management of the Institutions *de hors* the statutory prescription?

iii). When the appointments of the respondent-petitioners were not in accordance with the statutory prescription and against nonexistent posts, should the High Court direct for payment of salary to such appointees?

iv). Whether the appointees have any accrued right for continuance on the posts on which they were appointed by the Committees of Management *de hors* the statutory prescription in absence of sanctioned posts?

10. **Analysis.**

i). In the case of ***State of Bihar and others v. Devendra Sharma (2020) 15 SCC 466*** in which the question of termination of large number of candidates, appointed on Class-III or Class-IV posts in the Health Department, Government of Bihar till 1990, came into consideration and the Supreme Court, relying on the case of ***State of Karnataka v. Umadevi (3), (2006) 4 SCC page-1,*** has held that since these appointments were made without sanction of any post, these appointments had been made by adopting wholly illegal process. Paragraph-44 of *State of Bihar Vs. Devendra Sharma's* case (supra) is extracted herein below:-

"44. In view of the aforesaid judgments, it cannot be said that the appointment of the employees in the present set of appeals were irregular appointments. Such appointments are illegal appointment in terms of the ratio of the Supreme Court judgment in Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . As such appointments were made without any sanctioned post, without any advertisement giving opportunity to all eligible candidates to apply and seek public employment and without any method of recruitment. Such appointments were back door entries, an act of nepotism and favouritism and thus from any judicial standards cannot be said to be irregular appointments but are illegal appointments in wholly arbitrary process."

ii). As has been stated herein above, the appointments of the respondent-petitioners were against the statutory rules, arbitrary, capricious and null & void. The right to salary is a legal right of a person, who validly holds the post for which salary is claimed. If the appointment is made on nonexistent post de-hors the statutory rules, no right subsists for

claiming salary for such an appointment. The right to salary and other service benefits are statutory rights which spring from legal appointment to the post. If the appointment is illegal and non-est, there cannot be any statutory entitlement for salary and other service benefits. The Patna High Court in the case of **Rita Mishra & Ors. v. Director, Primary Education, Bihar and Ors, 1987 SCC Online Pat 159** in paragraphs 24 and 25 has observed as under:-

24. To sum up on this aspect, I am inclined to the view that where the very letter of appointment is flagrantly violative of the statutory procedures prescribed for selection and appointment, the same would be illegal and there being no valid appointment in the eye of law, no consequential right to salary stricto sensu would arise. In any case, no writ of mandamus can possibly be claimed in such a situation.

25. Having dealt above with the aspect of the substantive right to salary stricto sensu in the aforesaid situation, one may now embark upon its procedural aspect in detail which appears to me of not only equal but even of greater importance. The writ petitioners herein, irrespective of the invalidity or illegality of the letter of appointment and equally of the termination of their services or otherwise, claimed a writ of mandamus commanding the respondents to pay the salary for the alleged work period in the following terms:—

"It is, therefore, prayed that your Lordships may be graciously pleased to issue rule nisi calling upon the respondents to show cause as to why a writ in the nature of writ of mandamus or any other appropriate writ, order or direction be not issued directing them to pay the salaries of the petitioners and also arrear of salaries due to them....."

Now the claim for the aforesaid relief goes to the root and scope of a mandamus in the writ jurisdiction. Even at the risk of some prolixity, it becomes necessary to reiterate the same because of the vehement claim raised on behalf of the petitioners and some precedent to the contrary within the Court.'

iii). The Supreme Court in the case of **R. Vishwanatha Pillai v. State of Kerala & Ors (2004) 2 SCC, page 105**, approving the judgment of the Patna High Court in the case of *Rita Mishra & Ors. v. Director, Primary Education, Bihar and Ors* (supra) in paragraphs 17 and 18 has held as under:-

"17. *The point was again examined by a Full Bench of the Patna High Court in Rita Mishra v. Director, Primary Education, Bihar [AIR 1988 Pat 26 : 1988 Lab IC 907 : 1987 BBCJ 701 (FB)] . The question posed before the Full Bench was whether a public servant was entitled to payment of salary to him for the work done despite the fact that his letter of appointment was forged, fraudulent or illegal. The Full Bench held: (AIR p. 32, para 13)*

"13. It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of the law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it."

18. *We agree with the view taken by the Patna High Court in the aforesaid cases."*

iv). The Committees of Management are not competent to create post. The authority for creation of post is vested with the Director. In the present

case, the Committees of Management of the Institutions, *suo motu*, without there being any post and prior approval of the District Inspector of Schools, invited applications to make appointments on the nonexistent posts. These back-door entries of the respondents-petitioners made by the Committees of Management of the Institutions is an act of nepotism and favoritism inasmuch as one of the respondent-petitioners was near relative of Manager of the Institution and, therefore, these appointments cannot be said to be regular appointments from any judicial standards. We have no hesitation to hold that these appointments are not only irregular but illegal and wholly arbitrary.

v). The Supreme Court in the case of ***Ashwani Kumar v. State of Bihar (1997) 2 SCC 1*** has held that if the initial entry itself is unauthorized and that the payment of salary is against the non-sanctioned post, the question of regularizing services of such an employee does not arise for consideration. Paragraphs 13 and 14 of *Ashwani Kumar v. State of Bihar* (supra), which are relevant, are extracted herein below:-

13. *So far as the question of confirmation of these employees whose entry itself was illegal and void, is concerned, it is to be noted that question of confirmation or regularisation of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported*

regularisation or confirmation is given it would be an exercise in futility. It would amount to decorating a still-born baby. Under these circumstances there was no occasion to regularise them or to give them valid confirmation. The so-called exercise of confirming these employees, therefore, remained a nullity. The learned counsel for the appellants invited our attention to the chart showing the details of appointments of the appellants concerned as found at Annexure XXII at pp. 243 to 255 of the Paper-Book and also as a specimen a subsequent order of confirmation as found at p. 256 in the case of Ashwani Kumar. It was submitted that such confirmation orders were also given to number of employees who were initially appointed as daily-wagers/T.B. Assistants by Dr Mallick. Our attention was also invited to the letter of Joint Secretary Shri Anant Shukla written to the Superintendent, T.B. Hospital, Koelwar, Bhojpur on 17-10-1984 which is found as Annexure X at p. 127 of the Paper-Book to show that steps were taken for ratification of the orders of appointment of the daily-wage employees as per the direction of Deputy Director, T.B./Health Services, Bihar. As we have seen earlier when the initial appointments by Dr Mallick so far as these daily-wagers were concerned, were illegal there was no question of regularising such employees and no right accrued to them as they were not confirmed on available clear vacancies under the Scheme. It passes one's comprehension as to how against 2500 sanctioned vacancies confirmation could have been given to 6000 employees. The whole exercise remained in the realm of an unauthorised adventure. Nothing could come out of nothing. Ex nihilo nihil fit. Zero multiplied by zero remains zero. Consequently no sustenance can be drawn by the appellants from these confirmation orders issued to them by Dr Mallick on the basis of the directions issued by the authorities concerned at the relevant time. It would amount to regularisation of back-door entries which were vitiated from the very inception. It is not possible to agree with the contention of the learned counsel for appellants that the vacancies

on the Scheme had nothing to do with regular posts. Whether they are posts or vacancies they must be backed up by budgetary provisions so as to be included within the permissible infrastructure of the Scheme. Any posting which is de hors the budgetary grant and on a non-existing vacancy would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy.

14. *In this connection it is pertinent to note that question of regularisation in any service including any government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily-wage basis by a competent authority and are continued from time to time and if it is found that the incumbents concerned have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularise them so that the employees concerned can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by a competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the incumbent*

concerned. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back-door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant would ever survive for consideration, however competent the recruiting agency may be. The appellants fall in this latter class of cases. They had no case for regularisation and whatever purported regularisation was effected in their favour remained an exercise in futility. The learned counsel for the appellants, therefore, could not justifiably fall back upon the orders of regularisation passed in their favour by Dr Mallick. Even otherwise for regularising such employees well-established procedure had to be followed. In the present case it was totally bypassed. In this connection we may profitably refer to Government Order dated 31-12-1986 to which our attention was invited by the learned counsel for the appellants. The said Government Order is found in the additional documents submitted in CAs Nos. 10758-59 of 1995 at Annexure IV. Secretary to Government of Bihar, Health Department, by communication dated 31-12-1986 had informed all Regional Deputy Directors, Health Services; Tuberculosis Civil Surgeon-cum-Chief Medical Officer; and other authorities concerned in connection with the compliance and implementation of the orders passed and instructions issued by Deputy Director (Tuberculosis) Bihar, Patna under the Tuberculosis Control Programme covered under the 20-Point Programme. It was stated in the said communication that steps will be taken to fill up sanctioned Third and Fourth Grade posts as soon as possible according to the prescribed procedure and all possible efforts should be

made to achieve the fixed targets in a planned and phased manner. Even this letter clearly indicates that the posts had to be filled up by following the prescribed procedure. Despite all these communications neither the initial appointments nor the confirmations were done by following the prescribed procedure. On the contrary all efforts were made to bypass the recruitment procedure known to law which resulted in clear violation of Articles 14 and 16(1) of the Constitution of India both at the initial stage as well as at the stage of confirmation of these illegal entrants. The so-called regularisations and confirmations could not be relied on as shields to cover up initial illegal and void actions or to perpetuate the corrupt methods by which these 6000 initial entrants were drafted in the Scheme by Dr Mallick. For all these reasons, therefore, it is not possible to agree with the contention of the learned counsel for the appellants that in any case the confirmations given to these employees gave them sufficient cloak of protection against future termination from services. On the contrary all the cobwebs created by Dr Mallick by bringing in this army of 6000 employees under the Scheme had got to be cleared lock, stock and barrel so that public confidence in Government administration would not get shattered and arbitrary actions would not get sanctified.

vi). The Supreme Court in the case of ***Director of Education and Ors. vs. Gajadhar Prasad Verma (1995) 1 SCC 465Supp 5 SCR page-617***, which also pertains to the appointments made by the Committee of Management without their being a sanctioned post and without approval of the competent Authority, has held that if the prior approval has not been taken for creation and filling up of the posts and, appointments are made by the Committee of Management, then the Government shall not be obliged to make payment of salary to

such person(s). In paragraphs 5 and 6 of the said judgment, the Supreme Court has held as under:-

5. *Shri Pramod Swarup, learned counsel for the respondent, placed before us the direction issued by the State Government for creation of an additional post when the strength of the students exceeds 1100. It is his contention that since the strength of the students has been more than 1100, the creation of additional clerk has become necessary and that, therefore, the Management has resolved to appoint the respondent as an additional clerk. We are concerned with the creation of the additional post, may be, due to the increase in the strength of students. What is material is whether prior approval of the Director or the empowered officer has been obtained before creating that post. It is not the case of the respondent or the Management that such prior approval had been obtained or given by the competent officer. Therefore, so long as prior approval had not been given, though the respondent might have been appointed by the Management, the Government is not obliged to reimburse the salary paid to such clerk. The Management has to bear the expenditure from its own resources without claiming any reimbursement from the Government. The High Court, therefore, has committed grievous error of law in not adverting to this crucial question and allowing the writ petition directing the Government to create the post and to make the payment of the salary etc. The directions are wholly illegal and legally unsustainable.*

6. *It is stated and brought to our notice that a post has been created by the Government pursuant to the impugned order passed by the High Court. But the Government have also stated therein that it was subject to the result in the appeal. In that view, the creation of the post would not be an advantageous feature that favours the respondent. If there is any increase in the strength and sanction of the post is needed, it is open to the Management to take appropriate steps as per law.*

vii). A writ of Mandamus lies to secure performance of public duty imposed by law. If there is no statutory duty of the authority, writ of Mandamus cannot be issued. In the present case, the learned Single Judge has issued a writ of Mandamus for creation of posts on which the respondents-petitioners were appointed at their behest. The respondents-petitioners had no locus to come before this Court for creation of the posts in the Institutions in which they were appointed illegally. The writ of Mandamus is issued to command; and not to inquire and adjudicate. In a petition for writ of Mandamus, the petitioner does not have to establish a legal right but it is for enforcement of the existing legal right. It is issued only where public duty is clear, unqualified and specific. The respondent-petitioners had filed aforesaid writ petitions for creation and establishment of their legal rights. In our view, the aforesaid writ petitions were not maintainable so far as prayer for creation of posts was concerned. The learned Single Judge has grossly erred in issuing a writ of Mandamus for creation of posts. Therefore, the impugned judgment and orders are not sustainable in law. It is relevant to mention here that the Committees of Management have never approached this Court for creation of the posts on which the respondents were appointed. The respondent-petitioners had no right to be appointed against nonexistent posts. The Supreme Court in *Director of Education and Ors. vs. Gajadhar Prasad Verma* (supra) has held that even if the strength of the students is increased, in the absence of a post created by the Director, who is the competent Authority, no

appointment can be made by the Committee of Management and, therefore, the order for payment of salary cannot be passed. Since the appointments of the respondent-petitioners were void *ab initio*, no right gets accrued on them for continuance in service.

11. **Answers to the questions framed in paragraph-9**

i). We are of the considered view that the learned Single Judge has grossly erred in issuing a writ of Mandamus, directing the authorities to create posts, on which the respondent-petitioners were appointed since the appointments of the respondent-petitioners by the Committees of Management on nonexistent posts were *de hors* the statutory prescription and the learned Single Judge has grossly erred in issuing a writ of Mandamus, directing the authorities to create posts on which the respondents-petitioners were appointed.

ii). The respondent-petitioners had no legal right for appointment or consideration for appointment on nonexistent posts. The petitioner-respondents filed writ petitions after they were illegally appointed on nonexistent posts by the Committees of Management with prayer for creation of the posts. The Director was having no corresponding duty towards the respondent-petitioners for creation of the posts and, therefore, the writ petitions, on behalf of the respondent-petitioners with prayer for creation of the posts, were not maintainable. The writ of Mandamus, therefore, should not have been issued on these writ petitions for creation of the posts and the learned

Single Judge has grossly erred in directing for creation of the posts.

iii). The payment of salary is a legal right of a person who validly holds the post for which the salary is claimed. Since the appointments of the respondents-petitioners were not in accordance with the statutory prescription and, their appointments were made against nonexistent posts, they had no legal right to be appointed on such posts. Therefore, no direction for payment of salary to the respondent-petitioners could have been issued. The learned Single Judge has grossly erred in directing the payment of salary to the respondent-petitioners, whose appointments were wholly illegal, null and void.

iv). The appointments of the respondent-petitioners were void ab initio. They were appointed by the Committees of Management *de hors* the statutory prescription, without there being sanctioned posts available. The Committees of Management had no authority to make appointments of the respondent-petitioners. Since their appointments were void ab initio, no legal rights ever accrued on them for their continuance in service.

36. In view of aforesaid discussions, we **allow** these special appeals and **set-aside** the impugned judgment and orders passed by the learned Single Judge. However, it is made clear that the respondents-petitioners shall not be forced to refund the salary drawn by them in pursuance of the impugned judgment and orders passed by the learned Single Judge.

[D.K. Singh, J.] [R.R. Awasthi, J.]

Order Date :-5.7.2021

MVS/-

