**IN THE HIGH COURT OF ALLAHABAD (LUCKNOW BENCH)**

Service Single Nos. 3053, 2943, 2947, 2953, 2960, 2989, 2992, 2994, 3002, 3004, 3005, 3015, 3013, 3027, 3033, 3034, 2974, 2982, 2946, 2991, 3090, 2941 of 2008, 4495 of 2000, 3028, 3029, 3031, 2935, 6316, 3091, 2949, 2972, 3127, 3022, 3934, 2942, 3003, 3114, 2978, 3095, 6592, 2976, 6662, 2937, 2952, 2954, 2959, 2964, 2973, 3104, 3108, 3012, 3041, 2877, 3006, 3109, 3122, 3097, 2957, 2739, 3074, 2997, 3106, 3021, 2951, 2983, 3123, 3009, 3026, 3124, 3035, 3051, 3068, 3093, 3000, 6855, 3008, 2945, 2948, 6853, 2950, 3567, 6574, 3010, 2740, 3024, 6618, 6856, 2936, 3014, 3020, 2967, 3050, 3019, 6409, 3016, 2938, 2984, 2939, 3036, 3023, 2979, 3043, 3001, 3039, 2944, 2993, 2136, 2977, 2986, 2958, 3096, 3037, 3098, 6586 of 2008, 7198, 7843 of 2005, 10444, 10162 of 2006, 225, 764, 907, 983, 762, 905, 18, 919, 906, 904, 1000, 944, 986, 195, 412, 943, 763 of 2007, 3113, 3094, 6595, 8309, 3011, 6448 of 2008, 5590 of 2007, 2836 of 2005, 1378, 1413, 1473, 1673, 2171, 2802, 3310, 5960 of 2006, 4914, 5057, 6439 of 2007, 9824, 9842 of 2006, 290 of 2009, 3261 of 2005, 4199 of 1997 and 7477 of 2009

Decided On: 03.05.2012

Appellants: **Dharmendra Kumar Singh**  
**Vs.**  
Respondent: **State of U.P. and Others**

**Hon'ble Judges/Coram:**  
Anil Kumar, J.

**JUDGMENT**

**Hon'ble Anil Kumar, J.**

1. Heard Sri H.G.S. Parihar, Sri M.B. Singh, Pt. S. Chandra, Sri M.S. Rathour, Sri Ramesh Pandey, Sri Sanjay Mishra, Sri S.P. Singh, Sri G.C. Verma, Sri D.P.S. Chauhan, Sri R.P. Singh, Sri Ajay Kumar Singh Sri Sharad Pathak, learned counsel for petitioners and Sri V.S. Tripathi, learned Additional Chief Standing Counsel on behalf of respondents. The role of teachers in society is both significant and of widespread value. They had influenced the society they lived in and no other personalities had a greater influence than the teachers. Students are strongly influenced by teacher's love, compassion, character, competence, and moral commitment. A popular teacher is one who becomes a role model for his students. Often the students try to follow their teachers in their behavior, dress, etiquette, conversational style, and way of living. He's their ideal.

2. The importance of teachers as architects of our future generations demands that only the best, most intelligent and competent members of our intellectuals are allowed to qualify for this noble profession. But, it is unfortunate to find that in general the worst and most incapable people find their way into this profession. Anyone who fails to find an open road in life, gets into this profession and starts recklessly playing with the fate of nation.

3. In the instant matters, the controversy involved is in respect to the petitioners who are Assistant Teachers or Lecturers selected in Intermediate colleges situated in different cities of the State of U.P. as ad hoc teacher on substantive vacancy or short term vacancy which were subsequently converted into substantive vacancy by the Committee of Management. However, approval of their appointments has been refused by District Inspector of Schools concerned either expressly or impliedly, thus they were not paid the salary as matter regarding payment of salary has been rejected by the D.I.O.S. and for the said grievances they approached this Court under article226 of the Constitution of India for redressal of their grievances i.e. for payment of salary.

4. So far as the educational qualification and other eligibility criteria of the petitioners in respect of holding the post of Assistant Teacher/Lecturer is concerned, it is not an issue in the present case, but the only question involved in the present matter is whether the committee of Management of the various institutions situated throughout the State of U.P. have got power to make ad hoc selection against substantive vacancy or not.

5. Before dealing with the issue in question, it would be appropriate to quote the relevant provisions of U.P. Intermediate Education Act, 1921, Payment of. Salaries Act, 1971 and U.P. Secondary Education Services Selection Board Act, 1982 and Regulations and Rules framed under these Acts. Relevant portion of the same are reproduced as under :

1. The Uttar Pradesh Intermediate Education Act, 1921

16-E. Procedure for selection of teachers and head of institutions.--(1) Subject to the provisions of this Act, the Head of Institution and teachers of an institution shall be appointed by the Committee of Management in the manner hereinafter provided.

(2) Every post of Head of Institution or teacher of an institution shall except to the extent prescribed for being filled by promotion, be filled by direct requirement after intimation of the vacancy to the Inspector and advertisement of the vacancy containing such particulars as may be prescribed, in at least two newspapers having adequate circulation in the State.

(3) No person shall be appointed as Head of Institution or teacher in an institution unless he possess the minimum qualifications prescribed by the Regulations:

Provided that a person who does not possess such qualification may also be appointed if he has been granted exemption by the Board having regard to his education, experience and other attainments.

(4) Every application for appointment as Head of Institution or teacher of an institution in pursuance of an advertisement published under sub-section (2) shall be made to the Inspector and shall be accompanied by such fee which shall be paid in such manner as may be prescribed,

(5) (i) After the receipt of applications under sub-section (4), the Inspector shall cause to be awarded, in respect of each such applications, quality-point marks in accordance with the procedure and principles prescribed, and shall thereafter, forward the applications to the Committee of Management.

(ii) The applications shall be dealt with, the candidates shall be called for interview, and the meeting of the Selection Committee shall be held, in accordance with the Regulations.

(6) The Selection Committee shall prepare a list containing in order of preference the names as far as practicable of three candidates for each post found by it to be suitable for appointment and shall communicate its recommendations together with such list to the Committee of Management.

(7) Subject to the provisions of sub-section (8) the Committee of Management shall, on receipt of the recommendations of the Selection Committee under sub-section (6), first offer appointment to the candidate given the first preference by the Selection Committee, and on his failure to join the post, the candidate next to him in the list prepared by the Selection Committee under this section, and on the failure of such candidate also, to the last candidate specified in such list.

(8) The Committee of Management shall, where it does not agree with the recommendations of the Selection Committee, refer the matter together with the reasons of such disagreement to the Regional Deputy Director of Education in the case of appointment to the post of Head of Institution and to the Inspector in the case of appointment to the post of teacher of an institution, and his decision shall be final.

(9) Where no candidate approved by the Selection Committee for appointment is available, a fresh selection shall be held in the manner laid down in the section.

(10) Where the State Government, in cases of the appointment of Head of Institution, and the Director in the case of appointment of teacher of an institution, is satisfied that any person has been appointed as Head of Institution or teacher, as the case may be, in contravention of the provisions of this Act, the State Government or, as the case may be, the Director may, after affording an opportunity of being heard to such person, cancel such appointment and pass such consequential order as may be necessary.

(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 sessions, 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.

2. Regulations framed under The Uttar Pradesh Intermediate Education Act 1921.

Chapter-II

APPOINTMENT OF HEADS OF INSTITUTIONS AND TEACHERS

(Sections 16-E, 16-F and 16-FF)

1. The minimum qualifications for appointment as Head of the Institution and Teachers in any recognised Institution whether by direct recruitment or otherwise, shall be as given in Appendix A.

9. (1) Where a vacancy in the post of teacher is caused by grant of leave to him for a period exceeding six months or where a teacher is placed under suspension which has been approved in writing by the Inspector under sub-section (7) of Section 16-G and the period of such suspension is likely to exceed six months from the date of such approval the vacancy may subject to the provisions of these Regulations be filled temporarily by direct recruitment or promotion as the case may be.

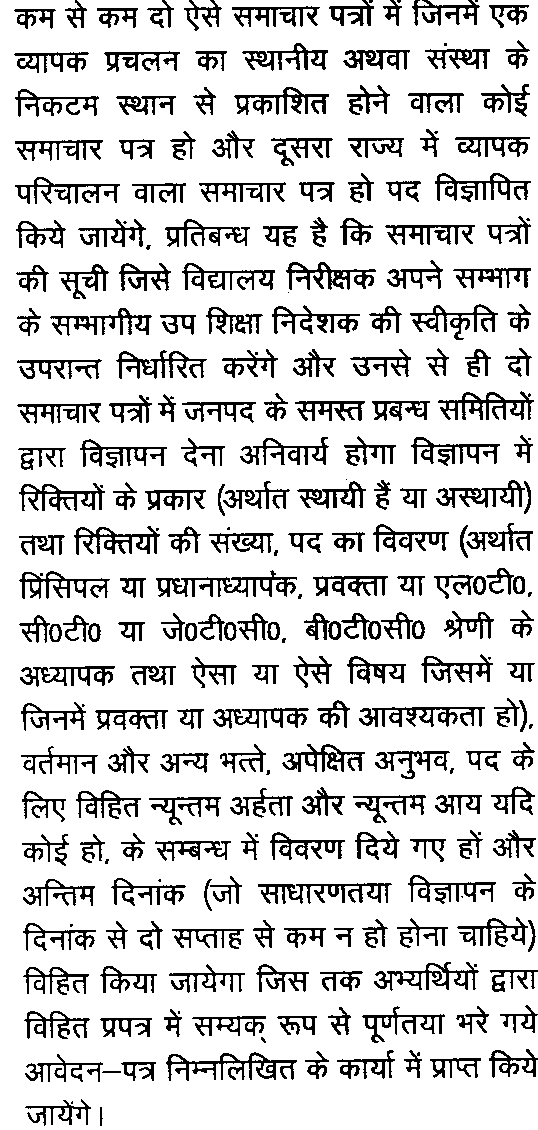
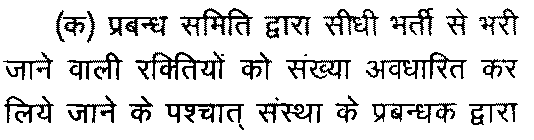
(2) Where any vacancy is of the nature referred to in Clause (1) or is caused as a result of promotion under Regulation 2 and the period of such vacancy exceeds thirty days but does not exceed six months, it may be filled by the Committee of Management by promotion of a duly qualified permanent teacher of the institution in the next lower grade on the basis of seniority.

(3) If any vacancy under Clause (2) cannot be filled due to the non availability of any teacher of the institution in the next lower grade, possessing the prescribed minimum qualifications for the post, it may be filled on ad hoc basis by the Committee of Management by the direct appointment for a period of not exceeding six months in aggregate.

(4) All vacancies filled under Clause (2) or Clause (3) shall be reported to the Inspector in the proforma prescribed in Appendix 'B' within a week of being filled up.

9-A. A teacher appointed to a post to fill a vacancy caused by the promotion of a permanent teacher from a lower grade to higher grade shall be deemed to have been appointed in substantive capacity on the post from the date of confirmation of such permanent teacher in the higher grade.

10. The procedure for filling up the vacancy of the head of institution and teachers by direct recruitment in any recognised institution shall be as follows :



(i) the District Inspector of Schools, or

(ii) the Regional Inspectors of Girls' Schools, in case of institutions for girls.

The advertisement shall also state that the prescribed application forms can be had from the office of any Inspector on payment of Rs. 9 per form by a crossed postal order or bank draft or through Treasury challan by depositing the amount in the State Bank of India under the head indicated by the Inspector. In no case the payment shall be accepted in cash in the Office of the Inspector. A copy of each advertisement shall be simultaneously sent by the Manager to the District Inspector of Schools or the Regional Inspectress of Girls' Schools concerned and in case the post of the head of institution is advertised a copy of the Advertisement shall also be sent to the Regional Deputy Director of Education.

3. Whether recognised/and on the grant -in-aid list...........

4. Purpose for which grant is required.............

(With details of expenditure)

5. Particulars of grants (recurring and non-recurring), if any received during the year of application and the year preceding it................

3. The Uttar Pradesh Secondary Education Services Commission and Selection Board Act, 1982

10. Procedure of selection of teachers specified in the Schedule.--(1) For the purposes of making appointment of a teacher specified in the Schedule, the management shall notify the vacancy to the Commission in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for appointment to the posts of such teachers shall be such as may be prescribed:

Provided that the Commissioner shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-section (1).

11. Panel of candidates selected by Commissioner.

(1) The Commission shall, as soon as possible, after the notification of vacancy under Section 10, hold interviews (with or without examination) of the candidates and prepare a panel of those found most suitable for appointment.

(2) The panel referred to in sub-section (1) shall be forwarded by the Commission to the officer or authority referred to in sub-section of Section 10 in such manner as may be prescribed.

(3) After the receipt of the panel under sub-section (2), the officer or authority concerned shall intimate the management of an institution in respect of which the vacancy was notified under sub-section (1) of Section 10, the names of candidates selected for appointment as teachers, and for this purpose, the officer or authority shall follow such procedure as may be prescribed.

(4) The management shall within a period of one month from the date of receipt of such intimation, issue appointment letter to the candidate whose name has been intimated under sub-section (3).

(5) Where the candidate referred to in sub-section (3) fails to join the post of a teacher in such institution within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such candidate is otherwise not available for appointment as such teacher, the officer or authority concerned may, on the request of the management, intimate fresh name or names from the panel forwarded by the Commission under sub-section (2) in the manner prescribed.

6. The procedure laid down in Sections and 11 qualifies the power of the Commission mentioned in Section 16 to make recommendations for appointment. The procedure as laid down in Sections 10 and 11 is obviously inapplicable to a case of transfer. It cannot thus be said that the Commission is to be consulted or that the Commission has to make recommendations with regard to transfer. The Commission can make recommendations only on the basis of regular selection as mentioned in Sections 10 and 11. These provisions do not fit in with the concept of a transfer of the nature contemplated in regulations Nos. 55 to 60.

7. Every transfer, though it does involve an appointment in the sense indicated above, is not a fresh appointment or a recruitment for a fresh appointment. It is only fresh appointments, and recruitments therefore which are sought to be regulated by the new Act.

16. Appointments to be made only on recommendations of the Commission or 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 Sections18 and 33 - (a) every appointment of a teacher specified in the Schedule shall, on or after July 10, 1981; be made by the management only on the recommendation of the Commission.

(b) every appointment of a teacher (other than a teacher specified in the Schedule) shall, on or after July 10, 1981, 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 apply with the modification that in sub-section (2) of the aforesaid section, for the words 'six months' the words two months' shall be deemed to have been substituted. (2) Every appointment of a teacher, in contravention of the provisions of sub-section (1), shall be void.

18. Ad hoc Teachers (as originally enacted).--

(1) Where the management has notified a vacancy to the Commission in accordance with the provisions of this Act, and

(a) the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher specified in the Schedule within one year from the date of such notification; or

(b) the post of such teacher has actually remained vacant for more than, two months, then, the management may appoint, by direct recruitment or promotion, a teacher on purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Intermediate Education Act, 1921 or the regulations made thereunder.

(2) The provisions of sub-section (1) shall also apply to the appointment of a teacher (other than a teacher specified in the Schedule) on ad hoc basis with the substitution of the expression 'Board for the expression "Commission".

(3) Every appointment of an ad hoc teacher under sub-section (1) or sub-section (2) shall cease to have effect from the earliest of the following dates namely

(a) when the candidate recommended by the Commission or the Board, as the case may be, joins the post;

(b) when the period of one month referred to in sub-section (4) of Section 11 expires;

(c) thirtieth day of June following the date of such ad hoc appointment.

The word "appointment" appearing in Section 16 has to be construed in harmony with the provisions of the two Acts, particularly Sections 10 and 11 of the new Act and Section 16-G of the Intermediate Education Act,. Words take their colour from the context in which they appear. The expression "appointment" in its widest sense would, no doubt, include a transfer also but considering the context and the object of the new Act the word "appointment"' as it appears in Section 16 cannot comprise an appointment through transfer or an appointment of say, a Government Official on deputation to a recognised institution.

Section 16 does not depend for its operation on fulfillment of any condition precedent or making of a provision, the language of sub-section (2) of Section 1 is clear and leaves no room for doubt that the appointment to be made "against the provisions of the Ordinance would be void.

The expression Void' used in sub-section (2) of Section 16 is very material. In the strict sense the word Void' means nullity.

18. Ad hoc Principals or Headmasters (as it stands after amendment in 2001).-

(1) Where the Management has notified a vacancy to the Board in accordance with sub-section (1) of Section 10 and the post of the Principal or the Headmaster actually remained vacant for more than two months, the Management shall fill such vacancy on purely ad hoc basis by promoting the senior-most teacher,

(a) in the lecturer's grade in respect of a vacancy in the post of the Principal;

(b) in the trained graduate's grade in respect of a vacancy in the post of the Headmaster.

(2) Where the Management fails to promote the senior-most teacher under sub-section (1) the Inspector shall himself issue the order of promotion of such teacher and the teacher concerned shall be entitled to get his salary as the principal or the Headmaster, as the case may be, from the date he joins such post in pursuance of such order of promotion.

(3) Where the teacher to whom the order of promotion is issued under sub-section (2) is unable to join the post of the Principal or the Headmaster, as the case may be, due to any act or omission on the part of the Management, such teacher may submit his joining report to the Inspector, and shall thereupon be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he submits the said report.

(4) Every appointment of an ad hoc Principal or Headmaster under subsection (1) or sub-section (2) shall cease to have effect from the date when the candidate recommended by the Board joins the post.

32. Applicability of U.P. Act II of 1921.--The provisions of the Intermediate Education Act, 1921 and the Regulations made thereunder in so far as they are not inconsistent with the provisions of this Act or the rules or regulations made thereunder shall continue to be in force for the purpose of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher.

33-E Rescission of orders.--The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, the Uttar

Pradesh Secondary Education Services Commission (Removal of Difficulties (Second) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Third) Order, 1982 and the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Fourth) Order, 1982, are hereby rescinded.

4. The Uttar Pradesh Secondary Education Services Selection Board Rules, 1998

Rule 2(e), -"Vacancy" means a vacancy arising out as a result of death, retirement, resignation, termination, dismissal or removal of a teacher or creation of new post or appointment or promotion of the incumbent to any higher post in a substantive capacity.

5. The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981.

1. Short title and commencement-

(1) This Order may be called the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981.

(2) It shall come into force at once.

2. Vacancies in which ad hoc appointment can be made.--The management of an institution may appoint by promotion or by direct recruitment a teacher on purely ad hoc basis in accordance with the provisions of this Order in the following cases, namely:

(a) in the case of a substantive vacancy existing on the date of commencement of this Order caused by death, retirement, resignation or otherwise;

(b) in the case of a leave vacancy, where the whole or unexpired portion of the leave is for a period exceeding two months on the date of such commencement;

(c) where a vacancy of the nature specified in clause (a) or clause (b) comes into existence within a period of two months subsequent to the date of such commencement.

3. Duration of ad hoc appointment.-- Every appointment of an ad hoc teacher under paragraph 2 shall cease to have effect from the earliest of the following dates, namely:

(a) when the candidate recommended by the Commission or the Boards joins the post; or

(b) when the period of six months from the date of such ad hoc appointment expires.

4. Ad hoc appointment by promotion-

(1) Every vacancy in the post of an Head of an institution may be filled by promotion:

(a) in the case of an Intermediate College, by the senior most teacher of the institution in the lecturer's grade;

(b) in the case of a High School raised to the level of an Intermediate College, by the Headmaster of such High School;

(c) in the case of a Junior High School raised to the level of a High School, by the Headmaster of such Junior High School.

(2) Every vacancy in the post of a teacher in Lecturer's grade may be filled by promotion by the senior most teacher of the institution in the trained-gradate (L.T.) grade.

(3) Every vacancy in the post of a teacher in the trained graduate (L.T.) grade shall be filled by promotion by the senior most teacher of the institution in the trained undergraduate (C.T.) grade.

(4) Every vacancy in the post of a teacher in the trained undergraduate (C.T.) grade shall be filled by promotion by the senior most teacher of the institution in the J.T.C. Grade or B.T.C. Grade.

Explanation.--For the purposes of clauses (1) to (4) of this paragraph, the expression "senior most teacher" means the teacher having longest continuous service in the institution in the Lecturer's grade or the trained graduate (L.T.) grade, or trained undergraduate 9C.T.) grade or J.T.C. Or B.T.C. Grade, as the case may be.

5. Ad hoc appointment by direct recruitment.--(1) Where any vacancy cannot be filled by promotion under paragraph 4, the same may be filled by direct recruitment in accordance with clauses (2) to (5).

(2) The management shall as soon as may be, informed the District Inspector of Schools about the details of the vacancy and such Inspector shall invite applications from the local Employment Exchange and also through public advertisement in at least two news papers having adequate circulation in Uttar Pradesh.

(3) Every application referred to in clause (2) shall, be addressed to the District Inspector of School and shall be accompanied:

(a) by a crossed postal order worth ten rupees payable to such Inspector;

(b) by a self-addressed envelop bearing postal stamp for purposes of registration.

(4) The District Inspector of Schools shall cause the best candidates selection on the basis of quality points specified in Appendix. The compilation of quality points may be done on remunerative basis by the retired Gazetted Government servants under the personal supervision of such Inspector.

(5) If more than one teacher of the same subject or category is to be recruited for more than one institution, the names of the selected teacher and the names of the institutions shall be arranged in Hindi alphabetical order. The candidate whose name appears on the top of the list shall be allotted to the institution the name whereof appears on the top of the list of the institutions. This processes shall be repeated till both the lists are exhausted.

Explanation.--In relation to an institution imparting instruction to women the expression "District Inspector of Schools" shall mean the "Regional Inspectress of Girls Schools".

6. Eligibility for appointment--Every appointment of a teacher under paragraph 4 to 5 shall be subject to the following conditions, namely:

(a) The candidate sough to be appointed by promotion or by direct recruitment must fulfil the essential qualifications laid down in Appendix A referred to in the Regulation (1) of Chapter II of the Regulations made under the Intermediate Education Act, 1921.

(b) The candidate sough to be appointed by direct recruitment under paragraph 5 shall not be related to any member of the Committee of Management in the manner indicated in Schedule II to the Intermediate Education Act, 1921.

(c) The candidate sought to be appointed by promotion under paragraph 4 must have been serving the institution in substantive capacity from before the date of commencement of this Order.

7. Disputes to be referred to Director.-

(1) Every dispute connected with the promotion or direct recruitment under this Order shall be referred to the Director and his decision thereon shall be final.

(2) Without prejudice to the generality of clause (1), the Director shall have the power to look into the complaint, if any, regarding the award of the quality points mentioned in Appendix or the validity or any promotion or direct recruitment in accordance with this order and to cancel any promotion, recruitment or appointment made in continuation of such order.

6. The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981

1. Short title and commencement.--

(1) This Order may be called the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981.

(2) It shall come into force at once.

2. Procedure for filling up short-term vacancies.--

(1) If short term vacancy in the post of a teacher, caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise, shall be filled by the Management of the institution, by promotion of the permanent senior most teacher of the institution, in the next lower grade. The management shall immediately inform the District Inspector of Schools of such promotion alongwith the particulars of the teacher so promoted.

(2) Where any vacancy, referred to in clause (1) cannot be filled by promotion, due to non-availability of a teacher in the next lower grade in the institution, possession the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in clause (3).

(3) (i) The Management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the Manager of the institution alongwith the particulars given in Appendix 'B' to this order. The selection shall be made on the basis of quality point marks specified in the Appendix to the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, issued with notification No. Ma-1993/ SV-7-1(79)-1981, dated July 31, 1981, hereinafter to be referred to as the First Removal of Difficulties Order, 1981. The compilation of quality point marks shall be done under the personal supervision of the Head of institution.

(ii) The names and particulars of the candidate selected and also other candidates and the quality point marks allotted to them shall be forwarded by the Manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of Schools shall communicate his decision within seven days of the date of receipt of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or, as the case may be, on his failure to communicate his decision within seven days of the receipt of papers by him from the Manager, the Management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager.

Explanation.--For the purpose of this paragraph--

(i) the expression 'senior-most teacher' means the teacher having longest continuous service in the institution in the Lecturer's grade or the trained graduate (L.T.) grade, or trained under-graduate (C.T.) grade or J.T.C. Or B.T.C. Grade, as the case may be;

(ii) in relation to institution imparting instructions to women, the expression 'District Inspector of Schools' shall mean the 'Regional Inspectress of Girls Schools';

(iii) 'short term vacancy' otherwise ceases to exist.

4. Every appointment of a teacher under paragraph 2 shall mutatis mutandis be subject to the conditions laid down in para 6 of the First Removal of Difficulties Order, 1981.

5. Substitution of paragraphs 2 of the First Removal of Difficulties Order 1981. - In the First Removal of Difficulties Order, 1981, for paragraph 2, the following paragraph shall be substituted, namely :

2. The management of an institution may appoint by promotion or by direct recruitment, a teacher on purely ad hoc basis in accordance with the provisions of this Order in the case of a substantive vacancy caused by death, retirement, resignation, or otherwise.

6. Amendment of the Appendix appended to the First Removal of Difficulties Order, 1981.--In the Appendix to the First Removal of Difficulties Order, 1981, for the entry against item 5 in each of the two tables pertaining to trained under-graduates grade and trained graduates grade, the following entry shall be substituted, namely

|  |  |  |  |
| --- | --- | --- | --- |
| Examination | First Division | Second Division | Third Division |
| 5. (a) Training | 12 | 6 | 3 |
| (b) Practical | 12 | 6 | 3 |

APPENDIX

(i) Name:

(ii) Date of birth

(iii) Qualifications - Examinations with date of passing them subject(s) and Divisions;

(iv) Whether trained ? If so division in theory and practice.

SUBMISSIONS MADE ON BEHALF OF PARTIES

8. First argument which has been advanced on behalf of petitioners in the present case is to the effect that Section 33 E of U.P. Act No. 5 of 1982 is ultra vires to the provisions of Article 14 of the Constitution of India as well as Section 16 E (11) of the U.P. Intermediate Education Act, 1921, as after insertion of the said section in the statute, there is no provision which enables the Committee of Management to make ad hoc selection/ appointment on the post of Assistant Teacher against substantive vacancy. Thus, the selection/appointment on the post of Assistant Teacher/Lecturer by the Committee of Management as per the Provisions of Section 16 E(11) of Chapter II and Regulation 9 of the Regulation framed under U.P. Intermediate Education Act, 1921, by the Committee of Management competent to make their selection/appointment in no manner be curtailed of the provision as provided under Section 33 E of the U.P. Act No. 5 of 1982.

9. Further in view of Section 32 of the U.P. Secondary Education Service Selection Board, 1982 which provides that the provisions contained under the U.P. Intermediate Education Act, 1921 and the Regulation framed thereunder which are not in consistent with the provisions of U.P. Act No. 5 of 1982 shall continue to applicable in respect to the appointment and selection of the teachers and since Regulation 9 is not in consistent with any provisions of Act No. 5 of 1982, so the selections/appointments are perfectly valid. Further, the provisions as provided under U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981 affirmed the power to make ah hoc appointment but the said order has been rescind on 25.01.1999 and thereafter the appointment, can be made under existing Regulation 9 of Chapter II of U.P. Intermediate Education Act, 1921 and as the same are not in consonance with provision of U. P. Act No. 5 of 1982, so even after the commencement of U.P. Secondary Education Service Selection Commission the said provision of Intermediate Act will remain operative in view of the provisions under Section 32 of U.P. Act No. 5 of 1982 which provides that the provisions contained under U.P. Intermediate Act and Regulation framed thereunder shall remain operative, moreover, U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981 were issued under Section 3 of U.P. Intermediate Education Act Overcome the defects arising out due to non-availability of teachers duly selected by the Educational Authorities.

10. The U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981 were issued authorising the appointing authority i.e. Committee of Management to make appointment on ad hoc basis so that the interest of students may not suffer, thus, the rescinding of the section without making any alternative arrangement for immediate filling of vacancy by U.P. Act 5 of 1982 is wholly illegal and arbitrary and contrary to the very purpose and object of the principles of Act (U.P. Intermediate Education Act, 1921) and against the mandate of Article 14of the Constitution of India, hence Section 33(E) of U.P. Act 5 of 1982 inserted vide U. P. Act, 12 of 1999 i.e. Uttar Pradesh Secondary Education Service Selection Board, (Amendment Act) 1999 and Uttar Pradesh Secondary Education Selection Board (Amendment Act), 2005. so far it amends Section 18 of Uttar Pradesh Secondary Education Service Selection Board, 1982 is unconstitutional and ultra vires.

11. Next argument which has been advanced on behalf of the petitioners is to the effect that Section 16 of the U.P. Act No. 5 of 1982 provides that notwithstanding anything contrary to the U.P. Intermediate Education Act, 1921 or Regulations framed thereunder (but subject to the provisions of Section 12, 18, 21-B, 21-C, 21-D, 21-F,22, 33-A, 33-B, 33-C, 33-D and 33-F) every appointment of teachers shall on or after the date of commencement of the U.P. Secondary Education Service Selection Board (Amendment) Act, 2001 be made by the management only on the recommendation of the Board. However, Section 16-EE of the U.P. Intermediate Education Act regarding the absorption of retrenched employees, the provision regarding transfer of the teachers from one institution to another institution under Regulations made under Section 16-E of the U.P. Intermediate Education Act and the compassionate appointment of dependent of the teachers have been saved and thus, from perusal of Section 16(1) of U.P. Act No. 5 of 1982, it is evident that regular appointment either after recommendation of the U.P. Secondary Education Service Selection Board or the regular appointment either by absorption of retrenched employees by transfer or and thus, entire scheme under Section 16 relating the appointment deals with regular appointment by different modes and only Section 18 relates to ad hoc appointment of Principals/head Masters.

12. Thus, so far as Section 16 of U.P. Act No. 5 of 1982 is concerned, it does not create a blanket bar on temporary/ ad hoc appointments in accordance with provisions contained under Section 16 E(11) of the U.P. Intermediate Education Act and Regulation 9 Chapter -II of the Regulations framed thereunder.

13. The Word "Notwithstanding" (non-obstante clause) contained in Section 16 (1) of U.P- Act No. 5 of 1982 will apply only to regular selection/appointment and not for ad hoc/ temporary Selections /appointments and it does not render the provisions of U.P. Intermediate Education Act and the Regulations framed thereunder as redundant. Section 16 E(11) of U.P. Intermediate Education Act is also special legislation and the words "death, termination or otherwise" has been substituted by Section 18 of U.P. Act No. 12 of 1978 w.e.f. 21.1.78 and in absence of any provision contained under U.P. Act No. 5 of 1982, the provisions relating to ad hoc/ temporary appointment will continue to operate in view of Section 32 of U.P. Act No. 5 of 1982. The word "notwithstanding" has been interpreted in the Book "Principles of Statutory Interpretation" by Justice G.P. Singh 7th Addition, the Extract of Chapter "Non Obstante Clause" (Page 271) and it has been interpreted that even though the notwithstanding clause is very widely worded, its scope may be restricted by construction having regard to the intention of the Legislature gathered from the enacting clause. This may particularly be so when the non-obstante clause "does not refer to any particular provision which it intends to override but refers to the provisions of the statute generally". In support of said argument, reliance has been placed on the following judgments :

(1) A.G. Varudarajulu and another v. State of T.N. and others,  : (1998) 4 SCC 231.

(2) R.S. Raghunath v. State of Karnataka and another,  : (1992) 1 SCC 335.

14. It is further submitted that from perusal of earlier provisions contained under Section 18 of U.P. Act No. 5 of 1982 and Removal of Difficulties Orders issued from time to time, it is evident that the State Government had taken care of the fact that even in case there is vacancy of teachers for a few months, even then, the institution will not be left without teachers and in the interest of students the management was permitted to make ad hoc selection/appointment even against the shot term vacancies which occurred for only 2 or 3 months.

15. Before commencement of U.P. Act No. 5 of 1982 the temporary / ad hoc appointments were to be made by the management in accordance with the provisions contained under Section 16 E(11) of the U.P. Intermediate Education Act and it provided that notwithstanding anything contained under Sub-Section 1 to 10 of the Section16-E of U.P. Intermediate Education Act, appointment in the case of a temporary vacancy caused by grant of leave to an incumbent for a period not exceeding six months (or by death, termination or otherwise) of an incumbent occurred during an educational session, may be made by direct recruitment or by promotion without reference to the selection Committee in such a manner or subject to such condition, as may be prescribed.

16. Under Section 16 E (11) of the U.P. Intermediate Education Act a proviso was inserted on 22.4.1978 providing that the appointment made under Sub-Section (11) in any case continued beyond the educational session for which such appointment was made since prior to commencement of U.P. Act No. 5 of 1982 for regular appointments the selections were to be made at the District Level by the Selection Committee comprising of District Inspector of Schools or its nominee and the Manager of the Committee of Management, as such it was expected that by the end of session, the selection committee will hold selection for regular appointment and the vacancy occurring at the end of session also due to retirement could have been filled up without any delay by the management by regular selection.

17. After commencement of U.P. Act No. 5 of 1982, judicial notice has been taken of the fact that the Commission is not making prompt selection and selections are being made after undue delay and even in the present matter, the requisition has been sent to the District Inspector of Schools then to the Board, but till date has not made any regular selection.

18. Further, the matter come up for consideration before this Court in the case of Rakesh Chandra Mishra v. State of U.P. and others, 2004 (22) LCD 1604, as to whether the management has right to make ad hoc Selection against the substantive vacancies as well as short term vacancies in accordance with Section 16E(11) of the U.P. Intermediate Education Act and Regulation 9 of Chapter II of the Regulations framed thereunder after the removal of Difficulties Orders being rescinded on 25.1.1999 and even after Section 18 regarding ad hoc appointment of the teachers being repealed w.e.f. 30.12.2000. This Court held that so far as the ad hoc appointments against short term vacancies as mentioned under Regulation 9 of Chapter II of the Regulations framed under U.P. Intermediate Education Act are concerned, the same can be made by the management even after the Removal of Difficulties Orders being rescinded and said provision was protected by Section 32 of the U.P. Act No. 5 of 1982 being not inconsistent with any provision of the U.P. Act No. 5 of 1982 and Rules and Regulations farmed thereunder.

19. Regarding the ad hoc appointments against the substantive vacancies, this Court held that so far as ad hoc selections against substantive vacancies as mentioned under Section 16 E(11) of the U.P. Intermediate Education Act are concerned, the same can be made by the management even after Section 18 being repealed with effect from 30.12.2000 by exercising powers conferred under Section 16 E(11) and thus, the selection against short term vacancy as well as against substantive temporary vacancies which had occurred due to death, termination or otherwise (resignation, retirement etc.) could be made and such appointments would continue till regular section was made by the Board.

20. In the case of Rakesh Chandra Mishra's (Supra) during the course of hearing, the Secretary, Secondary Education Department, Govt. of U.P. was called by the Court to explain as to what steps are being taken to meet out the shortage of teachers for the period till regular selection is made and the Secretary, Secondary Education Department informed the Court, that even if the ad hoc teachers who have been illegally appointed by the management be permitted to continue till end of session, (so considering the statement of Secretary, Secondary Education the Court was of the view that before the end of session some mechanism would be evolved for filling up the gap during the period for which no regular selection is held but nothing has been done till date.

21. Further, it has been argued that the word "otherwise" which has been used under Section 16 E(11) of the U.P. Intermediate Education Act will cover all the eventualities whether the vacancy had occurred due to death, resignation, promotion, dismissal, removal, reversion or retirement and also due to delay on the part of the Board in making selection for regular appointment of the teachers. As the Hon'ble Supreme Court in case of J.A. S. Inter College, Khurja v. State of U.P. and others;  : 1996 (10) SCC 71, has held that even in case the ad hoc appointments are not made in accordance with rules, such appointments can be allowed to continue till regular selection is held as well as in the case of Rakesh Chandra Mishra (Supra) this Court observed that the existing gap, if not immediately filled in, it will cause grave depredation to the society. "An unseemingly unforeseen, piquant situation has been created by doing away with all the process of making ad hoc appointment of teachers, leaving the genuinely admitted students, in particular subjects to lurch and at the same time compelling the Management to make arrangement by adopting unauthorized measures"

22. Thus, the management cannot afford, losing its prestige and goodwill by not being able to provide teachers to the students, in the subject allotted to them and therefore, they sometimes under compelling circumstances and at time of bestowing favours on their nears and dear one, appoint teachers on ad hoc basis, despite there being no authority with them for making such appointment, more so when the Selection Board in large number of cases has not been able to provide duly selected candidates, even against regular substantive vacancies and the vacancy caused for any reason whatsoever may be, on account of death, dismissal, termination, removal or retirement or otherwise of a teacher need not be allowed to remain unfilled for indefinite period and in case the appointment by regular selection through the Selection Board is likely to consume time, a provision may be made for making appointment for interregnum period i.e. till regularly selected candidate is available namely; the ad hoc appointment, for such period with a specific provision that on the availability of selected candidates such appointments shall stand automatically ceased irrespective of the fact as to whether the Committee of Management allows joining of such candidate who has been selected by the Board or not.

23. In the case of Rakesh Chandra Mishra (Supra) the Court has advised the State Government to make necessary provisions either by amending the Act namely, U.P. Act No. 5 of 1982 or if necessary by issuing necessary Removal of Difficulties Order, or otherwise for filling up vacancies by appointing ad hoc teachers till a regular selected teacher is made available by the Board, it is expected that the State Government shall take an early decision in the matter and expressed its hope and trust that the State Government would not be apathetic or reticent but shall take immediate action in issuing necessary direction as required, without any further delay. The case of Sri Rakesh Chandra Misrha was referred to a larger Bench by Hon'ble Single Judge in the case of Daya Shanker Misrha v. District Inspector of Schools, Allahabad and others, (Writ Petition No. 20843 of 2002), the point of reference are as under :

(i) Whether after rescission of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 with effect from 25.1.1999 the Committee of Management can make temporary/ ad hoc appointment on short term vacancies resorting to its power given under Chapter II, Regulation 9 and Section 16 E(11) of the U.P. Intermediate Education Act, 1921 despite the provisions of Section16(1) of the U.P. Secondary Education Services Selection Board Act, 1982?

(ii) Whether the judgment of learned Single Judge in Rakesh Chandra Mishra v. State of U.P. and others,  : (2004) 3 UPLBEC 2671, lays down correct law?

24. While answering the reference, the Division Bench expressed its concern that in case large number of vacancies are not filled up for years together and if an institution requires a teacher in some subjects then in that circumstances any other teacher who is qualified to teach such subjects, should be made available at the first instance. If a student at Intermediate level is not taught such subjects by a qualified teacher and the entire academic year passes, less said the better with regard to the learning of such student of such subjects. The entire batch in that institution, without any teacher of subjects such as mathematics and science would effectively be wasting its time and the only outcome would be failure and the large Bench held that the Management of an institution is vested with the power to fill up short term vacancy/temporary vacancy.

25. Moreover, Division Bench of this Court in the case of Daya Shankar (Supra) approved and reiterated the observations made in the case of Rakesh Chandra Mishra (Supra) by the learned Single Judge while making the reference order and thus both the learned Single Judges have felt that there should be some provision for filling up the substantive vacancies by making ad Hoc appointments. The larger Bench further held that 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, till date, the request made by the Hon'ble Single Judge in Rakesh Chandra Mishra's case to the State Government, to make some provisions for appointment of teachers and even the same view being taken by the Division Bench of this Hon'ble Court in Daya Shanker Mishra's case, that "since last about a decade no effective provision has been made by the State Government for appointment of teachers during the period no regular selection is held by the Board." (See;- Daya Shanker Misrha v. District Inspector of Schools and others, 2010(10) ADJ 829 (DB).

26. Accordingly, an argument has been raised on behalf of petitioners that from the perusal of the reference as made by learned Single Judge in the Daya Shankar Mishra case (supra) to a Division Bench/ Larger Bench the question to the effect that whether the Committee of Management has got power to make ad hoc selection against the substantive vacancy was not referred. As such the finding given by the Division Bench on reference in Daya Shankar Mishra's case that "however as long as a statute create a bar, the Management cannot confer with any power to make ad hoc appointment against substantive vacancy" cannot in any way be a legal impediment in the way of the Committee of Management to make ad hoc selection/ appointment against substantive vacancy by invoking provisions as provided under Section 16 E(11) of U.P. Intermediate Education Act, 1921 as the finding given by the Division Bench/Large Bench in the case of Daya Shankar Mishra (Supra) is without any contest and no reference in this regard made to the Larger Bench, so the same is not binding even though the said findings have been given by the Division Bench, in support of the said argument, reliance has been placed on the following cases :

1. State of Madhya Pradesh v. Narmad bachao Andolan and another, : 2011(7) SCC 639

2. State of U.P. and others v. Jeet S. Bisht and another,  : 2007 (6) SCC 586

3. Ajit Singh@Muraha v. State of U.P. and others, 2006 (5) ADJ 28 (FB).

27. Another argument has been advanced on behalf of petitioners that in view of the provisions of Section 16 E(11) of U.P. Intermediate Education Act, 1921, where there is a non obstantive clause and if the same is read with Section 16 (1) of U.P. Act No. 5 of 1982, wherein it has been mentioned that "notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made thereunder." which is also a non obstante clause, and as it is well known that a non-obstante clause is a legislative device which is usually employed to give over-riding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Hence, the non-obstante clause in Section 16 of U.P. Act No. 5 of 1982, namely, notwithstanding anything in the contrary contained in the Intermediate Education Act 1921 must mean not withstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. So there is no legal bar or impediment for selection /appointment of the Assistant Teacher/Lecturer by the Committee of Management invoking the provision of Section 6(E) 11 read with Regulation 9 of Chapter II of U.P. Intermediate Education Act, 1921 in spite of the existence of non-obstante clause in Section 16 of U.P. Act No. 5 of 1902

28. As Author Sri Bindra in his book interpretation of Statutes 7th Edition (1984) page 1093 has interpreted the word "notwithstanding anything" as under :

The very purpose of non-obstante clause is that provision shall prevail over any other provision and that other provision shall not be of any consequence in case there is any inconsistency or departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause would prevail over other clauses. Even by dictionary sense the expression "notwithstanding" implies that other provisions shall not prevail over the main provision.

29. Justice G. P. Singh in his commentary on the treatise "Principles of Statutory interpretation 5th Edition (1992) observed as under :

A clause beginning with "notwithstanding anything contained in this Act or in some particular Act or in any law for the time being in force. In some times appended to a section in the beginning with a view to give effect. The indicating part of the section in case of conflict and over-riding effect over the provisions or Act mentioned in the non-obstante clause has an over-riding effect and it has to be given its due effect.

30. Thus, in spite of the existence of the provisions as provided under Section 16(1) of U.P. Act 5 of 1982, the Committee of Management has got authority and power to select/appoint Teacher as Assistant Teacher on ad hoc basis against substantive vacancy and the said right cannot be taken away from the Committee of Management till the regular selection of candidates have been done against the post. In support of his argument, reliance has been placed on the judgment of the Apex Court in the case of Rabi Naray Mohapatra v. State of Orissa and others,  : 1991 (2) SCC 599.

31. Further, in order to support the action of the Committee of Management, selection/appointment on ad hoc basis against a substantive vacancy in the institution, it has been argued on behalf of petitioner by the learned counsel that initially Section 18 of U.P. Act 5 of 1982 provides/empowers the Committee of Management to make ad hoc appointment of Assistant Teachers/Lecturers against substantive vacancy. Subsequently, even after taking away the said power by the U.P. Act No. 5 of 1982, there is no legal impediment or bar to make ad hoc appointment against substantive vacancy because the said power exists with the Committee of Management in view of the provisions as provided under Section 32 of U.P. Act 5 of 1982 read with Section 16 E(11) of U.P. Intermediate Education Act, 1921 which empowers the Committee for selection of the teachers on ad hoc basis against substantive vacancy.

32. Even otherwise, the said power cannot be taken away from the Committee because the legislature has actually empowered the Selection Board to select the candidate for appointment against substantive vacancy, which is occurred in the institution govern by the U.P. Intermediate Education Act, 1921 and other enactments which governed the field and power to give appointment to a selected candidate/teacher is vested to the Committee of Management. Hence, there is no justification or reason on the part of respondents not to pay the salary to the petitioners who are appointed on ad hoc basis against the substantive vacancy when they are selected/appointed by the Committee of Management of the Institution, who has power to appoint them, so the action on the part of the official respondent/ D.I.O.S. Not to pay salary to them or to pass an order thereby refusing to give salary is an action which is wholly illegal and arbitrary, violative of Article 14 of the Constitution of India as well as principles of natural justice and cannot be sustained under law. As Education is a Fundamental Right Guaranteed Under Article 21 of the Constitution of India, as such the teachers who were selected/appointed on ad hoc basis against the short term vacancy by the Committee of Management by exercising power as provided under Section 16 E(11) of U.P. Intermediate Education Act has been rightly appointed taking into consideration teaching which is to be provided to the students. In support of argument, reliance has been placed on the judgment rendered by Hon'ble the Apex Court in the following cases :

1. Mohini Jain (Miss) v. State of Karnataka and others,  : 1992 (2) SCC 66.

2. Unni Krishnan J.P. v. State of Andhra and others,  : 1993 (1) SCC 645.

3. Rattan Chand Hira Chand v. Askar Nawaz Jung and others,  : (1991) 3 SCC 67.

33. It has been argued that the Committee of Management has right to make selection/appointment of teachers in pursuance to the provisions of Section 16 -E(11) of the U.P. Intermediate Education Act, 1921 which makes provision for scheme of administration and it provides that there shall be a scheme of administration for the institution and the said scheme of administration shall amongst the other matters provides for constitution of Committee of Management and the Management vested with authority to manage and conduct the affairs of the Institution as per the provisions of U.P. Intermediate Education Act. The said action on the part of Committee of Management is in accordance to the law laid down by Hon'ble the Apex Court in the case of Brahmo Soma) Education Society and others v. State of West Bengal and others, wherein it has been held that the Management has right to administer the institution and control of the State Government cannot extend day to day administration of the institution. Independence for the selection of teachers among qualified candidates is fundamental to maintenance of academic and administrative autonomy of an aided institution as well right to administer also includes the right to appoint teachers of their choice among the qualified candidates. (Reliance placed on (1) Municipal Corporation of Delhi v. Ournam Kaur, (1989) 1 SCC 104; (2) Thota Sesharathyamma v. Thota Manikyamma,  : (1991) 4 SCC 312, (3) State of Madhya Pradesh v. Narmada Bachao Andolan and another,  : (2011) 7 SCC 639, (4) Delhi Airtech Services Private Limited and another v. State of Uttar Pradesh and another, (2011) 1 SCC 354).

34. Lastly, it has been argued that the intention of Section 32 of U.P. Act No. 5 of 1982 by which the provisions of U.P. Intermediate Education Act and Regulations framed thereunder which are not inconsistent with any provision of U.P. Act No. 5 of 1982 and Rules framed thereunder will remain operative, to protect all the provisions of U.P. Intermediate Education Act and Regulations framed thereunder, so that if there is any difficulty arose due to non-fulfillment of object of the Act No. 5 of 1982 i.e. regular selection, the gap could have been filled up by making ad hoc / temporary selection/appointment by utilizing the provisions contained under U.P. Intermediate Education Act and the Legislature's intention was to make arrangement of teachers till regular selection is made and thus, as per the provisions contained under Section 16 E(11) of the U.P. Intermediate Education Act, the management has right to make ad hoc / temporary selection/appointment for a period till regularly selected candidate is made available. In support of said argument, reliance placed on the judgment of the Apex Court in the case of Venkatachalam v. Ajitkumar C. Shah and others, (2011) 9 SCC 707, accordingly it has been summed up that till date, the direction given by this Hon'ble Court in Rakesh Chandra Mishra's case in September, 2004 to the State Government to make necessary provision for appointment of regular teachers by way of regular selection has not been complied with, thus, the official respondents has not adhered to the direction/suggestion issued by Hon'ble the Single Judge in Rakesh Chandra Mishra's case being approved by the Division Bench of this Hon'ble Court in Daya Shanker Mishra's case and no appropriate steps have been taken by the State Government, as such, the ad hoc/temporary appointments of the teachers made by the Committee of Management of the various institutions as per the provisions of Section 16 E(11) of the U.P. Intermediate Act, 1921 to meet out the exigencies is a valid exercise and they may be paid salary till regularly selected candidates are not appointed by the Commission by the respective D.I.O.S. and the present writ petitions be allowed.

35. Sri V.S. Tripathi, learned State counsel submits that in the institution in questions selections/appointments have been made by the Committee of Management in the various districts of the State of U.P., are recognized and Government Aided Intermediate College. Accordingly, U.P. Intermediate Education Act, 1921, U.P. Secondary Education Services Selection Board Act 1982, Rules framed under Act of 1982 and U.P. High School and Intermediate Colleges (Payment of salaries to the Teachers and other employees) Act 1971 are applicable on the aforesaid College.

36. Section 16 of the U.P. Secondary Education Services Selection Board Act 1982 (hereinafter referred to as the Act of 1982) in very categorical terms provides that every appointment on the post of Teacher in a recognized and Government Aided Intermediate College will be made only in pursuance of recommendations of the Board.

37. On the short term vacancies of the posts of Teacher in recognized and Government Aided Intermediate Colleges appointments were being made under U.P. Secondary Education Service Commission (Removal of Difficulties (Second) Order 1981 but on 25.01.1999 Section 33 -E was inserted in the U.P. Secondary Education Services Selection Board Act 1982 and thereby the aforesaid Removal of Difficulties Second Order of 1981 has been rescinded, therefore now the power of Committee of Management of the College to make appointment against the short terms vacancy does not exit.

38. The earlier under Section 18 of the U.P. Secondary Education Service Selection Board Act 1982 ad hoc appointments on the posts of Teacher in recognized and Government aided Intermediate Colleges could have been made but in the year 2000 the aforesaid Section 18 was amended and now as per amended section 18 ad hoc appointment can only be made on the post of Principal and on the post of Teacher ad hoc appointments cannot be made.

39. Further, section 16(1) of U.P. Secondary Education Service Selection Board Act 1982 in very categorical terms provides that every appointment on the post of Teacher will be made on the recommendations of the Board therefore now the Committee of Management of a recognized and Government Aided Intermediate College does not have any authority to make any kind of appointment on the post of Teacher and if any appointment is made by the Committee of Management without recommendation of Board same will be hit by Section 16(1) of the Act of 1982 and therefore will be absolutely illegal.

40. Section 16 (1) in very categorical terms also provides that any provision existing in U.P. Intermediate Education Act 1921 and in Regulations framed under the Act of 1921, which are contrary to section 16(1) will be redundant and will not be applicable. It is further submitted that the language of Section 16(1) of the Act of 1982 is very clear and unambiguous as in the said section it has been provided that every appointment of a Teacher will be made on recommendation of Board and every appointment include all types of appointments i.e. regular appointments, appointments against short term vacancies and appointments on ad hoc basis, therefore it is patently manifest that no appointment on the post of Teacher can be made by the Committee of management except in accordance with Section 16(1) of the Act of 1982.

41. This Court in the case of Rakesh Chandra Mishra v. State of U.P. and others,  : 2004 (3) UPLBEC 2671, provided that the Committee of Management has power to make appointment on short terms vacancies under Section 16-E(11), of the U.P. Intermediate Education Act, 1921 and under Regulation 9 of Chapter II of the Regulations framed under the Act of 1921 but the aforesaid case law was again considered by another Hon'ble Single Judge of this Court at Allahabad in Civil Misc. Writ Petition No. 20843 of 2002 Sri Daya Shanker Misrha v. D.I.O.S. Allahabad and another, Hon'ble Single Judge in his order recorded categorical finding that aforesaid Section 16- E (110 of the Act of 1921 and Regulation 9 of Chapter II of the Regulations framed under Act of 1921 are contrary to the Section 16(1) of the Act of 1982 and therefore are redundant and will not be applicable.

42. Accordingly, Sri V.S. Tripathi, learned Additional Chief Standing Counsel submits that it is a matter of common knowledge that the Management of the private institution are not always fair in the matter of appointment of teachers on merit of the candidates.

43. In view of the above said facts, the legislature had stepped in and has taken away the power of ad hoc appointment from the Management of the aided institution in which the substantive vacancy created and the provisions as provided under Section 33 E in U.P. Act No. 5 of 1982 has been inserted which is in accordance with aims and object of U.P. No. 5 of 1982 by which [Section 16(1)], the power of selection of an assistant teacher against the substantive vacancy has been vested with the Selection Board, as such the said action is neither in contravention to Article 14 or Article 19(4) of the Constitution of India or any other provision as provided under U.P. Intermediate Act, 1921 and in support of his submission, Sri V.S. Tripathi, learned Additional Chief Standing Counsel had placed reliance on the judgment of this Court in the case of Shiksha Prasar Samiti Babhanan v. State of U.P. and others, 1986 UPLBEC 477, in the case of Prabhat Kumar Sharma and others v. State of U.P. and others,  : 1996 (3) UPLBEC 1959 and in the case of State of H.P. And others v. Mahendra Pal and others, 1955 (sic) Suppl. SCC 73.

44. Sri V.S. Tripathi, learned Additional Chief Standing Counsel also submits that in Section 16(1) of Act No. 5 of 1982 there is a non-obstante clause (notwithstanding anything), the same has an overriding Act over the notwithstanding clause as contained in Section 16(1) of the U.P. Intermediate Act, 1921 because the Act No. 5 of 1982 is a special Act and the same will prevail over the provisions as provided under U.P. Intermediate Education Act because the word notwithstanding as define in Chamber's 21st Century Dictionary as under :

prep in spite of, adverb in spite of that; however if although.

In legal Glossory (Government of India Publication) at page 224 defined as under :

a clause to prevail over other clause

45. In support of the said argument, Sri V.S. Tripathi, learned Additional Chief Standing Counsel has placed reliance on the judgment of the Apex Court in the case of Union of India v. Maj. I.C. Lala etc. etc., : 1973 (2) SCC 72 and in the case of KSE Board v. Indian Aluminum Co., : AIR 1976 SC 1031.

46. Sri V.S. Tripathy, learned Additional Chief Standing Counsel further submits that after the reference made in Daya Shanker Mishra's case by the learned Single Judge, the matter went up for consideration before a Division Bench of this Court and while answering the reference in Daya Shanker Mishra's case, the Division Bench/Larger Bench has held that there is no provision under U.P. Act No. 5 of 1982 for making selection/appointment under the short term vacancy. So, in view of the said categorical finding given by the Court, the argument as advanced from the side of the petitioners that the matter in respect to the selection against the substantive vacancy was not under consideration before the Division Bench/Larger Bench in the reference matter, as such the said finding given in respect to the appointment on substantive vacancy has no binding effect on the matter in issue has got not force and liable to be rejected in view of the judgment as rendered by the Apex Court in the case of Smt. Saiyada Mossarrat v. Hindustan Steel Ltd.,  : 1989 (1) SCC 272, in the case of Subhash Chandra v. Delhi Sub. Service Selection Board,  : (2009) 15 SCC 458 and in the case of Gangadhara Palo v. Div. Officer and another,  : 2011 (4) SCC 602, because the said finding given by the Division Bench though the matter in respect to substantive appointment not referred, even then will be obiter dicta as per the law of the Supreme Court as cited above (See Smt. Saiyada Mossarat v. Hindustan Steel Ltd.,  : (1989) 1 SCC 272, Subhash Chandra v. Delhi Sub. Service Selection Board, : (2009) 15 SCC 458, Gangadhara Palo v. Div. Officer and another,  : 2011 (4) SCC 602 and Divisional Controller KSRTC v. Mahadeva Shetty and another,  : (2003) 7 SCC 197).

47. Sri V.S. Tripathi, learned Additional Chief Standing Counsel also submits that an Assistant Teacher who is either appointed on a short term vacancy subsequently converted into substantive one or against the substantive vacancy by the Committee of Management has got no right to continue on the post in question in view of the law as laid down by a Division Bench in Daya Shanker Mishra's case and in support of his argument, he has placed reliance on the following judgments :

(a) Smt. Pramila Mishra v. Dy. Director of Education Jhansi and others, 1994 (2) ESC 1284 (A11)(FB)

(b) Rakesh Chandra Mishra v. State of U.P. and others, 2004 (22) LCD 1604

(c) Civil Misc. Writ Petition No. 20813 of 2002 (Daya Shanker Mishra v. State of U.P. and others).

(d) Daya Shanker Mishra v. State of U.P. and others,  : 2001 (1) UPLBEC 741

(e) Arun Kumar Mishra v. State of U.P. and others, 2010 (4) ADJ 143.

(f) Arjun Prasad @ Arjun Prasad Pandey v. State of U.P. and others, 2010(4) ADJ 9.

(g) Ram Niwas Sharma v. State of U.P. and others, 2010 (6) ADJ 299 (DB).

(h) Shashi Pal Rao v. C.O. M. Manas Inter College and others, 2010 (7) ADJ 392 (DB).

(i) Ghanshyam v. State of U.P. and others, 2011(1) ADJ 692 (DB) : 2011(2) ESC 945 (All)(DB).

(j) Haripal Singh v. State of U.P. and others, 2012(1) ADJ 272.

48. Sri V.S. Tripathi, learned Additional Chief Standing Counsel further submits that the argument as advanced on behalf of petitioners that no steps were taken by the State in order to fill up the vacancies in question in spite of the direction given by this Court in the case of Rakesh Chandra Mishra is also incorrect and wrong rather in this regard effective step has been taken and in order to support the said argument he has placed reliance on an affidavit filed by Sri Jitendra Kumar, Secretary Secondary Education, Govt. of U.P., Lucknow in Special Appeal No. 351 of 2009 (Hari Bansh Bahadur Singh v. Jitendra Kumar and others), relevant paragraphs of the said affidavit are quoted here-in below :

Para No. 10 - That in compliance of the Hon'ble Court's Order a massive survey of the Institutions receiving grant-in-aid from the State Government, was conducted which yields that out of 69602 posts of Assistant Teachers in L.T. Grade 4966 are vacant against which only 4176 posts have been requisitioned to the selection Board. Likewise, in case in Lecturer's grade, out of 24306 sanctioned posts, 1523 posts are still vacant against which only 1076 posts have been requisitioned to the Secondary Education Services Selection Board by the respective Committee of Management. A Photostat copy of the Survey Report dated 15.01.2010 is being annexed herewith and marked as Annexure No. 1 to this Court affidavit.

Para No. 11 - that it is relevant to submit here that vide Advertisement No. 1/2008. 2/2008. 530 and 554 posts of Institutional Heads have been advertised by the Selection Board and selection process has been completed by the Selection Board. Likewise, the head of the Institutions, vide advertisement No. 1/2009 and 1/2009 a number of 964 posts of Lecturers and 5990 posts of L.T. Grade Teachers have been advertised against which the selection process have been completed.

Para No. 12 - That it is further relevant to submit here that vide advertisement No. 1/2010, 4038 posts of L.T. Grade teachers were advertised and vide Advertisement No. 2/2010 a number of 892 posts of Lecturers were advertised and the written examination of which are due in the month of January, 2011.

Para No. 13 - That it is also noteworthy to state here that in Advertisement No. 1/2010 and 2/2010 the anticipated vacancy which are likely to form upto 30 June, 2011 in the respective institutions, have been included. A copy of the letter dated 24.11.2010 sent by the Secretary Secondary Education Services Selection Board, Allahabad to the Secretary, U.P. Government, Secondary Education Department, Civil Secretariat, Lucknow is being annexed herewith as ANNEXURE No. CA-2 to this Counter-affidavit.

Para No. 14 - That under the aforesaid facts and circumstances, particularly when the Service Selection Board is rapidly and continuously making appointments against the vacant post of Principals, Lecturers and L.T. Grade Teachers by direct recruitment therefore it cannot be said that the answering Respondents are not cautious in regard to filling up the existing vacancies, rather every effective measures are being taken by the answering respondents to fill up the respective vacancies in the non-Governmental aided institutions.

49. Thus, in view of the aforesaid legal position the Committee of Management does not have any authority to make appointments on the posts of Teachers without recommendation of the Board and if any appointment is made by the committee of Management in defiance of Section 16(1) of the Act of 1982 same is absolutely illegal and there is no liability on the State Government to make payment of salary to such appointee from the State Exchequer. Hence, the writ petitioners are liable to be dismissed.

FINDINGS AND CONCLUSIONS

A teacher or school teacher is a person who provides education for pupils (children) and students. The role of teacher is often formal and ongoing, carried out at a school or other place of formal education. In many countries, a person who wishes to become a teacher must first obtain specified professional qualifications or credentials from a university or college. These professional qualifications may include the study of peagogy, the science of teaching. Teachers, like other professionals, may have to continue their education after they qualify, a process known as continuing professional development. Teachers may use a lesson plan to facilitate student learning providing a course of study which is called the curriculum,

50. There are many similarities and differences among teachers around the world. In almost all countries teachers are educated in a university or college. Governments may require certification by a recognized body before they can teach in a school. In many countries, elementary school education certificate is earned after completion of high school.

CANADA

Teaching in Canada requires a post-secondary degree Bachelor's Degree. In most provinces a second Bachelor's Degree such as a Bachelor of Education is required to become a qualified teacher.

ENGLAND

Teachers must have at least a bachelor's degree, complete an approved teacher education program, and be licensed.

FRANCE

In France, teachers, or professors, are mainly civil servants, recruited by competitive examination.

SCOTLAND

In Scotland, anyone wishing to teach must be registered with the General Teaching Council for Scotland (GTCS). Teaching in Scotland is an all graduate profession and the normal route for graduates wishing to teach is to complete a programme of initial Teacher Education (ITE) at one of the seven Scottish Universities who offer these courses. Once successfully completed, "Provisional Registration" is given by the GTCS which is raised to "Full Registration" status after a year if there is sufficient evidence to show that the "Standard for Full Registration" has been met.

UNITED STATES

In the United States, each state determines the requirements for getting a license to teach in public schools. Teaching certification generally lasts three years, but teachers can receive certificates that last as long as ten years. Public school teachers are required to have a bachelor's degree and the majority must be certified by the state in which they teach. Many charter schools do not require that their teachers be certified, provided they meet the standards to be highly qualified as set by No Child Left Behind.

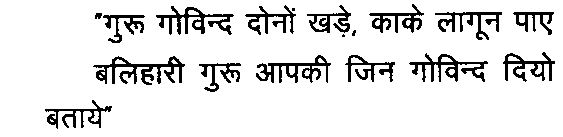
India

In Hindusm the spiritual teacher is known as a guru. In the latter Day Saint movement the teacher is an office in the Aaronic priesthood, while in Tibetan Buddhism the teachers of Dharma in Tibet are most commonly called a Lama. A Lama who has through phowa and sidhi consciously determined to be reborn, often many times, in order to continue their Bodhisattva vow is called a Tulku.

51. There are many concepts of teachers in Islam, ranging from mullahs (the teachers at madrassas) to ulemas.

52. Since ancient time, the position of teacher/guru throughout the world is above God and they are respected by every citizens in every walk of life.

53. A teacher does not only teach the students who came up for the said purpose but also shows spiritual path in life to its pupils. Sant kabir Das has said :



54. So far as the first argument advanced on behalf of the petitioners that Section 33(E) of U.P. Act 5 of 1982 is ultra vires to Article 14 of the Constitution of India and Section 16 E (11) of the U.P. Intermediate Education Act, 1921 as is discriminatory, arbitrary in nature because it take away the power of the Committee of Management to select a teacher for ad hoc appointment against the substantive vacancy.

55. There is always a presumption in favour of the constitutionality of an enactment and that the burden is upon the person who attacks it, is a fairly well-settled proposition that the classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Law made by Parliament or by the legislature can be struck down by the Courts on two grounds alone, namely :

(a) lack of legislative competency, and

(b) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision.

56. No enactment can be struck down by just saying that it is arbitrary or un-reasonable. Some constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that the Court thinks it unjustified. Parliament and legislatures, composed as they are representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them.

57. The Court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz.,

(a) unreasonableness, which can more appropriate be called irrationality,

(b) illegality, and

(c) procedural impropriety.

58. The Hon'ble Supreme Court in the judgment in Greater Bombay Coop. Bank Ltd. v. United Yarn Tex (P) Ltd. and others,  : 2007 (6) SCC 236, following the ratio as laid down in the case of State of A.P. And others v. McDowell & Co. and others,  : 1996 (3) SCC 709, held that it is the duty of the constitutional Courts under our Constitution to declare a law enacted by Parliament or the State Legislature as unconstitutional when Parliament or the State Legislature had assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution.

59. Accordingly, for the purpose of sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less in exactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment.

60. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. As held by the Apex Court in Karnataka Bank Ltd. v. State of Andhra Pradesh and others, : 2008 (2) SCC 254, that there is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt.

61. Where validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and validity of law upheld. In pronouncing on the constitutional validity of a statute, the Court is not concerned with the wisdom or unwisdom, justice or injustice of the law. If that which is passed into law is within the scope of power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a Court may think of it.

62. In State of U.P. v. Kartar Singh,  : AIR 1964 SC 1135, the Constitution Bench of the Apex Court has held that where a party seeks to impeach the validity of a rule on the ground that such rule is offending of Article 14, the burden is on him to plead and prove infirmity is under :

the rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any a priori reasoning but only as a result of materials placed before the Court by way of scientific analysis. It is obvious that this can be done only when the party invoking the protection of Article 14 makes averments with details to sustain such a plea and leads evidence to establish his allegations.

63. In Sub-Divisional Magistrate, Delhi v. Ram Kali,  : AIR 1968 SC 1, the Hon'ble Supreme Court again reiterated the said legal position as :

The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

64. In Pathumma v. State of Kerala,  : (1978) 2 SCC 1,"a seven-Judge Bench of the Apex Court highlighted that the legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution :

It is obvious that the legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognized that there is always a presumption in favour of the Constitutionality of a statue and the onus to prove its invalidity lies on the party which assails the same

65. The Apex Court in Fertilizers and Chemicals Travancore Ltd v. Kerala SEB,  : (1988) 3 SCC 382, emphasized that the allegations of discrimination must be specific and that the action of the Governmental authorities must be presumed to be reasonable and in public interest. It is for the person assailing it to plead and prove to the contrary (See also State of Maharashtra v. Marwanjee F. Desai and others, : 2002 (2) SCC 318).

66. In Praveen Singh v. State of Punjab and others,  : (2000) 8 SCC 633, the Apex Court held that in the matter of employment, i.e., selection and appointment, the authority concerned has unfettered power in procedural aspect. The Courts should not interfere unless the appointments so made are found to have been made "at the cost of fair play, good conscience and equity." The eligibility criteria should not be arbitrary or unreasonable and if is found so, it becomes liable to be quashed as it falls within the mischief of Article 14 of the Constitution of India which provides for equality before law and equal protection of law. (see also Bombay Labour Union and another v. M/s. International Franchises (P) Ltd. and another,  : AIR 1966 SC 942 and in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,  : (2002) 5 SCC 111).

67. Articles 14 and 16 of the Constitution secure equal protection and the doctrine of equality before law is a necessary corollary to the concept of rule of law adopted in the Constitution. However, there is always a presumption in favour of the constitutionality of the enactment and the person who challenges it has to show that there has been a clear transgression of the constitutional principles. Such a presumption stands from the wide power of classification which the legislature must have possessed in making laws operating differently as regards different groups of persons in order to give effect to policies.

68. Legislature is supposed to understand better the needs of the society and its laws are directed to problems made manifest by experience. In Madhu Kishwar and others v. State of Bihar and others,  : AIR 1996 SC 1864, the Hon'ble Supreme Court held that every discrimination does not necessarily fall within the ambit of Article 14 of the Constitution of India and becomes liable to struck off as every case has to be examined in peculiar facts and circumstances involved therein, otherwise it would create a chaotic situation.

69. It is well settled law that hardship or inconvenience of a group of persons cannot be the ground of deciding the law as bad. (Vide Commissioner of Agricultural Income Tax v. Keshav Chand, AIR 1950; Bengal Immunity Company v. State of Bihar,  : AIR 1955 SC 661; and D.D. Joshi v. Union of India, : AIR 1983 SC 420).

As is said, "dura lex sed lex' which means "the law is hard but it is the law." Even if the statutory provision causes hardship to some people, Court has to implement the same and ("inconvenience is not" a decisive factor in such matters) as held by Hon'ble Supreme Court in the case of Mysore State Electricity Board v. Bangalore Woolen, Cotton & Silk Mills Ltd. and others,  : AIR 1963 SC 1128.

70. Therefore, it is evident that hardship to an individual / group of persons cannot be ground of not giving the effective to the statutory provisions. More so, it is settled principle of law that the Court would lean in favour of upholding constitutionality of a Statute unless it is manifestly discriminatory as held by the Apex Court in the case of K. Anjaiah and others v. K. Chandraiah and another,  : (1998) 3 SCC 218, that it is the cardinal principle of construction that the statute and the rules or the regulations must be held to be constitutionally valid unless and until it is established that they violate any specific provision of the Constitution and the Court is under solemn duty to scrutinies the provisions of the Act. Rules or the Regulations within the set parameters if the validity of the statutory provisions is challenged (see also Smt Parayankandiyal Eravath Kanepravan Kalliani Amma and others v. K. Devi,  : AIR 1996 SC 1963; Dr. K.R. Lakshmanan v. State of Tamil Nadu and another,  : AIR 1996 SC 1153; New Delhi Municipal Committee v. State of Punjab etc. etc.,  : AIR 1997 SC 2847; Public Services Tribunal Bar Association v. State of U.P. and others,  : AIR 2003 SC 1115; and State of Gujrat v. Akhil Gujrat Pravasi v. Mahamandal,  : (2004) 5 SCC 155)).

71. Similarly, in Easland Combines, Coimbatore v. Collector of Central Excise, Coimbatore,  : (2003) 3 SCC 410, while reiterating the similar view, the Apex Court has held as under :

It is well settled law that merely because of law causes hardship, it cannot be interpreted in a manner so as to defeat its object......It is the duty imposed on the Courts in interpreting a particular provision of law to ascertain the meaning of intendant of the Legislature and in doing so, they should presume that the provision was designed to effectuate a particular object or to meet a particular requirement." (See. Nagaland Senior Government Employees Welfare Association and others v. State of Nagaland and others, : (2010) 7 SCC 643.)

72. Needless to mention therein that the vires of U.P. Secondary Education Service Selection Board (Amendment) Act, 2001 (U.P. Act 5 of 1982) although at the relevant point of time, the Section 16 (1) of the Act has not been inserted, come up for consideration before a Division Bench of this Court in the case of Shikhsha Prasar Samiti, Babhanan, District Gonda v. State of U.P. and others, 1986 UPLBEC 477, in para Nos. 5, 6 and 7, held as under :

Para No. 5 - How the Act is discriminatory or arbitrary in its application to various institutions has not been spelt out with any precise clarity. The averments are vague and general in character and it is not possible to hold on the basis of the pleading contained in the writ petition that whole of the Act or any part thereof is ultra vires the Constitution.

Para - 6. Article 19(1)(a) lays down that all citizens shall have a right to form association or unions. Article 19(4) provides that nothing in Sub-clause (c) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said Sub-clause.

Para No. - 7. Clause (1)(c) of Article 19 guarantees the right to form associations or unions. This clause has to be read with Clause (4) which permits the imposition of legal restrictions in the interest of public order or morality. The restriction imposed should not only be in the interest of public order or morality but' must also be reasonable. U.P. Act No. V of 1982 does not restrict the right of the citizens to form associations or unions. The members who constitute Petitioner society are free to form as many associations or unions as they likes The right to form association is different from making appointment of teachers in an institution. The Supreme Court in D.A.V. College Jullundur v. The State of Punjab :  : AIR 1971 SC 1737 has held that compulsory affiliation of an institution run by a society docs not affect the right to form association guaranteed under Article 219. In any case, the activities of the members of the association can be reasonably regulated in the interest of public order or morality. The U.P. Act V of 1982 is, therefore, neither discriminatory nor violative of any right under Article 19 of the Constitution."

73. Thus, keeping in view the aims and objects of both the Acts i.e. U.P. Intermediate Education Act, 1921 and U.P. Act 5 of 1982 by the legislature thereby inserting the provisions as provided under Section 33 (E) in U.P. Act 5 of 1982 by any means neither infringed nor violate the rights as guaranteed under Article 14 of the Constitution of India or any other provisions as provided under U.P. Intermediate Education Act, 1921 hence the argument as advanced in this regard on behalf of petitioners has got no force and rejected.

74. So far as the next argument advanced on behalf of the petitioners whether in spite of the provisions as provided under Section 16(1) of the U.P. Act 5 of 1982, the Committee of Management of an institution has got power to select teacher for appointment on ad hoc basis on the post of Assistant Teacher/ Lecturer invoking the provision as provided under Section 16 E (11) of the U.P. Intermediate Education Act, 1921.

75. Author Sri Bindra in his book interpretation of Statutes 7th Editioned (1984) page 1093 interpreted the word "notwithstanding anything" as under :

The very purpose of non-obstante clause is that that provision shall prevail over any other provision and that other provision shall not be of any consequence. In case there is any inconsistency or a departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause which would prevail over.

The very purpose of non-obstante clause is that that provision shall prevail over any other provision and that other provision shall not be of any consequence in case there is any inconsistency or departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause would prevail over other clauses. Even by dictionary sense the expression "notwithstanding" implies that other provisions shall not prevail over the main provision.

76. Justice G.P. Singh in his commentary on the treatise "Principles of Statutory interpretation 5th Edition (1992) observed as under :

A clause beginning with "notwithstanding anything contained in this Act or in some particular Act or in any law for the time being in force. In some times appended to a section in the beginning with a view to give effect. The indicating part of the section in case of conflict and over-riding effect over the provisions or Act mentioned in the non-obstante clause has an over-riding effect and it has to be given its due effect.

77. Patna High Court in the case of Laluprasad and another v. Sate of Bihar, : AIR 1976 Pat 137 in para 4 observed as under :

It is not a sound principle of construction to brush aside words in a statute as being inapposite or surplus age if they can have an appropriate application. The very purpose of non-obstante clause is that provision shall prevail over any other provision and that other provision shall not be of any consequence. In case there is any inconsistency or a departure between a non-obstante clause and other provisions, one of the objects of such a clause is to indicate that it is the non-obstante clause that would prevail over the other clause. Even by dictionary sense, the expression "nothwithstanding" implies that other provisions shall not prevail over the main provision.

78. Word "Notwithstanding anything contained" has been defined in Words and Phrases page 287 as under :

The word "notwithstanding" is one in opposition to and not one of compatibility with another statute and actually means in spite of.

79. Lord Viscound Simond in Smith v. East Elore Rural and District council and others,1956 (1) All ER 859, observed as under :

My Lord I do not refer in detail to these authorities only because it appears to me that they do not over-ride the first of all principles of construction that plain words must be given their plain meaning.

80. Hon'ble the Apex Court in the case of Sarwan Singh and another v. Kasturi Lal, : AIR 1977 SC 265 in paragraph 20 whereof it has been held as under :

Speaking generally, the object and purpose of a legislation assume greater relevance if the language of the law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly introduced into the Delhi Rent Act in 1975 not for seeking light from it for resolving in ambiguity, for there is none, but for a different purpose altogether. When two or more laws operate in the same filed and each contains a non obstante clause stating that its provisions will over-ride those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration.

81. Hon'ble the Apex Court in the case of Chunni Lal Parasadilal v. Commissioner of Sales fax U.P. Lucknow, 62 (1986) STC 1121, observed that an interpretation which will make the provisions of the Act effective and implement the purpose of the Act should be preferred when possible, without doing violence to the language.

82. Thus, the trust of the entire decision is that non-obstante clause will prevail other clauses. It simply cannot be brushed aside and it cannot be treated as a surplusage.

83. It is a well recognized rule of interpretation that every part of the statute must be interpreted keeping in view the context in which it appears and the purpose of legislation. In RBI v. Peerless General Finance and Investment Company Ltd., : (1987) 1 SCC 424 : (AIR 1987 SC 1023), Chinnappa Reddy, J. highlighted the importance of the rule of contextual interpretation in the following words:

Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute- maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the

Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

84. Another rule of interpretation of Statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions.

85. In Shri Ram Narain v. Simla Banking and Industrial Company Ltd., : 1956 SCR 603, Hon'ble the Apex Court held that the provisions contained in the Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951. Both the enactments contained provisions giving overriding effect to the provisions of the enactment over any other law. After noticing the relevant provisions, Hon'ble the Supreme Court observed:

Each enactment being a special Act, the ordinary principle that a special law overrides a general law does not afford any clear solution in this case.

It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein.

86. In Kumaon Motor Owners' Union Ltd. v. State of Uttar Pradesh, there was conflict between the provisions contained in Rule 131(2) (g) and (i) of the Defence of India Rules, 1962 and Chapter IV-A of the Motor Vehicles Act, 1939. Section 68-B gave overriding effect to the provisions of Chapter IV-A of the Motor Vehicles Act whereas Section 43 of the Defence of India Act, 1962, gave overriding effect to the provisions contained in the Defence of India Rules. The Hon'ble Apex Court after looking into object behind the two statutes, namely, Defence of India Act and Motor Vehicles Act and on that basis also it was held that the provisions contained in the Defence of India Rules would have an overriding effect, over the provisions of the Motor Vehicles Act.

87. In Ashok Marketing Limited v. Punjab National Bank,  : (1990) 4 SCC 406, the Constitution Bench considered some of the precedents on the interpretation of statutes and observed:

The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein.

88. In view of the above said facts, although the Section 16-E(11) of the U.P. Intermediate Education Act, 1921 has a non-obstante clause but that would prevail over the various sub sections of Section 16-E of Act 1921 and not to the provisions of the U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as the "1982 Act"). On the contrary, 1982 Act has overriding effect over any provision of 1921 Act and regulations framed thereunder to the extent they are contrary to Act No. 5 of 1982.

89. The Full Bench of this Court in Radha Raizada v. Committee of Management Vidyawati Darbari Girls Inter College (F.B.), 1994 All LJ 1077, has also found that 1982 Act has overriding effect over 1921 Act to the extent it contains inconsistent provisions. The Full Bench in Radha Raizada (Supra) after going through the provisions of 1982 Act and the Removal of Difficulties Orders issued thereunder came to the conclusion that a vacancy whether short term or regular has to be advertised in two daily newspapers and, therefore, the aforesaid view would not stand otherwise affected in any manner by Section 16-E(11) of 1921 Act since the later Act would override the earlier one.

90. Even otherwise U.P. Act 5 of 1982 is a special Act. The Apex Court in the case of Tata Motors Ltd. v. Pharmaceutical Products of India Ltd. and another, : JT 2008(9) SC 227, held that the provisions of a special Act will override the provisions of a general Act.

91. Further, if the non-obstante clause of Section 16 of U.P. Act No. 5 of 1982 i.e. notwithstanding anything contrary contained in the Intermediate Education Act, 1921", was not there, even keeping in view the intention of legislature in framing U. P. Secondary Service Commission Selection Board, 1982 and its aims and objects to make selection of suitable teachers in order to teach the students of Intermediate College in order to uplift and maintain high standards of education, there should be free and fair selection of the teachers (Assistant Teachers/Lecturers) to be appointed in the institution which are imparting education in various subjects in Intermediate Classes. The pro-visions as provided in U. P. Act No. 5 of 1982 in respect to selection of teachers/ Assistant Teachers by the selection Board must prevail over any provisions contrary to that provided in any Act or the Intermediate Education Act 1921, is the only interpretation which can be given to the provisions as provided under Section 16 of U.P. Act No. 5 of 1982 so as to advance the object of the Act (U.P. Act No. 5 of 1982) rather than retard it. Because the Courts decide what the law is and not what it should be. The Courts of course adopt a construction which will carry out the obvious intention of the legislature but cannot legislate. But to invoke judicial activism to set at naught legislative judgment is sub serve of the constitutional harmony and comity of instrumentalities. The above said view is reiterated by the Hon'ble Supreme Court in the following cases :

(I) Union of India and another v. Deoki Nandan Agarwal, AIR 1996 SC 96

(II) All India Radio v. Santosh Kumar and another,  : (1998) 3 SCC 237

(III) Sakshi v. Union of India and others,  : (2004) 5 SCC 518

(IV) Pandian Chemicals Ltd. v. CIT,  : (2003) 5 SCC 590

(V) Bhavnagar University v. Palitana Sugar Mills (P) and others, : AIR 2003 SC 511

(VI) J.P. Bansai v. State of Rajasthan,  : (2003) 5 SCC 134

92. In Nasiruddin v. Sita Ram Agarwal,  : (2003) 4 SCC 753, the Supreme Court has held that the Court can iron cut of the creases but cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain, unambiguous. It cannot add or subtract words to statute or read something into in which is not there. It cannot rewrite or recast the legislation.

93. It is well settled principle of law as laid down by Supreme Court in various decisions for example State of U.P. v. Singhepa Singh,  : AIR 1964 SC 358, keeping in view the consideration as laid down by Privy Council in the case of Nazir Ahmad v. King Emperor,  : AIR 1936 PC 253, that when the law prescribes a certain mode or specific mode of or for doing a thing or certain mode of exercising certain power of authority or right or for performing certain act then that act or thing has got to be done in that manner alone & not otherwise. Other modes in respect thereof are necessarily and by necessary implication taken to have been forbidden 8b closed.

94. In view of the abovesaid facts, argument as advanced by learned counsel for the petitioners that in spite of the provisions as provided under Section 16 of the U.P. Secondary Education Service Commission and Selection Board Act 1982 the selection on the post of Assistant Teacher/Lecturer in institution to teach Intermediate classes can be made by the Committee of Management by invoking the provision as provided under Section 16 E (11) has got no force rather the same is in contravention to law as laid down by Full Bench of this Court in the case of Radha Raizada (Supra) and the same is binding on this Court, hence rejected.

95. In the light of the abovesaid facts, when a vacancy is to be filled up by direct recruitment and salary has to be paid by State Exchequer the compliance of Articles 14 and 16 of the Constitution of India has to be observed otherwise direct recruitment by private arrangement or without making vacancy available to public at large would be violative of Articles 14 and 16 of the Constitution of India.

96. Another argument advanced on behalf of petitioners that the power to make ad hoc selection/appointment on the post of Assistant Teacher/Lecturer against substantive vacancy has been referred to the Division Bench/Larger Bench by the learned Single Judge in the Daya Shankar Mishra's case (Supra), as such any finding given in this regard by the Division Bench/Larger Bench has got no binding effect.

97. From the perusal of the judgment passed by learned Single Judge, matter in respect of the appointment of Assistant Teacher/Lecturer on ad hoc basis in the institutions which are governed by the above said provisions has come up for consideration before the learned Single Judge of this Court in the case of Rakesh Chandra Misra v. State of U.P. and others;  : (2004) 3 UPLBEC 2671, wherein it has been held that during the period when removal of difficulties order were in force or when the provisions of Section 18 of 1982 Act were in force, the appointment against short term vacancies and the ad hoc appointments could have been made only in the manner prescribed for making ad hoc/ short term appointments and the provisions of Regulation 9 of such appointment during the aforesaid period. However, the inconsistent provision in 1982 Act after 25.1.1999 to one contained in Cheaper-II, Regulation 9 and Section 16-E (11), the provisions of Chapter-II, Regulation 9 and Section 16-E (11) shall continue to hold the filed by virtue of Section 32 of 1982 Act. Paragraphs 71, 72, 75 and 79 of the said judgment are extracted below :

71. An understanding of the provisions of (Removal of Difficulties) Orders, U.P. Act No. 5 of 1982 as amended from time to time and the Regulation 9 of Chapter II of the Act 1921 makes it clear that during the period when other the (Removal of Difficulties) orders issued under the provisions of Selection Board Act, were in force or when the provisions of Section 18 of the said Act were in force, the appointment against short-term vacancies and the ad hoc appointments could have been made only in the manner prescribed for making ad hoc/ short-term appointments. The provisions of Regulation 9 of Chapter II of the Act, 1921 could not have been used for making such appointment during the aforesaid period but during all such period when there existed no such provision either under the (Removal of Difficulties) Orders aforesaid or Selection Board Act No. 5 of 1982 as amended from time to time, the Committee of Management could have made the appointments or could make the appointments strictly in accordance with the provisions of Regulation 9 (1) and (2).

72. Likewise at all times when there existed no such power to make appointment on temporary vacancy caused because of death, termination or otherwise during mid of the academic sessions the recourse could be taken to the provisions of Section 16-E (11) of U.P. Intermediate Education Act, 1921 for making such appointment which could lost till the end of such academic session in which such appointment was made, but this provision can be given a purposeful meaning by keeping the appointment intact till a regularly selected candidate is made available.

75. After the Amendment Act, 2001 the power to make ad hoc appointment has been completely taken away, even from the hands of the Committee of Management to make appointment was already taken away by virtue of U.P. Act No. 24 of 1992 by conferring the power upon the Selection Committee constituted under the provisions of amended Section 13. This power has also been taken away by the aforesaid Amendment of the year 2001. Thus after the Amending Act, 2001 came into force with effect from 30th December, 2000 there remains no power either with the Committee of Management or with Educational Authorities or the Selection Committee constituted under the Act for making such appointment under the provisions of the Selection Board Act, 1982. The power to make ad hoc appointment under various (Removal of Difficulties) Orders has already ceased by insertion of Section 33-E of the Act by means of Amending Act of 1999 which came into force on 25.1.1999.

79. While concluding I hold that in the circumstances detailed in the judgment all the appointments made by the Committee of Management, on the vacancy, if the vacancy is/was in the nature of vacancy as specified in Regulations 9(1) and 9(2) of the U.P. Act of 1921 has been filled during the period when either U.P. Act of 1921 was in force or when neither the (Removal of Difficulties) Orders issued under U.P. Act No. 5 of 1992 were available nor there was a provision under the Selection Board Act or the Rules framed there under to make such appointment the Committee of Management would have the power to make such appointment of short-term vacancy in accordance with the Regulation 9, which appointment would be in the nature of ad hoc appointments as given under the said provisions.

98. Thereafter, the case of Rakesh Chandra Misra (supra) came up for consideration before the learned Single Judge of this Court at Allahabad in Writ Petition No. 20843 of 2002 "Daya Shanker Mishra v. District Inspector of Schools and others" and learned Single Judge did not agree with the case of Rakesh Chandra Misra (supra), has referred the matter to the Larger Bench, the relevant portion of the judgment passed by learned Single Judge in the case of Daya Shanker Mishra (supra) is being reproduced herein below :

It is well settled law that when the statutes are clear, the Court by putting interpretation cannot add or subtract any words or alter the scheme of the Act. It is for the Legislature and the State Government to come forward and take appropriate steps for redeeming the situation. The attention of the learned Single Judge was not drawn towards the embargo contained in Section 16(1) of 1982 Act, i.e. the words "every appointment of a teacher", which as observed above, can include both substantive and short term appointment. I am of the opinion that following questions raised in this writ petition require to be referred to a Larger Bench for authoritative pronouncement :

(I) Whether after recession of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 with effect from 25.1.1999, the Committee of Management, can make temporary/ad hoc appointment on short term vacancies resorting to its power given under Chapter-II, Regulation 9 and Section 16-E(11) of the U.P. Intermediate Education Act, 1921 despite the provisions of Section16(1) of the U.P. Secondary Education (Service Selection Boards) Act, 1982?

(II) Whether the judgment of learned Single Judge in Rakesh Chandra Misra v. State of U.P. and others;  : (2004) 3 UPLBEC 2671, lays down correct law.

99. Thereafter, the matter in question came up for consideration before the Division Bench and it has held as under :

The 1982 Act puts a complete embargo on any appointments being made unless selected by the Board. According to Section 16(2) of the 1982 Act, any appointment of the teacher made in contravention of the provisions of Sub-section (1) would be void. Further Section 18 of the 1982 Act provides for making ad hoc appointments, according to which where a vacancy has been notified under Section 10 (1) of the 1982 Act by the management to the Commission and the Commission has failed to recommend the name of any suitable candidate within the specified time, then the management may appoint a teacher or principal or headmaster by direct recruitment or promotion on purely ad hoc basis subject to other terms and conditions as provided in Sub-section (3) thereof. This was the position when the 1982 Act was promulgated. Subsequently by amendment, Section 18 has been confined to ad hoc appointments of headmasters and principals only on the basis of promotion. In any case for dealing with the issue in hand, Section 18 as it originally stood, referred to vacancy being notified by the institution. Thus when the 1982 Act came into force, it gave the power to the management to make ad hoc appointments against notified vacancies i.e. substantive vacancies on ad hoc basis, upon failure of the Board to make the recommendations, within the stipulated time. Subsequently after amendment in Section 18 of the 1982 Act in the year 2001 the only power left with the management to make ad hoc appointment against substantive vacancy of Principal and Headmaster Now the question is what exactly is meant by the word vacancy as used in the Act. The word vacancy has not been defined in the 1982 Act. It has, however, been defined in Rule 2(e) of the 1998 Rules. It is very clear that the word vacancy has been defined to mean a substantive vacancy only arising out of death, retirement, resignation, termination, dismissal or removal or creation of a new post or appointment or promotion of an incumbent to any higher post in a substantive capacity. Further Sections 10 and 11 of the 1982 Act and the rules 10 to 12 of the 1998 Rules dealing with the procedure for recruitment, clearly provide the manner in which the vacancies are to be calculated and are to be notified. Such determination of vacancies is only referable to substantive vacancies.

In the light of the aforementioned statutory provisions, we have to examine as to whether the words "every appointment of a teacher" used in Section 16 of the 1982 Act would include within its ambit appointments made against short terms vacancies also or only the substantive vacancies. The language used in Sections 10, 11 and 18 of the 1982 Act, the definition of the vacancy as given in rule 2(e) of the 1998 Rules as also the rules 10 to 12 of the 1998 Rules lead to an inevitable conclusion that the vacancy means only the substantive vacancies, which are to be notified by the management and it is against such vacancies only that the Board shall have the power to make the selections.

The word appointment has to be correlated with the vacancy. Appointment is to be made against a vacancy. The question is of the nature of vacancy. The embargo created by section 16 of the 1982 Act has to be read and interpreted in reference to vacancy. In the present case as discussed above the vacancy refers only to substantive vacancy. Thus the power of the Board to make appointment is only against the substantive vacancy. The learned Single Judge while recording his disagreement with the ratio of law laid down in the case of Rakesh Chandra Misra (supra) has not taken into consideration this aspect of the matter. Although the learned Single Judge deciding the case of Rakesh Chandra Misra (supra) also did not deal with this aspect of the matter.

The next question to be considered which is interrelated is as to whether there is any power with the management surviving to make ad hoc appointments on short term vacancies after insertion of Section 33-E in the 1982 Act which rescinded the various Removal of Difficulties Orders issued. With regard to this question two aspects have to be considered. Firstly the effect of Section 32 of the 1982 Act, which provides that the provisions of 1921 Act, the Rules and Regulations made thereunder shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher, so far as they are not inconsistent with the provisions of the 1982 Act or Rules or Regulations made thereunder. Secondly whether there is any power under the 1921 Act or the Regulations framed thereunder to fill up short term vacancies.

We may note here with emphasis that Section 32 of the 1982 Act uses the words selection, appointment and promotion of a teacher. The words selection, appointment and promotion will include substantive as well as short term vacancies. Further we have to see whether there is any inconsistency or not in the provisions of the two Acts and the Rules and Regulations framed thereunder. We have already held above that the power of the Board to make selections is only with regard to appointments against substantive vacancies. There is no provision under the 1982 Act for making selection for appointments against short term vacancies.

Under the 1921 Act, the procedure for selection of teachers and head of the institutions is laid down in section 16-E thereof. Power of the management to fill up short term vacancy having occurred on account of leave extending for more than six months or on suspension is specifically provided in sub section 11 of Section 16-E of the 1921 Act. Further Chapter-II of the Regulations framed under the 1921 Act deals with the appoint merits of heads of the institutions and teachers. It refers to Sections 16-E, 16-F and16-FF of the 1921 Act. Regulation 9 of the said Chapter confers the power on the management to fill up the short term vacancies arising out of leave exceeding period of six months and suspension of a teacher having been approved. The management thus was vested with the power under the 1921 Act and the Regulations framed thereunder to fill up short term vacancy. Further as there is no provision under the 1982 Act or the Rules and Regulations framed thereunder with regard to filling up of short term vacancies, it can be safely concluded that there is no question of any inconsistency in the two Acts or the Rules and Regulations framed thereunder for filling up short term vacancies. Thus taking aid of Section 32 of the 1982 Act the definition of vacancy given in 1998 Rules and the provisions contained in Section 16-E(11) of the J 921 Act and Chapter-II of the Regulations framed under the 1921 Act, the management of an institution is vested with the power to fill up short term vacancies.

A Full Bench of this Court in the year 1994 in the case of Radha Raizada (supra) while dealing with the various provisions contained in the 1982 Act and the 1921 Act, had laid down that no ad hoc appointment could be made by the management against the substantive vacancy in view of the provisions contained in Sections 16 and 18 of the 1982 Act. ft, however, further held that only short term vacancies could be filled up by the management after following the due procedure prescribed in the Second Removal of Difficulties Order, which had not been rescinded till then. After its rescission in 1999 the power to fill up short term vacancy of a teacher can be derived by the management from section 16-E(11) of the 1921 Act and regulation 9 of the Chapter II of the Regulations framed under the 1921 Act.

We have also dealt with the practical aspect of the matter that in order to maintain not only the discipline but also the standard of education and commitment enforced under the Constitution, regular teaching is essential. For enforcing the same, in the given circumstances and under emerging situations, the short term vacancies need to be given urgent attention. If short term vacancies are not filled up in time, the teaching would intensely suffer. Apparently for this reason the Legislature knowing fully well that selections will be made by the Board, not for individual cases, but at State level would result into long durations, left the selection for short term vacancies outside the purview of the Board.

The learned Single Judge in the case of Rakesh Chandra Misra (supra) while concluding had also dealt with the issue that the State Government must take urgent steps for meeting the exigencies of filling up all the vacancies which are unforeseen and also for the vacancies which are likely to occur in near future including regular substantive vacancies by providing a mechanism for making ad hoc appointments against such vacancies either by direct recruitment or by promotion till the duly selected candidate is made available by the Board. The learned Single Judge was referring to substantive vacancies lying vacant for long durations and the management having been denuded of its powers for making the ad hoc appointments on substantive vacancies after the amendment of Section 18 of the 1982 Act, practical difficulties were arising in carrying out the primary goal of imparting quality education. These observations of the learned Single Judge in the case of Rakesh Chandra Misra (supra) were approved and reiterated by the learned Single

Judge while making the reference order. Thus both the learned Single Judges have felt that there should be some provision for filling up the substantive vacancies by making ad hoc appointments. 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.

We have although taken the same view as in the case of Rakesh Chandra Misra (supra) but for different reasons. Therefore, the judgment in the case of Rakesh Chandra Misra (supra) cannot be said to have laid down any incorrect law.

In view of the discussions made above, in our considered opinion the management has the power to make ad hoc appointments on short term vacancies under the provisions of 1921 Act and the Regulations framed thereunder and the judgment in the case of Rakesh Chandra Misra (supra) lays down the correct law.

100. In the judgment given by Division Bench/Larger Bench in the case of Daya Shankar Mishra (Supra), it has been in clear terms held as under :

However as long as the statute create a bar, the management cannot confer with any power to make ad hoc appointment against substantive vacancy".

101. In view of the said categorical finding given by the Division Bench/ Larger Bench in the case of Daya Shankar Mishra, even if the matter in respect to power of selecting teacher for appointment on the post of Assistant Teacher/Lecturer by the Committee of Management on ad hoc basis against the substantive vacancy has not been referred to Division Bench/Larger Bench, the same has got a binding effect in view of Section 16(1) of U.P. Act 5 of 1982 which will prevail over all the other provisions as provided in respect to selection of Assistant Teacher/lecturer against the substantive vacancy in U.P. Intermediate Education Act, 1921.

102. Even otherwise the said finding given by a Division Bench in respect to the power of the Committee of Management for making ad hoc selection/appointment against substantive vacancy is binding on a learned Single Judge (as per the law as laid down by the Apex Court in the cases of (a) Smt. Saiyada Mossarrrat v. Hindustan Steel Ltd., 1989 (1) SCC 252, (b) Subhash Chandra v. Delhi Sub. Services Selection Board,  : 2009 (15) SCC 458, (c) Gangadhara Palo v. Revenue Div. Officer and another,  : 2011(4) SCC 602, (d) Divisional Controller KSRTC v. Mahadeva Shetty and another,  : 2003 (7) SCC 197). As such the argument advanced on behalf of the petitioners in this regard, has no force, hence rejected.

103. One of the argument advanced that initially in view of the provisions as exists in Section 18 of the U.P. Act 1982 in respect to the power of ad hoc appointment of Assistant Teacher/Lecturer in LT Grade when the same has not been taken away read with the provision as provided under Section 16 E(11) of U.P. Intermediate Education Act, 1921 keeping in view Section 32 of U.P. Act 18 of 1982 and the provisions as provided under Section 16 of U.P. Act 5 of 1982 that power to select is still vested in the Committee of Management has got no force, and is liable to be rejected, as in the case of Hakim Chandra and others v. District Inspector of Schools, Jaunpur, 2010 (1) ADJ 357 and in the case of Ram Niwas Sharma v. State of U.P. and others, 2010 (6) ADJ 299 (DB), it has been held that after the enforcement of U.P. Secondary Services Selection Board, 1982, the Committee of Management has got no power to make selection of teachers on ad hoc basis against a substantive post and the same can be done only upon recommendation made by the Government authorities.

104. In the case of Ghanshyam v. State of U.P. and others, 2010 (10) ADJ 849 (DB), a Division Bench of this Court after taking into consideration the Full Bench judgment of this Court in the case of Promila Mishra v. District Inspectors of Schools and others, 2009 (9) ADJ 650, held that once a vacancy is converted into substantive vacancy, a teacher who is appointed by the Committee of Management on ad hoc basis has no right to continue on the post in question.

105. The said view was further reiterated by another Division Bench Judgment in Shashi Pal Rao v. Committee of Management, Manas Inter College, Fateshpur, Deoria and others, 2010 (7) ADJ, 392 (DB).

106. In the case of Abha Rani v. Regional Inspectress of Girls School, Meerut and others, 2011(2) ADJ 603 (DB) :2011(3) ESC 1491 (All)(DB), it has been held as under :

This Court may record that U.P. Secondary Education Services Commission and Selection Boards Ordinance, 1981 (Ordinance No. 8 of 1981) was enforced on 10th July, 1981. Under the ordinances, the power to make substantive appointment was withdrawn from the Committee of Management.

If the case of the petitioner is that she had been appointed in accordance with the U.P. Intermediate Education Act, U.P. Intermediate Education Act, 1921 and then this Court may only record that the procedure prescribed under the U.P. Intermediate Education Act has not been followed in the matter of appointment. Neither any selection committee under Section 16-F was constituted nor selection has been held in accordance with the procedure prescribed thereunder.

This Court has no hesitation to record that the entire claim set up by the petitioner is farce. Because of such illegal appointment claimed by the petitioner based on half facts without disclosing any statutory rules, wherein such appointment could be justified at the hands of the Committee of Management, petitioner obtained an interim order from this Court staying the operation of the order of Regional Inspectress of Girls School dated 4th February, 1981, which order was not even challenged in the present writ petition. The result of the interim stay order has been that the petitioner has drawn salary from the State exchequer since 1981.

The petitioner is completely ineligible to draw the salary from the State exchequer. On a pointed query made by this Court to the learned counsel for the petitioner, he stated that the appointment has been made under the provisions of U.P. Intermediate Education Act. However, he could not substantiate the contention so raised by referring to any averment in the writ petition, wherein the requirement of the constitution of the selection committee under Section 16E read with Section 16F and the procedure prescribed for selection could be said to have been followed.

In view of the aforesaid, this Court feels that the persons like the petitioner, who with the help of the Management succeed, is drawing the salary from the State exchequer without being appointed after following the statutory procedure prescribed must be put to terms. Therefore, not only the entire salary which the petitioner has drawn is to be recovered, exceptional cost is also to be imposed.

107. In the case of Haripal Singh v. State of UP. and others, 2012 (1) adj 272, after going through the various provisions as provided in respect to ad hoc appointment of a teacher on a substantive vacancy as per U.P. Intermediate Education Act, 1921 and U.P. Secondary Services Selection Board, 1982, held that a Committee of Management has got no power to appoint a teacher on a substantive vacancy on ad hoc basis.

108. In the case of Vishwamohini v. District Inspectors of Schools and others,  : 2012 (1) SCC 122, Hon'ble the Apex Court held as under :

3. The appellant thereafter filed a writ petition before the High Court of Judicature at Allahabad which was dismissed by the High Court. The learned Single Judge of High Court found that the appellant was appointed for a short term by the management and since Smt. Manju Lata Bajpai, Assistant Teacher, who was on long leave had retired, substantive vacancy occurred and against the substantive vacancy the management had no right to make short term appointment.

4. The appellant preferred an appeal against the dismissal of the writ petition before the Division Bench of the High Court. The Division Bench upheld the order of the learned Single Judge and dismissed the appeal.

5. We have heard the learned counsel for the appellant as also the learned counsel for the respondents.

6. In the peculiar facts and circumstances of this case, we are of the considered view that interest of justice would meet if the appellant is paid for the period she worked with the concerned school. Accordingly, we direct respondent Nos. 1 to 4 to pay the salary of the appellant for the period she worked, within eight weeks from today. However, the District Inspector of Schools and the State of U.P. would be at liberty to recover that amount from the management of the school or from any other individual.

109. For the foregoing reasons, it can be safely held that in view of the provisions as provided under Section16(1) of U.P. Secondary Services Selection Board Act, 1982, the Committee of Management has got no power whatsoever to make selections on the post of Assistant Teacher/ Lecturer in L.T. Grade against a substantive vacancy or a vacancy which has converted into substantive one and the power to make selection against the said vacancy is vested only with the Selected Board duly constituted for the said purpose.

110. Last argument as advanced on behalf of petitioner that the official respondent has not taken any step to fill up the vacancy in question in spite of the direction given by this Court in the case of Rakesh Chandra Mishra (Supra). In this regard Sri V.S. Tripathi, learned Additional Chief Standing Counsel on the basis of the affidavit filed by Sri Jitendra Kumar, Secretary Secondary Education, Govt. of U.P., Lucknow in Special Appeal No. 351 of 2009 (Hari Bansh Bahadur Singh v. Jitendra Kumar and others) has categorically submitted that necessary steps has been taken in order to fill up the vacancy in question, an advertisement has been issued, so it is hope and trust that the State/official respondent shall take effective steps in this direction in order to fill up the vacancies in question in order to carry out the direction/mandate as given by this Court in Rakesh Kumar Mishra's case (Supra) expeditiously keeping in view that the career of the students who are studying in the institution in question will not suffer during the present era of competition.

111. In the result, I do not find any infirmity or illegality in the action on the part of the State authorities/District Inspector of Schools either not to pay the salary or to stop the payment of salary to the Assistant Teachers/Lecturers who are appointed against substantive vacancy or short term vacancy which subsequently converted into substantive vacancy on ad hoc basis by the Committee of Management as the said authority has got no power under law to appoint them, accordingly, all the writ petitions lack merit and are dismissed. The interim orders granted in favour of petitioners in some of the writ petitions are vacated.

No order as to costs.