

(2013) 02 AHC CK 0116

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 22263 of 2007

Arun Kumar

APPELLANT

Vs

District Inspector of Schools and Others

RESPONDENT

Date of Decision : 05-02-2013

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2013) 3 ADJ 588 : (2013) 4 ALJ 33 : (2013) 4 AWC 3834 : (2013) 1 UPLBEC 775

Hon'ble Judges : B. Amit Sthalekar, J

Bench : Single Bench

Advocate : Indra Raj Singh, for the Appellant; Alok Dwivedi and P.C. Shukla, for the Respondent

Final Decision : Allowed

Judgement

B. Amit Sthalekar, J.—By this writ petition the petitioner is seeking quashing of the G.O. dated 9.2.2007 filed as Annexure-3 to the writ petition and the order dated 21.2.2007 by which the approval of the appointment of the petitioner as class IV against the general category vacancy in the Dayanand Intermediate College, Said Nagli, Jyotiba Phule Nagar, has not been granted. The facts of the case, in brief, are that there is an intermediate educational institution known as Dayanand Intermediate College, Said Nagli, Jyotiba Phule Nagar (hereinafter referred to as the Institution). The institution was governed by the provisions of the U.P. Intermediate Education Act, 1921 as well as the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of the Teachers and Other Employees) Act, 1971. According to the petitioner, a post of Daftari fell vacant on 15.1.2007 on account of promotion of Sri Subhash Chandra Verma on the post of clerk. Against the said vacancy one Sri Dev, peon of the institution was promoted as Daftari on 16.1.2007, which was approved by the District Inspector of Schools, Jyotiba Phule Nagar vide order dated 14.2.2007. The existing vacancy in class IV on account of promotion of Sri Dev was intimated by

the Principal of the Dayanand Intermediate College to the District Inspector of Schools and permission was sought to fill up the said post. The District Inspector of Schools, however, relying upon G.O. dated 9.2.2007 filed as Annexure-3 to the writ petition declined to grant approval and on 21.2.2007 a notice was issued to the Principal, Dayanand Intermediate College, Said Nagli, Jyotiba Phule Nagar, respondent No. 4 to show-cause as to why the post in general category of class IV was advertised in contravention of G.O. dated 9.2.2007. For reference it may be mentioned the vacancy of class-IV was advertised in two newspapers on 20.2.2007 namely "Amar Ujala" and "Yug Bandhu" and applications were invited from eligible candidates upto 28.2.2007. A Selection Committee was also constituted on 5.3.2007 and the petitioner was found to be the most suitable candidate for appointment and the Selection Committee thereupon recommended the name of the petitioner for appointment on the class-IV post in the institution. Letter of appointment was also issued to him on 6.3.2007, The petitioner joined the class IV post on 9.3.2007 and he is stated to be working since then.

2. I have heard Sri Indra Raj Singh, learned counsel for the petitioner and the learned standing counsel appearing for the respondent Nos. 1 and 2. On behalf of respondent Nos. 3 and 4 counter-affidavit has been filed by Sri Alok Dwivedi, whose name has also been shown. List has been revised. None appears for respondent Nos. 3 and 4.

3. From a perusal of the impugned G.O. dated 9.2.2007 it will be seen that a complete ban was imposed on recruitment in class III and IV posts but clause 3 of the G.O. mentions that this ban would not be a hindrance in the direct recruitment of S.C., S.T. and O.B.C. candidates. Clause-4 of the G.O. also mentions that in class-IV category, appointments may be made only with the approval of the Chief Minister. This condition in the matter of direct recruitment of Class III and Class IV that permission of the Chief Minister has to be taken borders on the bizarre. Under Regulation 101 of Chapter III of the U.P. Intermediate Education Act, 1921, appointment in class-IV is to be made by the Principal of the Institution with the prior approval of the District Inspector of Schools and there is no role to be played in such appointments by the Chief Minister, Regulations to the U.P. Intermediate Education Act, 1921 have been framed by the Board of High School and Intermediate Education in exercise of power u/s 15 of the U.P. Intermediate Education Act, 1921 and are statutory in nature.

4. In Smt. Naseem Bano Vs. State of U.P. and others, , the Supreme Court has held the regulations framed under the U.P. Intermediate Education Act, 1921 to be statutory in nature and has also held that any G.O. or Executive Order contrary to the same cannot override the Regulations. Para 6 of the judgment reads as follows;

6. The High Court has found that the appellant was not eligible for promotion to L.T. grade on August 29, 1977 when the post of L.T. grade teacher in Home

Science was created for the reason that the appellant was not a trained graduate on the relevant date as required under notification dated October 3, 1974. In the view of the High Court, by holding the qualifications mentioned in Appendix "A" of the Regulations, a person could claim appointment only in the C.T. Grade. We find it difficult to subscribe to this view. Promotion from C.T. Grade to L.T. grade is governed by clause (1) of Regulation 6 which postulates: (i) having a minimum five years" continuous substantive service on the date of occurrence of the vacancy; and (ii) possessing the prescribed minimum qualifications for teaching the subject in which the teacher in the lecturer grade or in the L.T. grade is required. The prescribed minimum qualifications referred to in clause (1) of Regulation 6 are the minimum qualification which are prescribed in the Regulations for appointment as teacher to teach the concerned subject which would mean the minimum qualification as laid down in the appendix to the Regulations. Clause (1) of Regulation 6 cannot be construed as referring to the notification dated October 3, 1974 because the notification, is only an executive order and the qualifications prescribed therein cannot override the qualifications prescribed in the Regulations which are statutory in character. The notification can, therefore, have no application to promotion to L.T. grade dealt with in Regulation 6 (1) and must be confined in its application to appointment by direct recruitment only.

5. Thus where a particular authority has been mentioned in the Regulations and conferred with the power of granting approval for recruitment of class III and class IV, that authority cannot be divested of that power, nor can that power be usurped by any other authority, be it the Chief Minister, except by way of amendment of the existing statutory rules. In the present case the alleged G.O. dated 9.2.2007 is only an Executive Order and as held by the Supreme Court in the case of Naseem Bano (supra), Executive Orders will not supersede the statutory rules.

6. In this regard Sri Indra Raj Singh has relied upon a Full Bench decision of this Court in R.B. Dixit v. Union of India and others, 2004 (2) CRC 664, wherein the Full Bench has held as follows:

6. We have held in Smart Chip Ltd. and Another Vs. State of U.P. and Others, , that in every legal system there is a hierarchy of norms as noted by the eminent jurist Kelsen in his Pure Theory of Law, In the Indian legal system this hierarchy is as follows:

1. The Constitution.
2. Statutory law, which may either be made by the Parliament or by the State legislature.
3. Delegated legislation, which may be either in the form of rules, regulations or statutes made under the Act.
4. Executive instructions or Government orders.

7. In the above hierarchy if there is conflict between a higher law and a lower law then the higher law will prevail. The executive instructions as part of the fourth layer in the hierarchy, which is at the lowest level, whereas an Act is part of the second layer and the Statutes made under the Act are delegated legislation and hence part of the third layer. The letters dated 31.8.1999 and 30.3.1999 are only executive instructions and hence they belong to the fourth layer. Hence they are neither Act nor Statutes. Hence in our opinion the age of retirement of an employee of the Indian Institute of Technology is 60 years and not 62 years vide Section 3 (2). We therefore respectfully disagree with the decision in Raja Ram Verma's case.

7. The Supreme Court in the case in Subhash v. State of Maharashtra and Ors. , has held as follows:

2. The Tribunal has dismissed the appellant's application only on the ground that the appellant had acquired the working experience of one year prior to acquisition of the basic qualifications which in this case is diploma in Automobile Engineering. For this purpose, the Tribunal relied upon the circular issued by the Government. The rules, namely, the Motor Vehicles Department (Recruitment) Rules, 1991 framed under Article 309 of the Constitution show that a mere possession of the working experience of at least one year in a reputed Automobile Workshop as mentioned under Rule 3(e) is enough. The rule does not make any difference between acquisition of such experience prior to or after the acquisition of the basic qualification. What is further, the record shows that even after the acquisition of the basic qualification as mentioned in Rule 3(c), the appellant has acquired the additional experience of one year in a reputed Automobile Workshop as required even by the said circular. The Tribunal has committed an error in relying upon the circular which cannot replace the rules framed under Article 309 of the Constitution. We are, therefore, of the view that the Tribunal's decision is incorrect. Since the appellant satisfies the qualifications required by the rules, the decision of the Tribunal has to be set aside. We accordingly set aside the impugned decision of the Tribunal and direct the respondent to consider the appellant for appointment, if otherwise he satisfies the requisite qualifications including the marks obtained in the written test and the interview already held. The appeal is allowed with no order as to costs.

9. Again in the case in P. Sadagopan and Others Vs. Food Corporation of India, Zonal Officer (South Zone) Represented by its Zonal Manager and Another, , the same principle has been laid down by the Supreme Court in para-3. Para-3 of the said judgment reads as follows:

The Regulation provides that such of the candidates who have put in three years' experience as Assistant, Category I are eligible to be considered for promotion as Assistant Managers in Category II post. It is now settled legal position that executive instructions cannot be issued in derogation of the statutory Regulations. In view of the fact that the statutory Regulations require that experience of three years is a pre-condition to consideration for promotion to

Category II post from Category I post, it would be obvious that any relaxation was in defeasance of the above Regulations. The Division Bench, therefore, was not right in upholding the power of the Board in directing relaxation of the statutory regulations and consideration of the cases without considering the claims of all the eligible persons. Moreover, later the Board itself cancelled the 1970 panel. The Regulation issued for promotion of the Scheduled Castes and Scheduled Tribes should also be considered. Admittedly, they were not considered. Since the claims of all the persons are not before us, we do not propose to close the matter at this end. Accordingly, we set aside the order of the Division Bench and direct the authorities concerned to determine the promotions of all the eligible persons in accordance with the statutory regulations and pass appropriate orders within a period of six months from the date of the receipt of the order.

9. Thus the G.O. dated 9.2.2007 is absolutely illegal and arbitrary and contrary to statutory Regulations framed under the U.P. Intermediate Education Act, 1921 and has no legs to stand and is accordingly quashed. The impugned order dated 21.2.2007 based upon the G.O. dated 9.2.2007 is also illegal and is accordingly quashed.

10. The writ petition is allowed. Sri Indra Raj Singh submitted that the petitioner has not been paid salary in view of the G.O. dated 9.2.2007 and impugned order dated 21.2.2007. In this regard the petitioner may make a representation to the District Inspector of Schools within a period of ten days from today. If such representation is filed, respondent No. 1, the District Inspector of Schools, Jyotiba Phule Nagar shall decide the same within a period of one month thereof regarding financial approval for payment of salary to the petitioner.