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(1993) 09 AHC CK 0001

In the Allahabad High Court

Case No : Special Appeal No. 542 of 1993

Anand Prakash Tyagi — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 07-09-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 27(1)
Constitution of India, 1950 — Article 226
Uttar Pradesh Intermediate Education Act, 1921 — Section 15, 9, 9(1), 9(2), 9(4)
Uttar Pradesh Intermediate Education Regulations, 1921 — Regulation 21

Citation : (1994) 2 AWC 829

Hon'ble Judges : S.C. Mathur, Acting C.J.;Sudhir Narain, J

Bench : Division Bench

Advocate : Ashok Khare, for the Appellant;

Final Decision : Dismissed

Judgement

S.C. Mathur, A.C.J.

1. Reserving reasons to be recorded, later we had by our short order dated 7th september 1993 dismissed the present special appeal. We now proceed to give stations for that order.

2. By his common judgment an order dated 16th August, 1993 a learned single Judge disposed of three writ petitions raising identical disputes The primary dispute was whether the State Government''s order dated 6th May, 1982, which provided for retention in service for two years of a teacher who had been awarded national or State level award after attaining the age of superannuation, created a legally enforceable right in such teacher. The secondary question was whether the State Government had acted arbitrarily and with discrimination while denying retention in service to the Petitioners in the three writ petitions. All the three petitions were dismissed by the learned Single Judge. Two of the Petitioners, namely, Dr. Prem Dutt Chamoli and Sri Rufus Mahesh Kumar Browne, filed special appeal against the said judgment which were dismissed by us

through judgment and order dated 30th August, 1993 All the three points mentioned herein were negatived by us. The remaining Petitioner, namely, Sri Anand Prakash Tyagi has now preferred the instant appeal. Learned Counsel for the Appellant submitted that certain fresh points have been raised in the present special appeal. On the basis of these allegedly fresh points the learned Counsel has claimed reconsideration of our judgment and order dated 30th August, 1993. We have heard the learned Counsel for the Appellant at some length.

3. Before taking up the allegedly, fresh points we may point out that the learned Counsel conceded that the writ petitions of all the three Petitioners were almost idontically drafted and the points raised were identical. In the affidavit filed in support of the application for interim relief in the present case certain facts have been stated and certain annexures have been filed which were admittedly not before the learned Single Judge.

4. The first question that arises for consideration is whether the fresh facts and papers now brought on record should be considered or not. Order 41 Rule 27 of the Code of Civil Procedure, 1908--for short the Code, Provides for production of additional evidence in appellate court. The Code does not apply to proceedings under Article 226 of the constitution. Consequently, Order 41 Rule 27 will also not apply. An appeal is a continuation of the original proceedings An appeal from a judgment in a writ petition is also a continuation of the writ petition. Therefore, the principles applicable to a writ petition may be applied to an appeal arising from a writ petition. The jurisdiction of this Court under Article 226 of the Constitution is very wide and the same width may be imported in the exercise of jurisdiction while hearing appear against a judgment rendered in a writ petition. Now for what purpose the amplitude of this power is to be utilized--for enforcement of a right or for enforcement of a privilege? We have already held by our judgment dated 30th August, 1993 that the Government Order dated 6th May, 1982 does not create any legally enforceable right in a teacher. If it creates anything at all in favour of a teacher, it is only a privilege it also simultaneously trenches upon some body''s Fight to get an appointment. When a Principal retires from his post a senior teacher may get promotion. When the retirement of a principal is postponed, the promotion of a senior teacher is also postponed. Accordingly the power to admit additional evidence at the appellate stage may be exercise in very rare cases and only where it exercise is essential to enforce a constitutional or a legal right.

5. The age of retirement of a teacher, including the Principal is admittedly prescribed by a statutory provision viz Regulation 21 of Chapter III of the Regulations framed under the U.P. Intermediate Education Act, 1921 and the same is 60 years. Up to this age, subject to statutory provisions, a teacher has the right to remain in service but thereafter, as observed earlier, it is, at the most, privilege. The claim of continuance will, therefore, not involve assertion of a constitutional or a legal right.

6. Apart from the above, if we apply the principles of Order 41 Rule 27, parties to

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the appeal have no right to produce additional evidence. It is specifically stated so in Sub-rule (1). Under Clause (b) of Sub-rule (1) the requirement of additional evidence has to be of the Court for pronouncing judgment Under Clause (aa) the party seeking to produce additional evidence has to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time the judgment appealed against was passed, At the most the Appellant can claim consideration of additional facts and additional papers under this clause. Under this clause he has to establish exercise of due diligence. Let us now examine whether there is any assertion of due diligence in Appellant?s affidavit. This only explanation given in the said affidavit for not producing the evidence earlier is contained in paragraph 18 wherein it is stated- "At the time of filing the writ petition, the Petitioner-Appellant did not have a copy of the said chart and as such was not in a position to enclose the same as annexure to the writ petition", (Emphasis supplied). From the emphasised portion it is apparent that the explanation is confined to the stage of filing the writ petition. It does not extend up to the time the judgment under appeal was pronounced. Further, there is no assertion that any effort was made to obtain the said evidence. In our opinion, the explanation given in the affidavit is wholly insufficient to explain the Appellant?s failure to produce the evidence now sought to be produced before the learned Single Judge.

7. In view of the above we hold that the Appellant is not entitled to rely on the additional evidence now brought on record through the affidavit referred to hereinabove,

8. Once the additional evidence is excluded from consideration there is nothing to require reconsideration of our judgment and order dated 30th August. 1993. Despite the above finding the arguments advanced by the learned Counsel may be considered.

9. It is submitted by the learned Counsel that Government Order dated 6th May 1982 is referable to Section 9(4) of the U.P. intermediate Education Act, 1921, for short ''Act'' and to Regulation 21 mentioned above and, therefore, it is not possible to say that the Government Order has no statutory force and it does not create a legal right. Section 9 bears the side heading "powers of Stale Government". Sub-section (1) states that the State Government shall have the right to address the Board with reference to any of the works conducted or done by the Board and to communicate to the Board its views on any matter with which the Board is concerned. Under Sub-section (2) the Board is required to report to the State Government the action taken by it. Sub-section (4) reads as follows:

(4) Whenever in the opinion of the State Government, if is necessary or expedient to take immediate action, it may without making any reference to the Board under the foregoing provisions, pass such order or take such other action consistent with the provisions of this Act as it deems necessary, and in particular,

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may any such order modify or rescind or make any regulation in respect of any matter and shall forthwith inform the Board accordingly.

10. Under this provision the Government has emergency power to take immediate action the action taken is required to be communicated to the Board forthwith. Government order dated 6th May 1982 is not addressed to the Board: it is addressed to the Director of Education. Even a copy of this Government order has not been sent to the Board. Accordingly it is not possible to say that Government Order dated 6th May 1982 was issued in exercise of the power conferred u/s 9(4).

11. Regulation 21 is also relied upon for submitting that Government order dated 6th May 1982 has statutory force and creates legally enforceable right. This Regulation reads as follows:

The age of superannuation of the Principal or Headmaster, teacher or matron, clerk or librarian and inferior servant shall be sixty years. Extension or re-employment beyond age of 60 may in special cases be given by the Committee to the heads of intentions and other employees after approval by such officers as the State Government may specify...

Under Section 15 of the Act right tO frame Regulations has been conferred upon the Board. The Regulation framed by the Board provides 60 years as the age of superannuation. Under this Regulation the State, Government is competent to specify an officer who may deal with the recommendations of the Committees of Management for continuing a teacher or other staff beyond the age of 60 years. There is no material on record to indicate that the State Government has in exercise of the power conferred under ''this Regulation, specified any officer to deal with the recommendations of the Committee of Management. Accordingly, even by reference to Regulation 21 it cannot be held that Government order dated 6th May 1982 has statutory force and creates legally enforceable right.

12. it is next submitted that Government Orders relating to conditions of service cannot be ignored, We may accept the proposition but even then no benefit comes to the Appellant is in our opinion, the Government Order cannot be said to be related to conditions of service. Conditions of service have already been prescribed by statutory provisions contained in the Act and Chapter III of the Regulations. There is no lacuna in these provisions which was sought to be filled by issuing the Government Order in question.

13. Supreme Court decision in State Bank of Bikaner and Jaipur and others Vs. Jag Mohan Lal, , relied upon by the learned Single Judge and by us in our earlier judgment, is sought to be distinguished by submitting that their Lordships were interpreting a provision which specifically reserved discretion in the employer to extend the period of service after superannuation or not to extend the same, while under the Government order in question no such discretion has been reserved The provision interpreted by their Lordships reads as follows:

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Provided that the competent authority may at its discretion, extend the period of service of an officer who has attained the age of fifty, eight years or has completed thirty years service as the case may be, should such extension be deemed desirable in the interest of the Bank.

(Emphasis supplied)

The important clause in the above provision is not "at its discretion" but. "should such extension be deemed desirable in the interest of the Bank". This is apparent from the emphasis supplied by their Lordships while reproducing the above proviso in paragraph 9 of the report. Further the question of right to continue in service after attaining the age of superannuation has been considered in paragraph 8 of the Report wish reference to the law laid down in earlier decisions. in paragraph 8 there is extract from State of Assam and Another, etc. Vs. Basanta Kumar Das, etc. etc., , which reads as under:

A Government servant has no right to continue in service beyond the age of superannuation and if he is retained beyond that age, it is only in exercise of the discretion of the Government.

XXX XXX XXX XXX

XXX XXX XXX XXX

the fact that certain persons were found fit to be continued'' in service does not mean that others who were not so found fit had been discrimiuated against. Otherwise, the whole idea of continuing only efficient people in service even after they had completed 55 years becomes only meaningless.

(emphasised).

The propositions emerging from the above observations are--

1. There is no right to be continued in service after attaining the age of superannuation ;

2. To continue or not to continue in service after that age is in the discretion of the employer and

3. No charge of discrimination can be founded on the basis that certain others who have also attained the age of superannuation have been retained in service.

14. Our attention was invited by the learned Counsel to the observations made by a Division Bench of this Court in Paragraph 12 of Smt. Kamud Lata Singh v. State of U.P. (1991) 1 UP LB EC 415, and it was submitted that the Government order dated 6th May 1982 had been specifically preserved while terminating re-employment of certain government servants. That was a case in which extension in service after attaining the age of superannuation had been granted at a time when a particular political party was in power the party was ousted from power and the next Government took a policy decision to terminate all the extensions which had been granted earlier. An exceptions was however made in respect of

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extension granted under Government order dated 6th May, 1982. In the judgment of the Division Bench reference has been made to this fact. No advantage comes to the Appellant from this judgment because even to-day the Government order dated 6th May, 1982 remains. It is not the case of the State that the same has been abrogated,

15. With reference to facts and figures contained in the affidavit and the additional papers filed in the Special Appeal the learned Counsel tried to submit that discrimination has been practised by the State Government. Such a plea is not available in view of the law laid down by their Lordships in State of Assam v. Basants Kumar Das (supra).

16. It was also tried to be submitted by the learned Counsel that the Government order dated 23rd October, 1991 had not been properly appreciated by the learned Single Judge. In particular it was submitted that the Appellants'' record of service was not required to be considered after he took charge of the post of Principle and consideration should have been confined to the period prior thereto. It was stressed that the Appellant became officiating Principal with effect from Ist July, 1990 and his substantive post was of Lecturer and the result of she subject taught by him as Lecturer was very good and the Appellant?s result of that subject alone was required to be considered. We are unable to accept the submission of the learned Counsel. The Appellant was discharging the duties of Principal at the time his case was considered for further retention in service, even though on officiating basis, and may have continued to work in that capacity for two years more if extension had been granted to him. We cannot, therefore, hold that any apparent illegality has been committed by the State Government in considering Appellant?s performance after he took over as officiating Principal on Ist July, 1990. Further, the alleged procedural irregularity will not convert a mere privilege into a right. In view of this finding, it is not necessary for us to examine the percentage of result shown by his institution and the percentage of result in the subject taught by the Appellant.

17. It was also submitted by the learned Counsel that the Appellant had been given the State Award in the year 1991 after examining his performance for the last five years and, therefore, there was no occasion for the State Government to re examine the same performance and deny him extension. Reference was made to Dr. Girish Bihari v. State of U.P. 1982 LIC 1500. In this case it was held that adverse entries awarded to a government servant prior to his promotion to a grade could not be taken into consideration for denying him promotion to the still higher grade, This case has no application to the present case as that case related to a matter falling within the conditions of service It was promotion which became due to the Petitioner prior to his attaining the age of superannuation. Further, again it would, at the most, amount to procedural irregularity creating no legal right.

18. In view of the above, the Special Appeal fails and is hereby dismissed but without any order as to costs. Interim order, if any operating, shall stand

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discharged.

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