

**Civil Appeal**

**Present: The Hon'ble Justice Kalyan Jyoti Sengupta  
And  
The Hon'ble Justice Md. Abdul Ghani**

**Judgment on: 13.04.2010**

**F.M.A. 771 of 2008**

**State of West Bengal & ors  
Vs.  
Smt. Husna Banu & ors**

**POINTS:**

APPOINTMENT, APPROVAL -Writ petitioner an unapproved Assistant Teacher- Identical method of appointment has been accepted to be regular and valid one, pursuant to the judicial pronouncement of the Court- State cannot be allowed to adopt pick and choose policy- Her services have been accepted for a long time and even the Administrator himself has not disengaged her, therefore, it cannot be said that the appointment is altogether void or invalid-Service Law.

**FACTS:**

The writ petitioner was appointed as Assistant Teacher by the Managing Committee of the said School on consolidated pay as an unapproved teacher. Despite repeated representations being made her appointment was not approved by the District Inspector of Schools. An Assistant Teacher in Geography was also similarly placed as the petitioner. In view of non approval of the appointment by the State she filed a writ petition praying for relief for approval of her appointment which was granted by the District Inspector of Schools. In view of approval of appointment, the petitioner - respondent herein filed a Writ Petition asking for similar relief. However, her prayer for approval and/or regularization was turned down by the Director of School Education. While rejecting the case of the respondent the Director of School Education came to the finding that the

petitioner was not appointed in accordance with the recruitment rules. The existing vacancy could be filled up by School Service Commission under concerned Act which came into force in November 1997. Therefore this appeal at the instance of the State impugning the judgment and order of the learned Trial Judge.

**HELD:**

When the appointment was initially made in favour of the writ petitioner/ respondent and the same was allowed to remain subsisting and her services accepted, even if it may not be in conformity with the rules framed by the same authority, it cannot be said to be invalid for the simple reason that the identical method of appointment has been accepted to be regular and valid one, pursuant to the judicial pronouncement of the Court. Hence, in a particular given situation if the authority concerned decides to deviate from original method of recruitment such deviation and variation can be said to be the proper and regular method of recruitment on changed circumstance. It is not the deviation or variation of any law or statute, it is a departmental instruction and norms by which appointment procedure is regulated and guided. Para-25

State cannot be allowed to adopt pick and choose policy and such action is arbitrary and capricious. It is always expected that state has to adopt a consistent view fairly so that it generates confidence in the mind of the people at large that action of the government is presumed to be always fair. The Court accepts that the appointment was made at a time when the School Service Commission did not come into force. At that time the managing committee was competent to give appointment and moreover at that point of time there was no law that the appointment should be made by public notification. It can at the highest be termed to be slightly irregular method when her services have been accepted for a long time and even the Administrator himself has not disengaged her, therefore, it cannot be said that the appointment is altogether void or invalid. Para-27

**CASES REFERRED:**

- (i) Secretary State of Karnataka v. Uma Devi(3) (2006) 4 SCC, page 1.
- (ii) State of U.P. v. Neeraj Awasthi and Ors. (2006) 1 SCC, Page 667.
- (iii) The State of W.B. v. Smritikana Maity & Ors. (2008) 1 CLJ (Cal), Page 316.
- (iv) (2004) 7 SCC 112.
- (v) The State of West Bengal v. Alpana Ray, (2006) 1 CLJ (SC) 186.
- (vi) State of Monipur v. Morangnunthou Singh & Ors. (2007) 10 SCC 544.
- (vii) Punjab Water Supply & Swerage Board v. Ramjodh Singh (2007) 10 SCC, page 544.
- (viii) Official Liquidator v. Dayanand (2008) 10 SCC 1..
- (ix) Smt. Bandana Ghosh (Sarkar) v. State of W.B. & Ors. (2006) 1 CLJ (Cal) page 487.
- (x) State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr. (2000) 9 SCC 94.
- (xi) State of U.P. v. Neeraj Awasthi and Ors. (226) 1 SCC, Page 667.
- (xii) Satyabrata Das. & Ors. v. CMDA & Ors. (2006) CWN 1023.
- (xiii) Kuldeep Singh v. Govt. O NIT of Delhi (2006) 5 SCC 702
- (xiv) U.P. State Electricity Board v Pooran Chandra Pandey 2008 (1) CLJ SC 87

Mr. Wasef Ali Mondal                      ...for the Appellants

Mr. Malay Kumar Basu  
Mr. Swapan Banerjee                      ....for the Respondent/Writ Petitioner

Mr. Ashok Banerjee  
Mr Mintu Kukmar Goswami              ....for the Respondent No.4

**THE COURT:**

1) This appeal is at the instance of the State impugning the judgment and order of the learned Trial Judge dated 10<sup>th</sup> September 2004 passed in Writ petition No. 3163(W) of 2003. The short fact of the case for which this writ petition was filed by the respondent is stated hereunder:

2) The writ petitioner was appointed as Assistant Teacher in Burnpur Sri. Guru Nanak High School (hereinafter referred to as the said School) by the Managing Committee of the said School on 29<sup>th</sup> March 1994. It appears from the said letter of appointment she was appointed with effect from 1<sup>st</sup> April 1994 on consolidate basic pay of Rs. 300 per month as an unapproved teacher as at that time there were vacancies in the School which were not filled up. The said letter of appointment was issued by the then Secretary of the Managing Committee of the said School as she was found to have requisite qualification. Since then she has been rendering services in the said School. Despite repeated representations being made her appointment was not approved by the District Inspector of Schools.

3) One Smt. Mukti Sinha an Assistant Teacher in Geography who was also similarly placed with that of the petitioner was also appointed by the said School even without any appointment letter being issued. In view of non approval of the appointment by the State Smt. Mukti Sinha filed a writ petition praying for relief for approval to her appointment. The Hon'ble Mr. Justice Amitava Lala (as His Lordship then was ) by an order dated 12<sup>th</sup> January 2000 was pleased to allow the prayer of the said Mukti Sinha by directing the District Inspector of Schools to regularize her service. Pursuant to the said order the District Inspector of Schools passed order dated 15<sup>th</sup> November 2000 approving the appointment of said Mukti Sinha in the said School. At that time as there were as many as 21 sanctioned teaching posts and out of which 9 posts were lying vacant. Even additional posts of teachers were also sanctioned. In view of approval of appointment of Smt. Mukti Sinha the petitioner - respondent herein filed a Writ Petition being WP No. 82 (W) of 2001 asking for the

similar relief as it was granted to Sm Mukti Sinha. The said Writ Petition was disposed by Hon'ble Justice D.P. Kundu ( as His Lordship then was) directing the Director of School education to consider the petitioner's case. Thereafter the petitioner was heard by the Director of School Education however, her prayer for approval and/or regularization was turned down. While rejecting the case of the respondent the Director of School Education came to finding that the petitioner was not appointed in accordance with the recruitment rules. The existing vacancy could be filled up by School Service Commission under concerned Act which came into force in November 1997.

4) The respondent/writ petitioner challenged above order of Director of School Education with the prayer for approval of the appointment of the respondent. The learned Trial Judge after considering the fact and large number of decisions of Supreme Court and High Courts then holding the field on this issue was pleased to set aside the order of the Director of School Education, and to direct the State respondent to take necessary steps for regularization and/or approval of the appointment of the writ petitioner for the post of Assistant Teacher of the School in Social Science Group.

5) The present appeal has been filed aggrieved by the judgment and order passed by the learned Single Judge. It appears from the records during pendency of this appeal this Court once directed the Director of School Education to reconsider this aspect and the matter was reconsidered by the Director of School Education but same stand was taken by the Director recording that it was not legally possible to approve of the appointment as at that point of time there has been no lawful Managing Committee to take any decision much less appointment. Moreover, such appointment was absolutely irregular and illegal. The decision of the Supreme Court in this regard does not permit any authority to regularize appointment. The Director has also quoted the decision of Supreme Court rendered in case of Secretary State of Karnataka v. Uma Devi(3) (2006) 4 SCC, page 1.

6) Now the question is whether the appointment was made by the legally valid Managing Committee or not. In order to ascertain factual position this Court directed the School authority to produce the relevant records with regard to the appointment of the petitioner. Necessary records namely resolution book containing minutes of the resolution was produced in this Court. It was found there has been a resolution before issuing letter of appointment by the Managing Committee, which records the petitioner/respondent was found to be fit on test for the post, so decision was taken to appoint her on temporary basis. Nothing was placed before this Court apart from recording of the Director of School Education that the Managing Committee was de-funct. In the context of the aforesaid factual background as mentioned in the writ petition as well as pendency of the appeal the parties have advanced argument which is summarized hereunder:

7) The learned Counsel for the appellant submits that the instance of Mukti Sinha in terms of the Court's order ought not to have been relied on by the learned Trial Judge while passing order in favour of the present writ petitioner. She contends that Mukti Sinha's appointment with effect from 6<sup>th</sup> April 1991 by the Managing Committee was in violation of the Recruitment Rules. He says that there has been a misrepresentation of material fact which amounts to practising fraud upon the Court. In this connection he has relied on a decision of the Supreme Court reported in (2003) 8 SCC 319, (1994) 1 SCC 1.

8) He reiterates the facts that there has been no Managing Committee and appointment letter was issued fraudulently. This appointment was made without following the recruitment procedure prevalent at that point of time. He also submits that tenure of the Managing Committee expired on 1<sup>st</sup> September 1992 as a result DDO was appointed on 20<sup>th</sup> March 1994. Subsequently the Administrator was appointed on 29<sup>th</sup> November 1997 as such the appointment of the writ petitioner

was void ab initio. He has relied on the following Supreme Court decisions on the point that if the appointment is not made without due process of selection it is not open for the Court to make them regular or permanent.

- (xv) Secretary State of Karnataka v. Uma Devi(3) (2006) 4 SCC, page 1.
- (xvi) State of U.P. v. Neeraj Awasthi and Ors. (2006) 1 SCC, Page 667.
- (xvii) The State of W.B. v. Smritikana Maity & Ors. (2008) 1 CLJ (Cal), Page 316.
- (xviii) (2004) 7 SCC 112.
- (xix) The State of West Bengal v. Alpana Ray, (2006) 1 CLJ (SC) 186.
- (xx) State of Monipur v. Morangnunthou Singh & Ors. (2007) 10 SCC 544.
- (xxi) Punjab Water Supply & Swerage Board v. Ramjodh Singh (2007) 10 SCC, page 544.
- (xxii) Official Liquidator v. Dayanand (2008) 10 SCC 1..

9) On the proposition of law he has relied a decision of this Court rendered in the case of The State of W.B. v. Smritikana Maity & Ors. (2008) 1 CLJ (Cal), Page 316 on the point that appointments made in absence of valid Managing Committee must be held to be illegal.

10) He referred to two decisions of this Court on the point that after the School Service Commission came into force no teacher can be appointed otherwise than recommendation of School Service Commission. On this proposition he has relied on following decisions of Supreme Courts as well as of this Court

- (i) The State of W.B. v. Smritikana Maity & Ors. (2008) 1 CLJ (Cal), Page 316.
- (ii) Smt. Bandana Ghosh (Sarkar) v. State of W.B. & Ors. (2006) 1 CLJ (Cal) page 487.

11) He further submits that Article 14 of the Constitution has a positive concept, no equality can be claimed in case of illegality. He has relied on following decisions on this proposition:

- (i) State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr. (2000) 9 SCC 94.
- (ii) State of U.P. v. Neeraj Awasthi and Ors. (226) 1 SCC, Page 667.
- (iii) Satyabrata Das. & Ors. v. CMDA & Ors. (2006) CWN 1023.
- (iv) Kuldeep Singh v. Govt. O NIT of Delhi (2006) 5 SCC 702
- (v) Secretary State of Karnataka v. Uma Devi(3) (226) 4 SCC, page 1.

12) He has urged on the proposition of law that the decision of the Court which is contrary to the principles settled in the decision of the Supreme Court, cannot be held to be a precedent.

13) In this regard he has placed reliance on the following decisions.

- (i) Secretary, State of Karnataka v. Uma Devi (3) (226) 4 SCC, page 1.
- (ii) State of U.P. v. Neeraj Awasthi and Ors. (2006) 1 SCC, Page 667.
- (iii) The State of W.B. v. Smritikana Maity & Ors. (2008) 1 CLJ (Cal), Page 316.

14) He further contends that the continuous service for a long time is not the ground for regularization. Availability of vacancy or fund would not be ground for regularization. He has placed reliance on the following decisions in this context:

- (iv) State of U.P. v. Neeraj Awasthi and Ors. (2006) 1 SCC, Page 667.
- (v) Secretary State of Karnataka v. Uma Devi(3) (2006) 4 SCC, page 1.
- (vi) Punjab Water Supply & Swerage Board v. Ramjodh Singh (2007) 10 SCC, page 544.
- (vii) Official Liquidator v. Dayanand (2008) 10 SCC 1.



15) There was no prior permission for such appointment as such the same cannot be regularized. He has drawn the attention of this Court to a decision of this Court.

The State of West Bengal v. Probhat Mondal : 2006 (1) CLJ (Calcutta) page 624.Part 7.

16) The other submission made in his written argument are in our view not relevant.

17) Mr. Malay Bose learned Senior Advocate appearing for the writ petitioners/respondents submits that when Mukti Sinha's appointment has been regularized in terms of the Court's order by the State there was no reason to deny the writ petitioner/respondent's claim as they were appointed in the same manner and method. Significantly the State Government has accepted the decision of this Court in the case of Mukti Sinha whereas the Government in the case of the respondent has taken different stand. The learned Trial Judge has considered large number of decisions of the Supreme Court and High Court on the facts and circumstances of this case and there is no reason to interfere with the same. When the decision of the learned trial Judge was rendered or the appointment was made the Supreme Court did not decide the Uma Devi's case as at that point of time. The Supreme Court Decisions which were cited, and considered by the learned Trial Judge was in a different direction from what has been decided in Uma Devi's case. Therefore, the law prevailing at the time of appointment as well as decision rendered in this matter was applied. Subsequent decisions of the Supreme Court cannot be made retrospective operation in general.

18) He contends his client's case is based on decision of this Court which was accepted by the respondent by regularizing the appointment of Mukti Sinha. Hence appointment rules is deemed to have been changed and/or varied by the respondent accepting the Court's direction. The recruitment method then provided in the School Code, is an administrative direction and is not the law made by any legislature nor it can partake the character of legislation that cannot be changed administratively. As such a rule regarding appointment in aided school is always changeable and

variable. If in case of Mukti Sinha such rule is departed from then why in case of writ petitioner it could not be done?

19) Mr. Ashok Banerjee learned Senior Advocate appearing for the School Authority producing the records submits that the decision for appointment of the writ petitioner was taken by valid Managing Committee. Pursuant to the resolution the Secretary issued the letter of appointment. The Administrator appointed much later even after appointment of Administrator the writ petitioner continued to serve.

20) After hearing the learned Counsels and having read the pleading on records and lastly having gone through the impugned judgment and order of the learned Trial Judge, the question arises as to whether the learned Trial Judge is justified in allowing the writ petition consequently granting relief by holding that the respondent/writ petitioner has been discriminated in the matter of regularization.

21) Crux of the question in this matter is whether the writ petitioner/respondent is entitled to get relief as granted by the learned Trial Judge when admittedly another Teacher on the similar facts and circumstances was granted relief by way of regularization accepting the judgment and order of this Court. It appears that the learned Advocate for the appellant argued covering many a subjects ranging from validity and legality of the appointment which in its turn raises question of competence of the appointing authority and legality of method of appointment. The learned Trial Judge, as we read, has extensively dealt with the legality and validity of the appointment. We notice the learned Trial Judge has applied the principle of law laid down by several judicial pronouncements then holding the field, and in our view has correctly applied the principle laid down by the judicial pronouncements at that point of time. The judgment of Supreme Court in case of State of Karnataka v. Uma Devi reported in (2006) 4 SCC 1 at that point of time was not rendered. It is subsequent pronouncement of the Supreme Court with regard to the appointment of

any employee in the Government or Government organization or statutory corporation. The above judgment has laid down the principle which needs to be considered in this case is that no appointment shall be made de hors recruitment rules. On the same ground large number of decisions have been cited by the learned Lawyer of the appellant which have already been quoted by us. In our view those are neither relevant nor germane in the issues involved herein. The decision of the Uma Devi's case has not dealt with the situation of discrimination nor the impact of acceptance of judicial pronouncement with regard to departure from the mode of appointment on identical fact and situation. As we have already noted here the issue is discrimination.

22) In a Supreme Court decision in case of U.P. State Electricity Board v Pooran Chandra Pandey reported in 2008 (1) CLJ SC 87, while considering and discussing the said Uma Devi's case has held in 11 paragraph as proposition of law as follows:

“.....in our opinion the decision of Uma Devi's case is clearly distinguishable. The said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution.”

23) In this case the Supreme Court on almost identical fact on the question of discrimination and arbitrariness passed order for regularization. In paragraph 17 in the above judgment, their Lordships observed that:

“ We have to read Uma Devi's case in conformity with the Article 14 of the Constitution, and we cannot read it in a manner which will make it in conflict with Article 14. The Constitution is the supreme law of the land, and any judgment, not even of the Supreme Court, can violate the Constitution.”

24) In this case a group of daily wagers (employees) of a co-operative Electricity Supply Society who were later on absorbed as such by the U.P. State Electricity Board, approached for

regularization of their services at par with original employees of the Board who are similarly placed. The Supreme Court having found the petitioners having rendered long 22 years services and having noted of the decisions of the Board for their original employees of same category for regularization granted relief. At the time of the argument the said Uma Devi's case was cited to contend regularization de hors the recruitment rule cannot be granted.

25) In this case we are constrained to hold that when the appointment initially made in favour of the writ petitioner/respondent and the same was allowed to remain subsisting and accepted her services even if it may not be in conformity with the rules framed by the same authority, cannot be said to be invalid for the simple reason the identical method of appointment has been accepted to be regular and valid one, pursuant to the judicial pronouncement of the Court. Hence we think in a particular given situation if the authority concerned decides to deviate from original method of recruitment such deviation and variation can be said to be the proper and regular method of recruitment on changed circumstance. It is not the deviation or variation of any law or statute, it is a departmental instruction and norms by which appointment procedure is regulated and guided. The learned Counsel for the appellant could not give any answer on the question of discrimination, on the contrary the learned Counsel has cited a decision of Supreme Court reported in (1995) 4 SCC 683, on the point that unchallenged decision of the Court cannot be a ground for enforcement of any right which is not otherwise permissible. In that case the Supreme Court factually found that a decision was rendered by the High Court which was subject to challenge before the Supreme Court and during pendency of such SLP similar judgments were passed by the Supreme Court in large number of matters subsequently. In that case it was held that when the parent order was under challenge and was found to be unsustainable in law, subsequent decision though not being challenged cannot be said to be acceptable judgment in the eye of law. In our considered opinion

this judgment address the question posed before the Court on the ground of discrimination, rather the decision of the Division Bench of the Supreme Court in case of U.P. State Electricity Board is absolutely apt guidance if not only binding precedent. This apart there is an unreported decision rendered by this Court on reference being made in case of Indian Council of Agricultural Research & Ors. Taramoni II & Ors. (WPCT 503 of 2005). On identical facts and situation the Court held that ratio of decision of Uma Devi's case is not an answer on the question of Article 14 of the Constitution of India. In that case the Division Bench differed on the point that whether Uma Devi's case is applicable on a fact when the State respondent after having accepted the earlier judgment of the Tribunal in case of regularization of services of a similarly placed employee can be ignored in a subsequent case of similar group of employees. In this case the learned Tribunal granted relief having found its earlier judgment on identical facts and situation having been accepted by the State. The said judgment was challenged by the State later on and one of the Hon'ble Judges of the Division Bench felt that Uma Devi's case has no manner of application in a clear case of discrimination under Article 14 but another learned Judge applied the principle laid down in the Uma Devi's case. Hence the matter was referred to the learned Third Judge who later has accepted the views that in case of discrimination under Article 14 of the Constitution Uma Devi's case has no manner of application.

26) We are unable to accept the decision of the Division Bench of this Court in case of State of West Bengal and Ors. v. Smritikana Maity & Ors. (reported in (2008) 1 CLJ 316 as it has dealt with the question of competency of the appointing authority in the context of the School Service Commission Act and it has not dealt with question of discrimination when Government accepting pronouncement of the Court has regularized in one case and rejects another case. All other decisions cited by the learned Counsel for the appellant quoted above are on the same principle and

same line and those judgments in our view have no manner of application because those judgments are not answer to the problem placed before us namely the discrimination. According to us at this stage the State authority cannot question the so-called irregular appointment of the petitioner when similar appointment has to be accepted and regularized in case of Mukti Sinha.

27) State cannot be allowed to adopt pick and chose policy and such action is arbitrary and capricious. It is always expected that state has to adopt a consistent view fairly so that it regenerate confidence in the mind of the people at large that action of the government is presumed to be always fair. Another argument has been advanced that after the School Service Commission come into force there cannot be any appointment other than provided in the said Act. This question has been dealt with by the learned Trial Judge and we also accept the same as the appointment was made at a time when the School Service Commission did not come into force. At that time the managing committee was competent to give appointment and moreover at that point of time there was no law that the appointment should be made by public notification. It can at the highest be termed to be slightly irregular method when her services has been accepted for a long time and even Administrator himself has not disengaged her, therefore, It cannot be said that appointment is altogether void or invalid. On the above discussion we do not find any force in the argument of the learned Counsel for the appellant/State. Hence we do not see any reason to interfere with the judgment rendered by the learned Single Judge. We affirm the same, consequently dismiss the appeal.

28) We are also staying the subsequent order of the Director of School Education rendered in terms of the Division Bench judgment and direct the respondent to carry out the order of the learned Single Judge.

**(Kalyan Jyoti Sengupta, J.)**

29) I agree.

**(Md. Abdul Ghani, J.)**

**FMA 346 of 2006.**

**Smt. Reba Bhattacharya & Ors.**

**V.**

**State of West Bengal & Ors.**

Mr. Malay Kumar Basu  
Mr. Swapan Banerjee..for the Respondent/Writ Petitioner

Ms. Nilima Das ..for the Appellant

Judgment on: 13.04.2010.

**K.J. Sengupta, J:-**

The facts are almost identical and the issues are similar in this case. Only distinguishing feature is that the order of the learned Single Judge has been implemented, however, with a rider the same will abide by the result of the appeal. When the facts and circumstances are identical, therefore, we deal with the judgment of the learned Single Judge and we dismiss the appeal, consequently the order implemented in this case hereby confirmed.

There will be no order as to costs.

Learned Advocate for the appellants prays for stay of the judgment and we allow such prayer for a period of three weeks from date.

**(Kalyan Jyoti Sengupta, J.)**

I agree.

**(Md. Abdul Ghani, J.)**