
(1992) 08 AHC CK 0075

In the Allahabad High Court

Case No : C.M.W.P. No's. 10826 of 1992 and 5653 of 1991

Budhi Sagar Dubey

APPELLANT

Vs

Dt. Inspector of Schools and Others

RESPONDENT

Date of Decision : 03-08-1992

Acts Referred:

Citation : (1992) 65 FLR 844 : (1993) 1 LLJ 798 : (1993) 1 UPLBEC 197

Hon'ble Judges : M. Katju, J

Bench : Single Bench

Advocate : R.O. Pradhan, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, J.—The petitioner was appointed as a Class IV employee in Salashi Inter College, Rudrapur, Deoria on March 1, 1980 and since then he is working in the college. One post of Assistant Clerk fell vacant in the institution on the appointing of one Ram Narain Chaturvedi, a clerk of the institution, as Assistant Teacher. The petitioner was appointed on January 7, 1991 on the post of Assistant Clerk which had been occupied by Ram Narain Chaturvedi. It may be mentioned that an order had been passed on November 20, 1990 in an earlier writ petition of the petitioner (Annexure 5 to the petition) directing that the petitioner should make a representation to the committee of management. Another writ petition had been filed by the respondent No. 3 in this Court which had been disposed of by the order dated October 22, 1990, (Annexure 6 to the petition). By the order dated October 22, 1990, this Court had directed that in view of the Supreme Court's decision *Sushma Gosain*, reported in *Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others*, the petitioner is entitled to be appointed under the Dying-in-Harness Rules because his father had died in harness. In view of the two orders of this Court dated October 22, 1990 and November 20, 1990 the committee of management wrote a letter to the District Inspector of Schools requesting for suitable directions. True copy of this letter

dated January 29, 1991 is Annexure 7. In reply, the District Inspector of Schools wrote a letter dated February 13, 1991 to the committee of management asking it to take a decision in accordance with law. True copy of this letter is Annexure 8. Subsequently the committee of management wrote a letter dated September 27, 1991 to the District Inspector of Schools requesting that financial approval may be granted in favour of the petitioner for his appointment as Assistant Clerk. True copy of this letter dated September 27, 1991 is Annexure 9. In my opinion this letter was wholly illegal. It was Vikramaditya Pandey, respondent No. 3 who was entitled to be appointed as Assistant Clerk on the vacancy created by the appointment of Ram Narain Chaturvedi. It is settled law that a person who seeks appointment under the Dying-in-Harness Rules to be accommodated and has to be given a permanent appointment vide 1991 (2) UPLBEC 995. By the letter dated October 14, 1991, the District Inspector of Schools directed the committee of management to appoint respondent No. 3. True copy of this order is Annexure 10. Thereupon the management forwarded all papers of the petitioner with a covering letter dated November 12, 1991 to the District Inspector of Schools. True copy of this letter is Annexure 11. Thereupon a reminder dated December 27, 1991 was sent by the management to the District Inspector of Schools to grant financial approval in favour of the petitioner and it was also requested that Vikramaditya Pandey may also be appointed as Assistant Clerk by relaxing the strength of clerks. True copy of the letter dated January 27, 1991 is Annexure 12. Thereafter the order dated February 29, 1992 was passed by the District Inspector of Schools directing appointment of respondent No.3 as Assistant Clerk. By this petition the said order dated February 29, 1992 has been challenged by the petitioner.

2. Counter and rejoinder affidavits have been filed. I have heard learned counsel for the petitioner and also learned counsel for the respondents. In my opinion, there is no infirmity in the impugned order. It is settled law that a person who is entitled under the relevant Government Order dated September 23, 1981 as a dependant of an employee of an educational institution who dies in harness is entitled to be appointed to a non-teaching post. Hence, the respondent No. 3 was entitled to be appointed to the post of Assistant Clerk and his appointment is perfectly valid. As regards the petitioner, no doubt there is a recommendation of the manager in favour of the petitioner as well as respondent No. 3 stating that they may be accommodated as Assistant Clerk. However, since admittedly there is as yet only one post of Assistant Clerk, hence this Court cannot direct two appointments as that will saddle additional financial liability upon the State Government without any authorisation of law. Of course, it is open to the District Inspector of Schools if he so chooses to permit the appointment of the petitioner in accordance with law but no mandamus can be issued by this Court in this connection.

3. Learned counsel for the petitioner submitted that there are four posts of Assistant Clerk and under Chapter III Regulation 2(2), 50% of the posts are to be filled in by promotion and 50% by direct recruitment. It is alleged in para 7 of

the writ petition that the post in question is to be filled in by promotion. In para 6 of the counter affidavit of respondent No. 3 it has been stated that the committee of management had not passed any resolution to the effect that the petitioner will be promoted as Assistant Clerk, when the post fell vacant after appointment of Ram Narayan Chaturvedi as a teacher. In paragraph 7 of the counter-affidavit it is alleged that the petitioner is still working as Peon. In para 8 of the counter-affidavit it is alleged that the High Court had directed that the respondent No. 3 be appointed as Assistant Clerk on the vacancy created by Ram Narayan Chaturvedi who was appointed teacher. It is alleged that the petitioner concealed these facts when he filed writ petition No. Nil of 1990. It is also alleged that the petitioner was fully aware of the order dated October 22, 1990 of this Court, but he suppressed these facts.

4. It may also be mentioned that in the connected Writ Petition No. 5653 of 1991 respondent No. 3 has filed a counter-affidavit in which it is stated that 50% promotion quota of Assistant Clerk has already been filled in, and hence, the petitioner cannot be promoted.

5. It may be mentioned that the Hon. Supreme Court in *Dr. Ramji Dwivedi v. State of U.P.* 1983 (47) FLR 74 (SC), has held that the order] of the State Government u/s 9 (4) can modify or rescind the Regulations. The Supreme Court upheld the decision of this Court reported in 1982 UPLBEC 137. In my opinion the order of the State Government dated September 3, 1981 giving benefit of Dying-in-Harness rules amounts to an order u/s 9 (4), and hence, even if the petitioner was entitled to appointment under the promotion quota under Regulation 2(2), he cannot get the benefit of that: Regulation since the regulation has been modified by the order of the State Government dated Septembers, 1981.

6. Learned counsel for the petitioner then submitted that he was appointed on leave vacancy whereas the respondent No. 3 is claiming a substantive appointment. In my opinion, even if a leave vacancy is created, it has to be first offered to the person who is entitled to the benefit of the dying-in-harness rules, and if the person who had gone on leave does not return then the person entitled to the benefit of dying-in-harness rules should be confirmed on that post. If, however, the person who had gone on leave returns then the person entitled to the benefit of dying-in-harness rules should be given an appointment by creating an additional post. It would not be proper to direct creation of an additional post unless a person who on leave returns or joins the post. A person who was appointed on leave vacancy has no right to the post and he will have to go out if a person entitled to the benefit of dying-in-harness rules is available, for it would not be proper to saddle the Government with additional financial liability of having two persons against one post.

7. This writ petition and the connected Writ Petition No. 5653 of 1991 *Budhi Sagar Dubey v. District Inspector of Schools and others* are both dismissed. It is of course open to the District Inspector of Schools to consider the case of the

petitioner sympathetically and if possible accommodate him against any vacant post of Assistant Clerk. There is no order as to costs.