

SUPREME COURT OF INDIA

Munishwar Dutt Pandey

Vs.

Ramjeet Tiwari

(N. P. Singh and S. B. Majmudar JJ.)

C.A.No.7943 of 1996

03.12.1996

JUDGEMENT

S. B. MAJMUDAR, J.:-

1. In this appeal by special leave under Article 136 of the Constitution of India the appellant has brought in challenge the decision rendered by a Division Bench of the High Court of Judicature at Allahabad. Lucknow Bench in Special Appeal No. 300 of 1992, moved by respondent No. 1 against a common judgment and order of the learned single Judge in three writ petitions filed by the contesting parties to these proceedings, namely, the appellant on the one hand and respondent No. 1 on the other. The short question involved in these proceedings is as to whether the appellant Munishwar Dutt Pandey or respondent No. 1 Ramjeet Tiwari is entitled to continue as Principal of Brijendra Mani Inter College, Kohandaur, Pratapgarh functioning in the State of Uttar Pradesh. For the sake of convenience we will refer to the appellant as original writ petitioner, and respondent No. 1 as the main contesting respondent.

2. A few relevant facts leading to these proceedings deserve to be noted at the outset. The original

writ petitioner and the contesting respondent were appointed as teachers in the aforesaid Brijendra Mani Inter College, Kohandaur in Pratapgarh District of State of Uttar Pradesh. Both of them were working as lecturers in their respective Departments of Sanskrit and Geography. One Jagdeo Prasad Misra was working as regularly appointed Principal of the said Brijendra Mani Inter College (hereinafter referred to as 'the College'). He retired from service on 30th June, 1988, on attaining the age of superannuation. Immediately before his retirement, said Shri Misra addressed a letter jointly to the Chairman / President of the Managing Committee of the College and its Secretary inquiring from them as to whom he should hand over charge on his retirement. In that letter he mentioned that the writ petitioner was senior most lecturer of the College having been appointed on 12th August 1969 and the second senior most lecturer in the College was the contesting respondent. On this letter of retiring Principal, the Secretary of the Managing Committee made an endorsement to the President / Chairman of the Committee stating that Shri Misra was superannuating on 30th June 1988 and the writ petitioner was the senior most lecturer of the College and, therefore, he recommended that the charge of the post of Principal be given to him. This recommendation was accepted by the President / Chairman of the Committee on 1st July 1988. Pursuant to this order, a Letter of Appointment effective from 1st July, 1988 was issued to the writ petitioner under the signature of Chairman / President of the Managing Committee appointing the writ petitioner as ad hoc Principal of the College. It appears that on that day the said order was not backed up by any Resolution of the Managing Committee. However, it was mentioned in this Letter of Appointment that the writ petitioner was being appointed purely on ad hoc basis and his appointment would last till a suitable candidate was made available by the U. P. Secondary Education Services Selection Board (hereinafter referred to as 'the Board'), or till any other decision was taken by the management. Pursuant to this Appointment Letter the writ petitioner started working as Principal of the said College from 1st July 1988. On 29th October 1988, the Managing Committee of the College passed a Resolution accepting the ad hoc appointment of the writ petitioner on the post of Principal. The said appointment was in turn approved by the District Inspector of Schools vide his letter dated 19th May, 1989, for payment of salary under the provisions of U. P. High Schools and Intermediate Colleges (Payment of Salaries to Teachers and other Employees) Act, 1971. In the said Letter of Approval it was mentioned that the approval was given for appointment of the writ petitioner under Section 18 of the U. P. Secondary Education services Selection Board Act. 1982, (hereinafter referred to as 'the Act') and the appointment was purely temporary and would last till a candidate selected by the Board was available.

3. It is not in dispute between the contesting parties that the writ petitioner is senior to the contesting respondent. The writ petitioner was appointed as lecturer in Sanskrit on 12th August 1969. Whereas the contesting respondent was appointed as a lecturer in Geography on 14th August 1969. It was also an admitted position between the contesting parties before the High Court, both before the learned Single Judge as before the Division Bench, that the management of the College had sent in July 1988, a requisition to the Board for selection of a regular Principal of the College. As prescribed under the Rules framed under the Act the management forwarded names of writ petitioner and contesting respondent to the Board which called both of them and other candidates for interview. The Board after interviews notified on 3rd May 1991, that it had selected the contesting respondent at serial No. 1 and one another person named Shiv Sagar Shukla at serial No. 2, in order of merit for the post of Principal of the College. However, the writ petitioner was not selected. The Board communicated the said notification to the management vide its letter dated 6th May 1991. In pursuance of the said selection the Committee of Management appointed the contesting respondent to the post of Principal of the College vide its Resolution dated 18th May

1991, and Letter of Appointment of the same date was issued in favour of the contesting respondent who took over charge from the writ petitioner on 14th May, 1991. Now in the meantime it transpired that Section 33-A of the Act got amended by the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Act, 1991. As per the said Act Section 2 of the Amending Act was deemed to have come into force from 6th April 1991, and the remaining provisions were to come into force at once. Section 33-A of the Act was amended by insertion of sub-sections (1-A), (1-B) and (1-C) in Section 33-A of the Act. We shall refer to the said provisions of the Amending Act an appropriate stage in latter part of this judgment. Placing reliance on these amended provisions of Section 33-A the writ petitioner moved the High Court of Judicature at Allahabad, Lucknow Bench by way of writ petition contending that his ad hoc appointment as Principal with effect from 1st July 1988, had stood statutorily regularised and, therefore, he was entitled to continue as a regularised Principal of the College and consequently the contesting respondent could not continue as Principal of the said College. He, of course, by separate writ petition challenged the process of selection undertaken by the Board but we are not concerned with that writ petition in the present proceedings. The third writ petition was moved by the contesting respondent contending that he was entitled to continue as a regularly selected Principal of the College. As all these three writ petitions involved common question they were heard together and were disposed of by a common Judgment of the learned single Judge of the High Court. The learned single Judge took the view that in the light of the Amending Act of 1991, which had brought on the Statute Book Section 33-A (1) (1-A) of the Act appointment of writ petitioner was required to be regularised as Principal of the College. Consequently the contesting respondent could not continue to function as Principal of the College. In the light of the aforesaid finding of his the writ petition filed by the writ petitioner was allowed. A writ of certiorari was issued quashing the notification dated 3rd May 1991, appointing the contesting respondent as Principal of the College. A writ in the nature of mandamus was issued commanding the management and other authorities which were joined as parties to the writ petitions not to give effect to the notification dated 3rd May, 1991, and directing them to allow the writ petitioner to continue on the post of Principal of the College. The writ petition filed by the contesting respondent was dismissed. As stated earlier it is the common order of the learned single Judge of the High Court which was brought in challenge by the contesting respondent by filing Special Appeal No. 300 of 1991, before the Division Bench of the High Court. The Division Bench by its impugned order took the view that the writ petitioner was not entitled to get regularisation of his ad hoc appointment as Principal and neither amended provision of Section 33-A (1) (1-A) nor Section 33-A (1) (1-C) was applicable to the case of the writ petitioner. Consequently there was no question of regularising his services as Principal and on the contrary as in the selection process the contesting respondent was selected and the writ petitioner was not selected, it was the contesting respondent who was entitled to continue as Principal of the College and not the writ petitioner. Consequently, the appeal was allowed and the judgment of the learned single Judge was set aside. However it was clarified that as the writ petitioner Munishwar Dutt Pandey had held the post of Principal in spells under different orders of the Court if he had been paid the salary of the post of Principal he shall not be compelled to refund the same. If on the other hand the salary was not paid he shall not be entitled to get it. The aforesaid judgment of the Division Bench is brought on the anvil of scrutiny in the present proceedings by the writ petitioner.

Rival Contentions

4. Learned counsel for the writ petitioner contended in support of the appeal that the writ petitioner, who was promoted as Principal on ad hoc basis with effect from 1st July 1988, was entitled to be regularised in the substantive vacancy of the Principal of the College by virtue of Section 33-A (1) (1-A) of the act. He Submitted that it is true that reliance was also placed by the writ petitioner before the High Court on Section 33-A (1) (1-C) of the Act but the he does not claim regularisation under the said provision. According to him though earlier the appellant was promoted as ad hoc Principal under the orders of the President of the College with effect from 1st July 1988, the said appointment was duly backed up and ratified by subsequent Resolution of the Managing Committee of the College on 20th October 1989, and that the High Court was in error in treating the appellant's ad hoc promotion to the post of the Principal of the College only from 29th October 1988. In his submission the said conclusion reached by the Division Bench of the High Court was contrary to the express terms of the said Resolution which clearly stated that the Managing Committee had unanimously accepted the writ petitioner's ad hoc appointment as 'Acharya' and this acceptance obviously referred to the initial ad hoc appointment w. e. f. 1st July 1988. It was next contended by learned counsel for the writ petitioner that the Division Bench of the High Court was not justified in taking the view that the writ petitioner's appointment by way of promotion to the post of Principal was governed by paragraph 4 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1991 (hereinafter referred to as 'the Order') and not by paragraph 2 thereof. According to the learned counsel paragraph 4 was complementary to paragraph 2. Both operated in the same field and had to be read conjointly. It was accordingly submitted that the case of the appellant for regularisation was squarely covered by the amended provisions of Section 33-A (1) (1-A) of the Act and that once that conclusion was reached the writ petitioner stood regularised as Principal by the deeming fiction of the said provision w. e. f. 6th April 1991. Consequently the subsequent interviews for the said post as held by the Selection Board were an exercise in futility as they related to a post which was no longer vacant from 6th April 1991 on wards. Hence the result of the selection proceedings by the Board became superfluous and of no legal effect. Accordingly the selection of contesting respondent pursuant to such an infructuous process of selection could not avail him to continue as Principal of the College. In his submission the decision to which the learned single Judge reached was well borne out from the scheme of the Act and was wrongly set aside by the Division Bench by the impugned judgment.

5. While supporting these contentions on behalf of the appellant-writ petitioner, learned counsel for respondent No. 4 the Committee of Management of the College, contended that the appointment of writ petitioner by way of promotion on ad hoc basis was not as per Section 18 of the Act as for applicability of the said section two conditions were required to be fulfilled:

(i) that the appointment should have been made after the vacancy of the Principal was notified by the Management to the Selection Commission in accordance with the provisions of the Act; and

(ii) the period of one year should have elapsed from the date of such notification of vacancy during which the Commission had failed to recommend the name of any suitable candidate for being appointed as a teacher specified in the Schedule or alternatively at least a period of two months should have elapsed during which the post of such teacher should have actually remained vacant and

only thereafter the management might have appointed by promotion the concerned teacher on ad hoc basis.

According to her by the time the Management passes the Resolution on 29th October 1988, the post of Principal had not remained actually vacant. On the contrary on the wording of the said Resolution it could be said that the said post of Principal it was already occupied by the writ petitioner with effect from 1st July 1988 of course as an ad hoc promotee to the said post. It was, therefore, submitted by learned counsel for the Management that the appointment by way of promotion of the writ petitioner on ad hoc basis was made by the Management not as per Section 18 of the Act but as per paragraph 2 of the Order.

6. On the other hand learned counsel for the contesting respondent in the first instance contended that the Order as subsequently amended the Second Order, did not cover vacancy which might arise after the coming into force of the said Order as these Orders were confined to only those existing vacancies which had remained unfilled till the commencement of these Orders. In his submission the said conclusion can be drawn from the express wording of both these Orders as construed in the light of the respective preambles to these Orders. He submitted that on a harmonious construction of the relevant paragraphs of these Orders along with the preambles which indicated the need for enactment of such Orders by the subordinate legislative authority a conclusion can be reached that these Orders were meant to cater to only those vacancies which had arisen in the light of the day upto the time these Orders for removal of difficulties got enacted. That these Orders sought to remove the then existing difficulties for the managements which were not able to fill up the then vacancies and the selecting authorities, namely the Commission or the Board on the other hand had not been able to select the required candidates to fill up these vacancies. That as in the present case the vacancy of the Principal had arisen seven years after promulgation of these Orders, the said vacancy of the Principal was beyond the sweep of both the first and the second Orders. He fairly stated that this contention was not canvassed either before the learned single Judge or before the Division Bench of the High Court but in his submission as the contention went to the root of the matter and raised a pure question of law it deserved to be considered by us. He alternatively contended that paragraph (2) of the Order was clearly repugnant to the scheme of the Act and as paragraph (2) was a piece of subordinate legislation it must yield to the parent provision found in Section 18 and, therefore, it must be held that the ad hoc promotion given to the writ petitioner was in substance according to the provisions of Section 18 and not de hors it. It was next contended by him that the Division Bench of the High Court rightly held that Resolution dated 29th October, 1988, was purely prospective and could not retrospectively promote the writ petitioner with effect from 1st July, 1988. That a conjoint reading of all the recitals of the Resolution yielded this result. Once that is so it must be held, according to the learned counsel for the contesting respondent, that the writ petitioner got no benefit of Section 33-A (1) (1-C). He further contended that so far as the applicability of Section 33-A (1) (1-A) is concerned the Division Bench of the High Court had rightly held that paragraph (2) of the Order did not cover, the writ petitioner's case as the writ petitioner was promoted as head of the institution if at all, as per Paragraph (4) of the Order and for such appointments the scheme of regularisation as contemplated by Section 33-A (1) (1-A) could not be of any avail as only ad hoc promotions under paragraph (2) of the Order were envisaged by the sweep of the said provision. Promotions of head of the institutions contemplated by the Paragraph (4) of the Order were outside the purview of the said provision and consequently the writ petitioner could not get the benefit of the

said provision. That once the writ petitioner is out of the beneficial sweep of the regularisation provisions of Section 33-A (1) (1-A) it must be held, submitted learned counsel for the contesting respondent, that as he had failed to be selected for the said post in open competition and the contesting respondent was duly selected on merits for the said post, the writ petitioner was rightly non-suited by the impugned judgment of the Division Bench of the High Court.

7. In view of these rival contentions the following points arise for our determination :

(1) Whether the writ petitioner is entitled to get the benefit of deemed regularisation of his ad hoc promotion as Principal of the College under Section 33-A (1) (1-A) of the Act.

(2) Whether the writ petitioner's appointment by way of promotion was under Section 18 of the Act.

(3) Whether the writ petitioner's appointment by way of promotion as ad hoc Principal of the College was effective from 1st July, 1988, as contended by the writ petitioner or from 29th October, 1988, as submitted by learned counsel for the contesting respondent.

For the reasons which we will indicate presently our answers to the aforesaid points for determination are as under :

Point No. 1 - In the affirmative.

Point No. 2 - In the negative.

Point No. 3 - The writ petitioner's appointment by way of ad hoc promotion as Principal became effective from 1st July, 1988, and not only from 29th October, 1988.

8. In view of our aforesaid answers to these points for determination the writ petitioner is entitled to succeed in the present proceedings. We now proceed to record our reasons in support of the aforesaid answers to these points for determination. However, before we do so it would be apposite to glance through the relevant statutory provision governing the controversy between the parties.

Statutory provisions

9. The Act of 1982, was preceded by an Ordinance of 1981. The said Ordinance was captioned "Uttar Pradesh Secondary Education Services Commission and Selection Boards Ordinance, 1981 (U. P. Ordinance No. 8 of 1981)". It was promulgated with a view of establish a Secondary Education Services Commission and six or more Secondary Education Selection Board for selection of teachers in institutions recognised under the Intermediate Education Act, 1921. It is not in dispute that the College in question is governed by the provisions of the Intermediate Education Act, 1921. This Ordinance was followed by the Act of 1982, being U. P. Act No. 5 of 1982. The Preamble of the said Act provides that it is an Act to establish Secondary Education Services Commission and Selection Boards for selection of teachers in institutions recognised under Intermediate Education Act, 1921. We will now refer to the relevant provisions of the said Act as were applicable at the relevant time in 1988, when the vacancy of the Principal arose in the College and for occupying the same the rival claims of the writ petitioner and the contesting respondent have to be examined. Section 9 of the Act provides for establishment of Commission called Uttar Pradesh Secondary Education Services Commission. The Commission was entrusted under Section 9 with the powers and duties to prepare guidelines on matter relating to the method of recruitment and promotion of such categories of teachers as are specified in the schedule and to perform diverse other functions as laid down in the said section. Section 10 of the Act is material for our purpose. It reads as under:

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

The said section will have to be read with Section 2(k) which defines 'Teacher' to mean 'a person employed for imparting instruction in an institution and includes a Principal or a Headmaster'. A conjoint reading of these provisions will, therefore, indicate that once the vacancy of a Principal arises in a College governed by the said Act the management has to notify the vacancy to the Selection Commission in the manner provided by the Rules which prescribed the procedure for that purpose. The next relevant section is found in Chapter IV of the Act dealing with 'Appointment of Selected Teachers'. It reads as under:

"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 Sections 18, 21- B, 21-C, 21-D, 33 and 33-A.

(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, 1981, be made by the management only on the recommendation of the Board;

Provided that in respect of retrenched employees, the provisions of Section 18-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 years' 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. "

Then follows Section 18 which represented the main bone of contention between the contesting parties. It is, therefore profitable to extract it as under:

"18. Ad hoc Teachers. (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 teachers has actually remained vacant for more than two months, then, the management may appoint, be 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 next relevant Section is Section 33 which may profitably be noticed as under :-

"33. Power to remove difficulties. (1) The State Government may, for the purposes of removing any difficulty, be a notified order, direct that the provisions of this Act shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as it may deem to be necessary or expedient;

Provided that no such order shall be made after two years from the date of commencement of this Act;

(2) Every order made under sub-section (1) shall be laid before both the Houses of State Legislature.

(3) No order under sub-section (1) shall be called in question in any Court on the ground that no difficulty as is referred to in sub-section (1) existed or required to be removed. "

Then follows Section 33-A which deals with 'Regularisation of certain appointments'. The said section with its relevant amendments is germane to the present controversy. The relevant provisions

thereof read as under:-

"33-A. Regularisation of certain appointments. - (1) Every teacher directly appointed, before the commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Ordinance, 1985, on ad hoc basis against a substantive vacancy in accordance with paragraph 2 of Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, as amended from time to time, who possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with, the provisions of the Intermediate Education Act, 1921, shall, with effect from the date of such commencement, be deemed to have been appointed in a substantive capacity provided such teacher has been continuously serving the institution from the date of such appointment up to the date of such commencement.

(1-A) Every teacher appointed by promotion, on ad hoc basis against a substantive vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, as amended from time to time, who possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with the provisions of, the Intermediate Education Act, 1921, shall, with effect from the date of commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Act, 1991, be deemed to have been appointed in a substantive capacity provided such teacher has been continuously serving the institution from the date of such ad hoc appointment to the date of such commencement.

(1-B)

(1-C) Every teacher appointed by promotion or by direct recruitment before July 31, 1988 on ad hoc basis against a substantive vacancy in accordance with Section 18, who possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with the provisions of the Intermediate Education Act, 1921 shall, with effect from the date of commencement of the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Act, 1991 be deemed to have been appointed in a substantive capacity provided such teacher has been continuously serving the institution from the date of such ad hoc appointment to the date of such commencement.

(2) Every teacher deemed to have been appointed in a substantive capacity under sub-section (1) or (1-A) or (1-B) or (1-C) shall be deemed to be on probation from the date of commencement referred to in sub-section (1) or (1-A) or (1-B) or (1-C) as the case may be.

(3) Nothing in this section shall be construed to entitle any teacher to substantive appointment-

(a) if on the date of commencement referred to in sub-section (1) or (1-A) or (1-B) or (1-C) , as the case may be, such post had already been filled or selection for such post had already been made in accordance with this Act, or

(b) if such teacher was related to any member of the Committee of Management or the Principal, or Head Master of the institution concerned.

Explanation - For the purposes of this sub-section a person shall be deemed to be related to another if

(i) they are members of a Hindu undivided family; or

(ii) they are husband and wife; or

(iii) the one is related to the other in manner indicated in the Second Schedule to the Intermediate Education Act, 1921. "

We may now refer to the relevant rules framed by the Governor in exercise of powers conferred under Section 35 of the Act. The relevant rule for our purpose is Rule 4 which deals with 'Determination and intimation of vacancies'. It lays down that 'the Management shall determine and intimate to the Management shall determine and intimate to the Commission, in the proforma given in Appendix 'A' and in the manner hereinafter specified, the number of vacancies existing or likely to fall vacant during the year of recruitment and, in the case of any post, other than the post of the head of an institution, also the number of vacancies to be reserved for the candidates belonging to the scheduled castes, scheduled tribes and other category of persons in accordance with the rules or orders issued by the Government in this behalf in regard to the educational institutions'. Clause (ii) of Rule 4 (i) provides that 'in regard to the post of head of an institution, the Management shall also forward, mutatis mutandis in the manner hereinafter specified, the names of two senior-most teachers, copies of their service records (including character rolls) and such other record or particulars as the Commission may require from time to time'. Sub-rule (5) of Rule 4 lays down that, 'where a vacancy occurs at any time during the session or after the requisition has already been sent in accordance with sub-rules (2), (3), (4) or (5) of these Rules, the Management shall notify the vacancy to the Inspector within 15 days of its occurrence and the Inspector and the Deputy Director shall deal with it in the manner mentioned in sub-rules (3) and (4) within 10 days of its receipt by them'. The next relevant statutory provision is furnished by the Order issued by the Governor in exercise of powers vested in him under Section 33 of the Act which deals with 'Removal of difficulties' as seen earlier. The said Order which may be styled as the first Order is dated 31 st July, 1981. The Preamble of the said Order reads as under:

"Whereas, the Uttar Pradesh Secondary Education Services Commission and Selection Boards Ordinance, 1981 (U. P. Ordinance No. 8 of 1981) was promulgated on July 10, 1981 with a view to establish a Secondary Education Services Commission and six or more Secondary Education Selection Boards for selection of teachers in institutions recognised under the Intermediate Education Act, 1921;

And, whereas, the establishment of the Commission and the Selection Boards is likely to take some time and even after the establishment of the said Commission and Boards, it is not possible to make selection of the teachers for the first few months:

And, whereas, a number of vacancies in the posts of teachers in various institutions recognised under the Intermediate Education Act, 1921, exist and the failure or delay in filling up of such vacancies is likely to create difficulties;

Now, therefore, in exercise of the powers under section 33 of the Uttar Pradesh Secondary Education Services Commission and Selection Boards Ordinance, 1981 (U. P. Ordinance No. 8 of 1981), the Governor is pleased to direct that the provisions of the said Ordinance shall have effect subject to provisions of the following Order :

... .."

Paragraphs 2 and 4 of the said Order are required to be noted at this stage. They read as under :

"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 of 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.

4. Ad hoc appointment by promotion. - (1) Every vacancy in the post of the Head of an institution may be filled by promotion :-

(a) in the case of an Intermediate College, by the seniormost 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 seniormost teacher of the institution in the trained graduate (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 seniormost teacher of the institution in the trained under-graduate (C. T.) grade.

(4) Every vacancy in the post of a teacher in their trained under-graduate (C. T.) grade shall be filled by promotion by the seniormost 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 "seniormost 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."

This Order was followed by the Second Order dated 11th September 1981. It was also obviously enacted in exercise of powers of the Governor under Section 33 of the Act. The Preamble of the Second Order reads as under :

"Whereas, the Uttar Pradesh Secondary Education Services Commission and Selection Boards Ordinance, 1981 (U. P. Ordinance No. 8 of 1981), was promulgated on July 10, 1981 with a view to establish a Secondary Education Services Commission and six or more Secondary Education Selection boards for selection of teachers in the institutions recognised under the Intermediate

Education Act, 1921 (U. P. Act No. 11 of 1921);

And whereas, the establishment of the Commission and the Selection Boards is likely to take some time and even after the establishment of the said Commission and Boards, it may not be possible to make selection of the teachers for the first few months;

And whereas, a number of vacancies in the posts of teachers in various institutions recognised under the said Act exist and the failure or delay in filling up of such vacancies is likely to create difficulties;

And whereas, the filling up of certain short term temporary vacancies, caused by grant of leave to or on account of suspension of a teacher or otherwise, in accordance with the provisions of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 is likely to delay the appointment of substitutes in such vacancies;

Now, therefore, in exercise of the powers under sub-section (i) and section 33 of the Uttar Pradesh Secondary Education Services Commission and Selection Boards Ordinance, 1981 (U. P. Ordinance No. 8 of 1981), read with section 21 of the U. P. General Clauses Act, 1904 (U. P. Act 1 1904), the Governor is pleased to direct that the provisions of the said Ordinance shall have effect subject to the provisions of the following Order :

... .."

Paragraph of the said Order deals with 'Procedure for filling up short term vacancies' with which we are not concerned. The relevant clause of the said Second Order is Paragraph 5 which seeks to substitute paragraph 2 of the First Order by a new substituted paragraph 2 which reads as under :

"5. Substitution of Paragraph 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'. "

In the background of the aforesaid statutory scheme it would be necessary to examine the scope and ambit of the U. P. Secondary Education Services Commission and Selection Boards (Amendment) Act, 1991 whereby Section 33-A of the Act underwent substantial amendments and brought on the statute Book provisions of Section 33-A(1)(1-A) and (1-C) which are extracted earlier. The Prefatory Note containing Statement of Objects and Reasons for the said Amendment Act of 1991 being U. P. Act 28 of 1991 deserves to be noted in this connection. It reads as under :

Prefatory Note - Statement of Objects and Reasons - Section 33-A of the Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 provides for the regularisation of the Services of such teachers as were appointed directly before June 12, 1985 on ad hoc basis against substantive vacancies in accordance with Paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 and possessing the prescribed qualifications or exempted therefrom. It has been decided to amend the said Act to regularise the services of those qualified teachers also who were -

(a) appointed by promotion on ad hoc basis against substantive vacancies in accordance with the provisions of paragraph 2 of the said Order of 1981 and are continuing as such; and

(b) appointed by promotion or by direct recruitment before July 13, 1988 on ad hoc basis against substantive vacancies in accordance with Section 18 of the said Act and are continuously serving as such.

2. Since Certificate of Teaching grade has been declared to be a dying cadre from May 13, 1989 in non-Government Secondary Schools and the new appointments in such cadre have since been stopped, it has been decided that the services of those teachers who were directly appointed on ad hoc basis against substantive vacancies in such grade after June 12, 1985 and before May 13, 1989, in accordance with the provisions of paragraph 2 of the said Order of 1981 and are continuing as such should also be regularised.

3. Since the State Legislature was not in session and immediate legislative action to implement the said decision was necessary, the Uttar Pradesh Secondary Education Services Commission and Selection Boards (Amendment) Ordinance, 1991 (U. P. Ordinance No. 28 of 1991) was promulgated by the Governor on April 6, 1991. "

It is in the light of the aforesaid statutory scheme governing the controversy in question that we have to examine the main contentions of the contesting parties giving rise to the aforesaid points for determination. We accordingly proceed to deal with these points seriatim.

Point No. 1

10. So far as this point is concerned a mere look at Section 33-A (1) (1-A) shows that before it can be pressed in service the following conditions must be satisfied by the concerned teacher who claims to be regularised thereunder :

1. A teacher including the Principal as per Section 2(k) of the act must have been appointed by promotion on ad hoc basis against a substantive post.
2. Such appointment must have been made in accordance with paragraph 2 of the First Order of 1981 as amended from time to time.
3. He must possess the qualifications prescribed under the Intermediate Education Act, 1921 or might have been exempted from such qualifications.
4. Regularisation will be with effect from the date of the commencement of the Amending Act of 1991.
5. Subject to the rider that such teacher should be continuously serving in the institution from the date of his initial ad hoc appointment till the date of the commencement of the Amending Act of 1991.

Before we proceed to examine the cases of the writ petitioner for regularisation under the aforesaid provision and try to find out whether all the aforesaid conditions are satisfied by the writ petitioner or not one preliminary objection to such consideration as put forward by the learned counsel for the contesting respondent has to be noted for being dealt with. His objection is that the Order of 1981 itself as amended from time to time will not apply in the case of the writ petitioner. He fairly stated that such a contention was not canvassed either before the learned single Judge or before the Division Bench of the High Court and the Controversy before the High Court was limited to the question of applicability of paragraph 4 or paragraph 2 of the said Order so as to attract or rule out the provisions of Section 33-A (1) (1-A). However, as the contention went to the root of the matter we have permitted learned counsel for the contesting respondent to agitate this point for our consideration.

11. Learned counsel for the contesting respondent submitted that the First Removal of Difficulties Order or for that matter the second one will have to be appreciated in the light of the Preambles concerned which resulted into these Orders. It is of course true that these Preambles pointed out that number of vacancies were existing by the time the Act came into force or for that matter even at the time when the Ordinance preceding the Act was promulgated and it was likely that some time would be taken before the machinery for filling up of these posts by selection would become fully operative and that there were number of vacancies in the posts of teachers in various institutions recognised under the Intermediate Education Act, 1921 and the delay in filling up these vacancies through the selection machinery envisaged by the Ordinance and the Act would cause difficulties. It is also true that paragraph 2 of the First Order of 31st July, 1981 clearly laid down that the management of the institution may appoint by promotion or by direct recruitment a teacher on purely ad hoc basis in connection with a substantive vacancy existing on the date of the commencement of the Order cause by death, retirement, resignation or otherwise as provided by clause (a) of paragraph 2 of the First Order of 1981 while clauses (b) and (c) thereof dealt with leave vacancies which might have existed and might have continued upto a period exceeding two months on the date of such commencement or such leave vacancies or substantive vacancies might have come into existence within a period of two months subsequent to the date of commencement. These provisions had a direct nexus with the date of commencement of the Order, namely, 31st July, 1981. Consequently it could have been said with some emphasis that substantive vacancy of a Principal with which we are concerned should have either existed on the date of commencement of First Order, i. e. 31st July, 1981 or at latest within two months thereafter and such a vacancy could be filled up by the management by promotion as per paragraph 2. However, said paragraph 2 concerning substantive vacancy underwent a sea change by the subsequent Order, that is, the Second Order dated 11th September 1981. As we have seen earlier the said substituted paragraph 2 has no nexus to any existing vacancy on the date of commencement of the Order or to a vacancy arising only within a period of two months thereafter. On the contrary it operates in future and takes in its sweep all substantive vacancies caused in future by death, retirement, resignation or otherwise of a teacher which could be filled up by the management by promotion on purely ad hoc basis. It is of course true that the amended paragraph 2 of the First Order as substituted by the Second Removal of Difficulties Order talks of the vacancies causes by death, retirement etc. But that does not necessarily mean that they should have been caused by the time the Second Order came into force. Such an intention of the Order making authority is contra-indicated by the express terminology of the substituted paragraph 2 as distinguished from the earlier existing paragraph 2(a) in the Order of 31st July, 1981 which had clearly linked such substantive vacancies with the date of commencement of the First Order. Consequently, on the express language of substituted paragraph 2 of the First Removal of Difficulties Order by the Second Order it is not possible to agree with the contention of learned counsel for contesting respondent that even the substituted paragraph 2 of the First Order by the Second Order would still limit the substantive vacancies only to the date of the commencement of even the Second Order. Such an interpretation would fly in the face of the express language employed by the Order-making authority in the substituted paragraph 2 of the First Order. It is now well settled that the Preamble of a statutory instrument cannot control the express clear language and sweep of the operating provisions of such an instrument. Nor can the express language of a statutory provision be curtailed or read down in the light of the Preamble in the absence of any ambiguity in the enacted provision. In this connection we may refer to a decision of a two member Bench of this Court in the case of *Rashtriya Mill Mazdoor Sangh v. National Textile Corporation (South Maharashtra) Ltd.*, 1995 (6) SCALE 609 : (1996 AIR SCW 1), S. C. Agrawal, J. speaking for the Court relying on earlier decisions of this Court has observed in paragraph 10 of the Report as under :

". It is one of the cardinal principles of the statutory construction that where the language of an Act is clear, the Preamble cannot be invoked to curtail or restrict the scope of the enactment and only where the object or meaning of an enactment is not clear the Preamble may be resorted to explain it. (See: Burrakur Coal Co. Ltd. v. Union of India, 1962 (1) SCR 44 : (AIR 1961 SC 954) and M/s. Motipur Zamindari Co. (P) Ltd. v. The State of Bihar, 1982 Supp. (1) SCR 498 at page 504) : (AIR 1962 SC 660). "

Learned counsel for the contesting respondent, however, invited our attention to the following judgments of this Court :

1. State of Karnataka v. Shri Ranganatha Reddy, 1978 (1) SCR 641 : AIR 1978 SC 215.
2. Secretary, Regional Transport Authority, Bangalore v. D. P. Sharma, 1989 Supp (1) SCC 407 : AIR 1989 SC 509 :
3. His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala, 1973 (4) SCC 225 : (AIR 1973 SC 1461).
4. Minerva Mills Ltd. v. Union of India, 1980 (2) SCC 591 : AIR 1980 SC 1789.

There cannot be any dispute in connection with the settled legal position that when the provisions of the Statute are not clear Preamble can be looked at to find out the real object of enactment. But in the present case as we have seen earlier whatever the Preamble might have said a clear distinct intention to the contrary is seen from substituted paragraph 2 by Second Removal of Difficulties Order. It must, therefore, be held that the Order-making authority had tried to go beyond the scope of the Preamble while enacting the substituted paragraph 2 when the earlier paragraph 2 of the First Order ran parallel to the Preamble. Even otherwise as held by this Court in the case of Prabhat Kumar Sharma v. State of U. P. , 1996 (6) JT (SC) 579, the Removal of Difficulties Order has a permanent operational effect and would necessarily, therefore, cover all future vacancies after 1981.

12. In view of the aforesaid settled legal position, therefore, it must be held that paragraph 2 as substituted by the Second Removal of Difficulties Order would take in its sweep even future substantive vacancies of teachers including Principals which might be caused on account of contingencies contemplated thereunder and the said Order would continue to operate till it was rescinded. In this connection it is profitable to have a look at Section 33 of the Act under which these Orders have been enacted. As seen earlier the said Section provides that the State Government may, for the purpose of removing any difficulty, be a notified order, direct that the provisions of this Act shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as it may deem to be necessary or expedient. Consequently the State Government would have provided the period during which

such an Order could operate. But such a provision is not found in these Orders limiting their period of operation. It is of course true that the proviso to Section 33 had laid down that such Orders could not be made beyond two years of the coming into force of the Act. But as both the aforesaid Orders were enacted within that time they had to operate on their own once their duration of operation was not laid down by the Order-making authority in its wisdom. In fact this question is concluded by the decision of this Court in Prabhat Kumar Sharma (supra). In the said decision a Bench of two learned Judges of this Court speaking through K. Ramaswamy, J. in its order has laid down that the Removal of Difficulties Order is a permanent one and not transient as contended for. For arriving at that conclusion the Bench had referred to, with approval, the decision of a Full Bench of Allahabad High Court in the case of Radha Raizada v. Committee of Management, Vidyawati Darbari Girls College, 1994 (3) UPLBEC 1551, Once these Removal of Difficulties Orders of 1981 are held to be of permanent nature and would, therefore, operate to cover future vacancies also, it is not possible to agree with the contention of learned counsel for the contesting respondent that these Orders could not cover in their sweep the vacancy of the Principal of the College in question which arose from 1st July, 1988 on superannuation of the then Principal Shri Misra. Consequently the preliminary objection raised by learned counsel for the contesting respondent stands rejected.

13. Now is the time for us to revert to the consideration of the question whether Section 33-A(1) (1-A) would apply in the case of writ petitioner. So far as the first condition for its applicability is concerned it cannot be disputed that the writ petitioner was appointed by promotion on ad hoc basis against substantive vacancy of the Principal as the then Principal Shri Misra retired on 30th June, 1988. We will revert to the controversy whether the writ petitioner's appointment by promotion on ad hoc basis was with effect from 1st July, 1988 or from 29th October, 1988 a little later when we will deal with Point No. 2. For the time being it is sufficient to note that much before the coming into operation of Section 33-A (1) (1-A) the writ petitioner was promoted on ad hoc basis as Principal of the College against the substantive vacancy caused by the superannuation of the then Principal. When we turn to the second condition for applicability of Section 33-A(1)(1-A) it has to be seen whether such promotion of the writ petitioner was in accordance with paragraph 2 of the 1981 Order as amended from time to time. As we have observed earlier, paragraph 2 of the First Order of 1981 as it was couched in the then existing form might have curtailed the filling up of such vacancy with reference to only the then existing vacancy on the commencement of the Order or as existing within two month after but that restriction has been removed by the Order-making authority in its wisdom by wholly substituting paragraph 2 by the Second (Amendment) Order as we have seen above. A mere look at that provision shows that it has no nexus with the then existing vacancies and would cover even future substantive vacancies. However, the Division Bench of the High Court has held against the writ petitioner on the ground that writ petitioner's ad hoc promotion on this substantive vacancy was a per paragraph 4 and not paragraph 2 of the First Order as amended by the Second Order. When we keep paragraph 2 as substituted by Second Order in juxtaposition with paragraph 4 of the First Order which had remained unamended and untouched by the Second (Amendment) Order we find that both operate on the same field. Paragraph 2 as amended stated that the management may appoint by way of promotion a teacher on purely ad hoc basis in accordance with the provisions of the Order in case of substantive vacancy caused, amongst others, by retirement of the outgoing teacher. As 'teacher' includes Principal as provided by Section 2(k) of the Act the thrust of the amended paragraph 2 would read that a substantive vacancy of Principal also can be filled up by the management by promotion of a teacher on purely ad hoc basis. But while filling up such vacancy by promotion on ad hoc basis the procedure laid down by the Order has to be kept in view. Paragraph 4 of the Order lays down the procedure and gives the

guidelines as to how the vacancy of the head of the institution, i. e. , the Principal as earmarked by paragraph 2 has to be filled in. Paragraph 2 specifies the vacancy and paragraph 4 deals with the procedure for filling up such a vacancy. When we turn to paragraph 4 we find that ad hoc appointment by promotion in the post of Head of the institution has to be made only by appointing the seniormost teacher of the institution. It is not as if paragraph 4 operates independently of paragraph 2 as paragraph 2 in its sweep covers substantive vacancies of all teachers who might have died or retired or resigned or might have gone out otherwise. But while coming to the Head of the institution special procedure has been provided in paragraph 4 and to that extent paragraph 4 is a proviso to paragraph 2 or is complementary to it and both operate in the same field when the question of filling up of a substantive vacancy of a Principal who is Head of the institution, arises for the management which has to fill up such a vacancy on ad hoc basis by appointing the seniormost teacher of the institution in the lecturer's grade. With respect the Division Bench of the High Court erred in taking the view that paragraph 4 would operate independently of paragraph 2 or has no nexus with paragraph 2. In fact paragraphs 2 and 4 will have to be read together as the terminology employed in paragraph 2 enjoining the institution to appoint by promotion a teacher on purely ad hoc basis in accordance with the provisions of this Order which would necessarily bring in the sweep of paragraph 2 the procedure laid down by paragraph 4 and the guidelines contained therein in connection with the filling up of the vacancies of teachers who were heading the institution and who might have died, retired or resigned or might have gone, otherwise, out of office as laid down by paragraph 2. It must, therefore, be held that the appointment of writ petitioner by promotion on ad hoc basis on the post of Principal when a substantive vacancy was caused on account of the retirement of the erstwhile Principal got squarely covered by paragraph 2 read with paragraph 4 of the Order and it could not be said, therefore, that the second condition for applicability of Section 33-A (1)(1-A) was not fulfilled in the present case as erroneously held in the judgment under appeal. The second condition for applicability of Section 33-A(1) (1-A) therefore, is also complied with in the present case by the writ petitioner. So far as the third condition is concerned there is no dispute that the writ petitioner possesses all the qualifications prescribed under the Act of 1921 for filling up the said post. So far as the fourth and fifth conditions are concerned they are also fulfilled by the writ petitioner as he claims regularisation from the date of commencement of the Amending Act of 1991, that is, with effect from 6th April, 1991 and till that date he had worked as promotee Principal on ad hoc basis continuously from the date of his initial entry as a promotee ad hoc Principal of the College. Thus all the five conditions for applicability of Section 33-A (1) (1-A) were fulfilled by the writ petitioner. It must, therefore, be held that he became a regularised Principal of the College with effect from 6th April, 1991 and had to be treated to be on probation on the said post of Principal from 6th April, 1991 as laid down by Section 33-A (1) (1-A) and 33-A (2) of the Act. Once this conclusion is reached the subsequent interviews for filling up the post of Principal as held on 15th April, 1991 and the recommendation of Selection committee on 3rd May, 1991 would become redundant and otios as such a recommendation would be to a post which no longer existed for being filled in by direct selection. In fact the vacancy of the post of Principal of this College ceased to exist on and from 6th April, 1991. Consequently all the subsequent exercises of course in ignorance of the aforesaid statutory provisions and the deeming effect thereof would pale into insignificance and would be otios with the result that whoever emerged successful in the selection process would have no post to fall back upon or to occupy. The first point for determination is accordingly answered in the affirmative.

14. So far as this point is concerned learned counsel for the contesting respondent vehemently submitted that S. 18 of the Act which is a paramount provision clearly lays down the procedure to be followed by the management for filling up on ad hoc basis the vacancies which might have been notified to the Commission in accordance with the provisions of the Act and once the said provision operates paragraph 2 or paragraph 4 of the Order which is a subordinate legislation must give way to this parent provision. So far as this submission is concerned let us first see whether S. 18 was attracted in the facts of the present case. For applicability of S. 18 two conditions are required to be fulfilled - (i) the management must have notified the vacancy to the Commission in accordance with the provisions of the Act and the Rules framed thereunder which lay down that on occurrence of vacancy within 15 days the management has to notify such vacancy to the Commission and the management has to send names of two seniormost teachers whose claims have to be considered by the Commission, and (ii) after such notification the Commission should have failed to recommend the name of any suitable candidate for a period of one year or the concerned post should have remained actually vacant for more than two months. If these two contingencies occur then the management may appoint by promotion a teacher on purely ad hoc basis as per S. 18. On the facts of the present case the first condition got satisfied as it is an admitted position between the parties as noted by the Division Bench of High Court in the judgment under appeal that respondent No. 4 (present writ petitioner) was senior to the appellant before the Division Bench (present contesting respondent) and it was further admitted that the management in July, 1988 sent a requisition to the U. P. Secondary Education Services Selection Board for selection of a regular Principal of the college and it had also sent the names of both these contesting teachers to the Board which called both of them and others for interview. However, before that was done on the very first day, that is, 1st of July, 1988 the writ petitioner got appointed by promotion. If that appointment was purely a stop-gap arrangement of holding charge, as submitted by learned counsel for the contesting respondent, and became a promotional appointment on ad hoc basis only on 29th October, 1988 by Resolution of the Managing Committee then it can be said that the first condition for applicability of S. 18 was satisfied. So far as the second condition is concerned the learned counsel for contesting respondent submitted that even that is satisfied because the Managing Committee appointed the writ petitioner by way of ad hoc promotion as Principal of the college only on 29th October, 1988 and till that time post of Principal had actually remained vacant as the President of the College had no authority to appoint by ad hoc promotion any teacher to the post of Principal. Consequently for applicability of both these conditions the scope and ambit of the Resolution of the Managing Committee dated 29th October, 1988 would assume great significance. If the said Resolution operated prospectively as contended by learned counsel for contesting respondent then both the conditions of S. 18 would get attracted. If on the other hand the said Resolution ratified the ad hoc promotion of the writ petitioner with effect from 1st July, 1988 then none of the conditions of S. 18 would come in the way of the writ petitioner or would cut across the applicability of S. 32-A(1) (1-A) and the appointment would remain within the four corners of paragraph 2 of the Order as amended by the Second Order.

15. So far as this question is concerned, therefore, we have to look at the wording of the First Promotion Order and the wordings of the Managing Committee's Resolution of 29th October, 1988. So far as the first appointment of the writ petitioner dated 30th June, 1988 is concerned it was obviously made by the President of the College appointing the writ petitioner on the post of Principal by promotion on ad hoc basis. But the said appointment was made subject to any contrary

decision by the Management or emerging on the scene any selected candidate from the Secondary Education Services Commission and in either of these two eventualities the appointment of the writ petitioner was automatically to come to an end. Now it must be kept in view that President of the College was not a mere manager and he could act on behalf of the Managing Committee subject to the ratification of his action by the Managing Committee and that precisely happened by Resolution No. 2 of the Managing Committee dated 29th October, 1988. We may refer to the translated version of the said Resolution as made available to us by the contesting respondent himself in his counter-affidavit at Annexure '1'. It reads as under:

True copy of Resolution No. 2 : - Passed in the meeting dated 29-10-1988, of the Managing Committee of Sri Brijendra Mani Inter College, Kohadaur pratapgarh.

Resolution No. 2:- Appointment of Officiating Principal on ad hoc basis on the post of Principal which has fallen vacant on account of retirement of Sri Jagdeo Prasad Misra the ex- Principal - Before the Managing Committee the application of Sri Munishwar Dutt Pandey Sr. Most Lecturer, Sanskrit, attested copies of eligibility Certificate and the report of Manager were produced. The Principal of the college Sri JagDeo Prasad Misra has retired after attaining the age of 60 years, on 30-6-1988 and the post is vacant. Under Section 16 CH. A. Chapter II of U. P. Intermediate Education Act, 1921 the aforesaid post is to be filled by promotion of highest grade of Sr. Most Lecturer.

The Managing Committee unanimously accept the ad hoc appointment of Sri Munishwar Dutt Pandey, M. A. Acharya on the basis of his high service of 19 years."

(Emphasis supplied)

We have also seen the original version of the Resolution which was in Hindi. A copy thereof was taken on record by consent of parties. It is no doubt true that the Resolution had stated that the post of the Principal was vacant on account of retirement of the then Principal on 30th June, 1988 and the post was to be filled in by promotion. But that is only introductory paragraph of the Resolution. The operative part of Resolution clearly mentions that Managing Committee unanimously accepts the ad hoc appointment of the writ petitioner Shri Munishwar Dutt Pandey. The original version of this operative part of the Resolution in Hindi states that the Management accepts the ad hoc appointment of the writ petitioner as Principal. The words are 'tadarth niyukti sweekar karti hai'. Learned counsel for the contesting respondent would have been right if the Resolution would have read as 'tadarth niyukti karti hai'. Acceptance of the ad hoc appointment is different from ordering ad hoc appointment. In other words the operative part of the resolution does not read that the Managing Committee unanimously appoint Shri Munishwar Dutt Pandey as ad hoc Principal. On the contrary it states that the 'Managing Committee unanimously accepts the ad hoc appointment of Shir Munishwar Dutt Pandey' meaning thereby that the ad hoc appointment of the writ petitioner made by the President with effect from 1st July, 1988 is ratified and approved. Not only that this aspect is further highlighted by the approval granted by the Inspector of Schools to the said

appointment by promotion for the purpose of salary grant for 1st July, 1988 itself as seen from the letter of District Inspector of Schools dated 19th May, 1989 which accords sanction for payment of salary for ad hoc appointment of writ petitioner, seniormost lecturer of the College from the date of taking over charge of the post of Principal which fell vacant due to retirement of the then Principal Shri Misra. It is of course true that the said approval letter of the District Inspector of Schools mentions that the said appointment is under S. 18 of the Act, but in the light of the legal position which emerges in the back ground of well established facts on record it has to be held that the said appointment by promotion, of course on ad hoc basis, was to take effect from 1st July, 1988 and it would obviously be prior to the notification of the vacancy which would have taken place not on 1st July, 1988 itself but at any time within 15 days from the occurrence of that vacancy. Learned counsel for the writ petitioner in this connection invited our attention to the Law Lexicon Reprint Edition, 1987 of Shri P. Ramanatha Aiyar wherein at page 13 the word 'acceptance' has been shown to have one of the meanings, 'receipt of a thing offered by another with an intention to retain it, as acceptance of a gift' or 'taking and accepting of anything in good part and as it were a tacit agreement to a preceding act, which might have been defeated and avoided were it not for such acceptance ' In our view the phraseology employed by the Managing Committee in its Resolution of 29th October, 1988 leaves no room for doubt that it had accepted and rectified what its President had done when he passed the first order promoting on ad hoc basis the writ petitioner as Principal of the College with effect from 1st July, 1988. In the written submissions on behalf of the contesting respondent it has been pointed out that the agenda of the meeting of the Managing Committee was confined to the filling up of the vacancy of Principal on ad hoc basis. We fail to appreciate how this agenda could be said to have been given a go-by when the Resolution was passed accepting the ad hoc appointment made earlier by the President. The Managing Committee was alive to the question about filling up of the vacancy of Principal by promotion on ad hoc basis and it is on that subject that the Managing Committee deliberated and passed the Resolution which must be given effect to according to its express terminology.

16. Faced with the aforesaid difficulty learned counsel for the contesting respondent submitted that S. 18 which is the parent provision must operate and cover the field of vacancies which may come into existence after. The commencement of the Act and para 2 of the Order being an act of subordinate legislation, must yield to parent provisions of S. 18. As a general proposition of law there cannot be any dispute on this aspect. In the written submissions on behalf of the contesting respondent it has been pointed out by referring to a decision of this Court in the case of Ramesh Birch v. Union of India, 1989 Supp (1) SCC 430: (AIR 1990 SC 560) that subordinate legislation cannot be in conflict with or repugnant to the parent provision. We fail to appreciate how this submission can be of any avail to the contesting respondent. He will be right in this contention if it is shown that para 2 of the Order is repugnant to S. 18. It is of course true that both of them deal with the same topic. namely, 'Ad hoc appointment of teachers in an institution governed by the Act'. But a mere look at S. 33 shows that the Legislature in its wisdom has provided that the Order-making authority may in case of difficulties remove the same by notified order. Once that happens the order itself has the effect of modifying or even omitting the existing provisions of the Act for the period specified in the Order. As there is no specification of any period of life for the Order and as held by this Court it operates on a permanent basis, when the Order operates the provisions of the Act which may be covering the field will themselves get modified or altered or even omitted. That exercise is permitted by the parent legislation itself by enacting S. 33 the vires of which are not in dispute before us. Even that apart sub-section (2) of S. 33 itself provides that such an order has to be laid before both the Houses of the State Legislature. So it would get the sanction of the parent

Legislature itself. As we have seen earlier S. 16 of the Act which deals with 'appointments to be made only on recommendations of the Commission or the Board' is expressly made subject to Ss. 33 and 33-A amongst others. These provisions are in the parent Act itself and consequently S. 33-A which is a part and parcel of the parent provision has to operate of its own and there cannot be inconsistency or incongruity between the two provisions of the same Act, namely. S. 18 on the one hand and S. 33-A including S. 33-A(1)(1-A) on the other.

17. For all these reasons, therefore, contention of contesting respondent that paragraph 2 of the Order which itself is incorporated in S. 33-A (1) (1-A) and is a part and parcel of the same parent provision is in any way repugnant to S. 18 of the Act. It must, therefore, be held that none of the conditions for applicability of S. 18 is shown to have existed on the facts of the present case, as the writ petitioner was put in saddle as Principal of the College by the Managing Committee itself ratifying his promotion on ad hoc basis with effect from 1st July, 1988 prior to the notifying of the vacancy by the management to the Commission and such appointment being made not within two months of such notification and as the said post had not remained actually vacant during that period on account of the ratification by the Managing Committee of the action of its President as seen earlier. The second point for determination, therefore, is answered in the negative.

Point No. 3

18. The answer to this point is covered by the aforesaid discussion on Point No. 2 and accordingly it must be answered by holding that the writ petitioner's appointment by promotion as ad hoc Principal was effective from 1st July, 1988.

19. As a result of the aforesaid discussion it must be held that the Division Bench of the High Court with respect was in error when it upset the decision of the learned single Judge who had held in favour of the writ petitioner. It must be held that the writ petitioner was regularised by the deeming provision of S. 33-A (1) (1-A) as Principal of the College with effect from 6th April 1991 and contesting respondent, therefore, could not be appointed to the said post pursuant to the selection process which became abortive and inoperative in law as there was in fact no vacancy of the Principal which could be filled up by any selection process undertaken after 6th April, 1991 so far as the College managed by the 4th Respondent is concerned.

20. In the result this appeal succeeds and is allowed. The order of the Division Bench of the High Court in Special Appeal No. 300 of 1992 is quashed and set aside and instead the order passed by the learned single Judge on 7th September, 1992 is restored. Writ petitioner's writ petition will accordingly stand allowed. As a consequence of the present order, the order of status quo granted on 15th April, will stand vacated. The writ petitioner is held entitled to function as full-fledged Principal of the College subject to his probation being declared by the Management. In the facts and circumstances of the case there will be no order as to costs.

Appeal allowed.

