

(2007) 01 AHC CK 0094
In the Allahabad High Court

Dharam Dev

APPELLANT

Vs

The District Inspector of Schools, The Committee of
Management and Surendra Nath Yadav

RESPONDENT

Date of Decision : 05-01-2007

Acts Referred:

Citation : (2007) 5 AWC 4794 : (2007) 2 UPLBEC 1271

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Krishna, J.—The challenge in the present writ petition is the order dated 21st August, 1991, passed by respondent No. 1, District Inspector of Schools, promoting Surendra Nath Yadav, respondent No. 3 from the post of LT grade teacher to Lecturer's grade in Economics. The grievance of the petitioner is that his claim for promotion on the aforesaid post of Lecturer in Economics has not at all been considered, illegally and he being entitled for promotion to the aforesaid post, and was within the zone of consideration the impugned order is liable to be quashed, for ignoring his claim even for consideration.

2. The facts of the case lie in a narrow compass. The facts which are not much in dispute or can not be possibly be disputed by either parties are as follows:

3. A vacancy on the post of principal arose on 30th June, 1987 in Tarun Inter College, a recognized aided intermediate college, hereinafter referred to as the College, on account of the retirement of Sri Ram Braksha Singh. One Hari Narain Shukla was given ad hoc promotion to the aforesaid post of Principal. Sri Rampati Pandey who was a teacher in Economics in Lecturer's grade was selected by the U.P. Secondary Education Service Commission as Principal of the College. He subsequently joined on the aforesaid post of Principal of the College and the date of his joining and filling up the resultant vacancy on the post of Lecturer in Economics is the bone of contention between the parties.

4. The petitioner was appointed on 17th February, 1972 initially in LT grade as a teacher in the said College and his appointment was approved on August 23rd 1972 by the District Inspector of Schools and has been working since then as LT grade teacher. Sri S.N. Yadav, respondent No. 3 was appointed as LT grade teacher on August 1st 1973 in the College and his appointment was approved on 25th December, 1973 by the District Inspector of Schools. Obviously the petitioner was senior to respondent No. 3 in LT grade and on this score there is no dispute in between the parties.

5. A dispute arose between the petitioner on the one hand and respondent No. 3 on the other hand, when the management decided to fill up the vacancy on the post of Economics Lecturer which fell vacant due to appointment of Sri Ram Pati Pandey as Principal of the College. The petitioner claimed that he should be promoted, thus, he made a number of representations detailed in para 12 of the writ petition. They are dated 21st April, 1990, 3rd July, 1990, 4th September, 1990, 10th December, 1990 and 13th February, 1991 addressed to the Management of the College. He made representation staking his claim for promotion to the District Inspector of Schools also on 4th January, 1991 and 14th February, 1991 as mentioned in para 13 of the writ petition. The management in its meeting dated 23rd December, 1990 by resolution No. 3 (Annexure-11 to the writ petition) resolved to promote Sri Surendra Nath Yadav, respondent No. 3 on the post on the post which fell vacant on account of selection of Ram Pati Pandey as Principal of the College and his assuming charge as such, on ad hoc basis. The said resolution has been approved by the District Inspector of Schools by the order dated 21st August, 1991, granting approval for ad hoc promotion of Sri Surendra Nath Yadav, respondent No. 3 with the stipulation that he shall continue till a duly selected candidate from the Commission joins or on the detection of any concealment of fact. The said resolution of the committee of management and the approval order dated 21st August, 1991 have been challenged presently in the petition.

6. One more relevant before proceeding further there is to be noticed. Post graduation i.e. MA in Economics is the prescribed minimum educational qualification under the relevant rules for the post of Lecturer in Economics. The petitioner lacked this qualification but according to him he passed M.A. Economics in 1988 Examination from Gorakhpur University and submitted the attested copy of the marks sheet of M.A. Economics Examination with a covering letter to the Principal of the College on October 25, 1989 (vide para 9 of the writ petition). He thus claims that became qualified for consideration for promotion on the post of Lecturer Economics after obtaining the Master's degree in Economics in 1988 Examination. The contention of the petitioner is that he possessed the minimum educational qualification on the relevant date i.e. the day on which the vacancy on the post of Economics Lecturer arose.

7. The bone of contention of respondents is that the petitioner did not possess the prescribed minimum educational qualification on the date of vacancy and

according to them the date of vacancy is "June 1989". This aspect shall be considered in detail in the later part of this judgment.

8. Three sets of counter affidavits have been filed by the respondents separately although on similar pleas. The central theme of these counter affidavits, is, that the petitioner was not qualified on the date of occurrence of vacancy on the post of Lecturer Economics. The relevant date according to them is June, 1989, the day when Sri Ram Pati Pandey, Lecturer in Economics was duly selected by the Commission on the post of Principal in the College. In the counter affidavit filed on behalf of the College (affidavit of Ramji) it has been stated there was a dispute about seniority in between Hari Narain Shukla and Ram Pati Pandey. It was decided by the DIOS in favour Ram Pati Pandey, holding him to be the senior most Lecturer of the College. The Commission through the DIOS communicated to the College that by the letter dated 12th July, 1989 that Ram Pati Pandey has been selected for the post of Principal on permanent basis. From this very fact by way of conclusion/inference it has been stated in para 17 of the counter affidavit that "post of Principal of the institution was filled up in the month of July, 1989 and consequently a post of Lecturer in Economics fell vacant in the institution in question in the month of July, 1989."

9. Respondent No. 3 was the only qualified candidate for being promoted on the post of Lecturer in Economics at the time when the post fell vacant i.e. July, 1989." The petitioner had not passed his M.A. Examination in Economics by that time and hence he could not have been promoted on the post of Lecturer in Economics although he was senior to respondent" (vide para 19 of the counter affidavit).

10. In addition to the facts as stated in the counter affidavit filed on behalf of the Management, respondent No. 3 ventured to make an attempt to establish in his counter affidavit that his academic qualification is better than the petitioner, specially the Economics subject. He has been teaching intermediate students since 1982-83, while the petitioner being third divisioner through out. does not possess any experience of teaching of Intermediate Classes in Economics.

11. In the counter affidavit filed on behalf of District Inspector of Schools sworn by Smt. Ramlali Singh, the stand taken by the College and by respondent No. 3 have been supported and for the sake of brevity it is not necessary to reiterate them. Suffice it to say in para 5 thereof an identical stand has been taken that the post fell vacant on June, 1989 and Surendra Nath Yadav was the only person who was duly qualified for the promotion and he has been teaching Economics subject for Intermediate Classes since 1982-83 till the date of promotion.

12. In the rejoinder affidavits besides reaffirming the allegations made in the writ petition, a number of documents have been enclosed showing that the petitioner appeared in 1988 M.A. Examination from Gorakhpur University. Its result was declared in August 1988 (vide para 16 of the rejoinder affidavit,(page 8 of the affidavit sworn on 15.11.1992).It has been further stated that the post in

question fell vacant for the first time on 1st March, 1990 and on that day the petitioner was duly qualified to be promoted on the said post on ad hoc basis. In this very paragraph it has been stated that the last paper of M.A. Economics of the petitioner was held on 24th May, 1988 and his result was declared in August, 1988.

13. Along with a supplementary affidavit, a copy of which was served on the counsel for the respondents on 17th August, 2002, a photostat copy of the degree issued by Gorakhpur University certifying that Dharam Deo (Petitioner) has passed Master of Arts Degree (Economics) in third division, dated 20th October, 1988 has been filed to which no counter affidavit to controvert the said allegations was filed nor any time was sought by any of the counsel during the course of the hearing of the arguments in the writ petition, which was heard on a number of dates.

14. On the basis of the submissions of the learned Counsel for the parties the following three questions are mooted for determination in the present case.

(1) What is the date on which the post of Lecturer Economics fell vacant; is it June, 1989 as submitted by the respondents or 1st March, 1990 as submitted by the petitioner ?

(2) Did the petitioner acquire the prescribed minimum educational qualification i.e. M.A. Economics on or before June, 1989 or subsequent thereto ?

(3) Whether respondent No. 3 should have been granted promotion to the post in question as the said post was not notified to Commission and thus, the question of making ad hoc appointment u/s 18 of the Act, as stated in para 20 of the writ petition, does not arise ?

Question No. 1.

15. Coming to question No. 1, which is not in dispute the fact is that the vacancy on the post of principal arose on account of retirement of Ram Braksha Singh on 30th June, 1987. Pending selection by the Commission to fill up the said post of Principal, one Hari Narain Shukla was given ad hoc promotion to the post of Principal who worked up to 28th February, 1990. In the mean time Ram Pati Pandey, Lecturer in Economics was duly selected and recommended by the Commission for the post of permanent Principal of the College. The information about selection of Ram Pati Pandey was sent by the District Inspector of Schools on behalf of Commission vide his letter dated July 12, 1989 (C.A. 1 to the counter affidavit of the College) directing the Manager of the College to issue appointment letter accordingly within a period of one month to the selected candidate i.e. Ram Pati Pandey (Lecturer). On this basis the stand taken by the District Inspector of Schools, college and respondent No. 3 is that a vacancy arose on the post in question in the month of June, 1989. This has been the common and consistent case of all the three respondents which is being disputed by the petitioner.

16. Coming to the pleadings of the parties, it may be noted that in para 3 of the writ petition a specific averment has been made that Ram Pati Singh joined as Principal of the College on 1st March, 1990. This has been reiterated in the rejoinder affidavit of the petitioner. However, there is no denial of this fact in any of the counter affidavits. The petitioner has also annexed certain documents by way of certificate issued by the Principal certifying that Ram Pati Pandey assumed charge of the post of Principal on 1st March, 1990 (Annexure-2 to the rejoinder affidavit). It has come on record that Hari Narain Shukla who was working as ad hoc principal in the College filed writ petition No. 9157 of 1989 and the said writ petition was decided by this Court by judgment dated 15th January, 1989, directing the Committee of Management to immediately act upon the recommendation made by the Commission and issue appointment letter to the selected candidate. The Deputy Director of Education by his letter dated 25.1.1990 in exercise of power conferred on him u/s 17(2) of the Commission Act 1982 directed the Management to issue appointment letter to Ram Pati Pandey within a week of the receipt of the letter. This was followed by letter of the District Inspector of Schools, dated 15th February, 1990 and Committee of Management was warned that if the Committee of Management fails to issue appointment letter to Ram Pati Pandey, selected Principal of the College, the authority shall be compelled to initiate proceedings for appointment of authorized controller u/s 17 (2) of the Act and salary shall be paid to Sri Ram Pati Pandey by single operation of account. These two letters have been annexed as Annexures 3 and 4 to the rejoinder affidavit sworn on 28th March, 1972. Veracity of these letters was not doubted by the respondents. Even otherwise also they can not be doubted for the reason that the respondents have not come forward and have failed to place any material on record to show the actual date of joining of Ram Pati Pandey as Principal of the College.

17. The Committee of Management respondent No. 2 could have very easily placed on record the actual date of joining of Sri Ram Pati Pandey as Principal of the College as it is the best person, who is supposed to know about actual date of joining of Sri Ram Pati Pandey as Principal. It has also not placed a copy of the appointment letter issued by it, giving appointment to Sri Ram Pati Pandey on the post of Principal. These documents are vital and crucial documents for determination of question of vacancy on the resultant post of Lecturer in Economics held by Ram Pati Pandey immediately preceding of his assuming charge of Principal ship in the College. In this connection observation of Apex Court in Bharat Singh and Others Vs. State of Haryana and Others, may be usefully noted which reads as follows:

In our opinion when a point which ostensibly a point of law is required to be substantiated by facts the party raising point if he is writ petitioner must plead and prove such facts by evidence which must appear from the writ petition and if he is respondent, from the counter affidavit. If the facts are not pleaded or evidence in support of such facts is not annexed with the writ petition or to the counter affidavit, as the case may be, the court will not entertain the point....

In a writ petition or in the counter affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.

18. The contention of the respondent's counsel that the vacancy on the post in question arose in June, 1988 as Ram Pati Pandey was duly selected who was holding the post as Principal, now needs to be examined. The said argument proceeds on the ignorance of the very fact that the relationship of master and servant or employer and employee comes into existence when the contract of employment is entered into. In other words, an appointment is offered by the employer through appointment letter and the said offer is accepted by the candidate by giving his joining. Before that the relationship of master and servant does not come into existence. Keeping in view this basic principle in mind, if we examine the facts of the present case, it is axiomatic that no attempt was made by any of the respondents to show when appointment letter to the post of Principal was issued to Ram Pati Pandey, or the day when he gave the joining. Obviously he worked as Lecturer Economics and there was relationship of employer and employee qua the post of Lecturer in between the Committee of Management and Ram Pati Pandey till he joins the post of Principal. In other words the vacancy under no circumstance on the post in question (Lecturer) shall arise till the working of Sri Ram Pati Pandey as Lecturer on the post in question. The selection of Sri Ram Pati Pandey on the post of Lecturer will not in any manner create a vacancy on the post of Lecturer Economics. This view is further fortified from the fact that the Management is statutorily required to issue an appointment letter i.e. make an offer to the selected candidate to come and join the post offered to him. Take a case when a duly selected candidate for any reason may not join the post on which he has been selected, and if the argument of the learned Counsel for the respondents is accepted, it would lead to an anomalous situation. Take for example, the contract of employment of Ram Pati Pandey on the post of Lecturer comes to an end as soon as he was declared successful for the post of Principal and if for one reason or the other he refuses to join on the post of Principal, the post of Lecturer would become automatically vacant according to the respondents. Therefore, the arguments raised by the learned Counsel for the respondent does not appeal to reason, nor it is supported by any principle known to law.

19. There is another aspect of the matter, the lien on the post of Lecturer of Sri Ram Pati Pandey will come to an end only when he joins the post of Principal. During the currency the lien on the post, no appointment can validly be made, In *State of Haryana and Others Vs. Rajindra Sareen*, it has been held that appointment can not be made against a post in which another officer holds a lien, though in a slightly different context. The observation of the Supreme Court made in the *State of Haryana Vs. Shri Des Raj Sangar and Another*, to the effect that in the absence of written request by an employee lien on the post permanently held by him i can not be terminated, can be pressed into service in the present case also. In this view of the matter Ram Pati Pandey continued to hold the post of Lecturer in the college till his joining to the post of Principal.

20. The word "lien" has been defined by Supreme Court in *Ramlal Khurana (Dead) By Lrs. Vs. State of Punjab and Others*, in the following manner

8. The other contention urged for the . appellant that he was not confirmed in the Excise Department and unless confirmed, he acquired no lien cannot also be accepted. Lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed. Generally when a person with a lien against a post is appointed substantively to another post, he acquires a lien against the latter post. Then the lien against his previous post automatically disappears. The principle being that no Government servant can have simultaneously two liens against two posts in two different cadres. It is a well accepted principle of service jurisprudence.

21. At the cost of repetition at this juncture it may be pointed out that the fact that Ram Pati Pandey joined the post of Principal on 1st March, 1990, as averred in para 3 of the writ petition, has not been denied by any of the respondents in their counter affidavits. What to say of denial, the District Inspector of Schools in his counter affidavit has stated that the contents of said paragraph needs no reply (see para 6). Other counter affidavits on this issue are more or less same lines.

22. The up shot of above discussion in nutshell is that although Ram Pati Pandey, Lecturer Economics was duly selected for the post of Principal in June, 1989, but he actually joined on the post of Principal on 1st March, 1990 and thus resultant vacancy on the post of Lecturer Economics arose on 1st March, 1990 and not before. The submission of the respondents that the vacancy arose in June, 1989 on account of selection of Ram Pati Pandey on the post of Principal in the College has no substance in the eyes of law and, therefore, can not be accepted. Necessarily it follows that the qualification for the post of Lecturer Economics should be determined of the prospective candidates with reference to that date, i.e. 1st March, 1990.

Question No. 2.

23. It was hotly contested by the respondents that the petitioner did not possess the requisite minimum qualification on the date of occurrence of vacancy, which according to them was June, 1989. Reliance was placed particularly on para 9 of the writ petition, wherein it was stated by the petitioner that he submitted an attested copy of the marks sheet of M.A. Economics Examination with the covering letter to the Principal on 25th October, 1989. The contention of Sri P.S. Baghel, learned Counsel for respondent No. 3 is that the contents of para 9 of the writ petition is Waterloo for the petitioner. On a close reading of the aforesaid paragraph it would be clear that the petitioner submitted marks sheet of M.A. Economics Examination on 25th October, 1989, it does not necessarily follow that he passed the examination in the year 1989 itself, coupled with the fact that a copy of the degree of M.A. Economics has been annexed along with the supplementary affidavit, which remained uncontroversial, issued by the Vice

Chancellor, Gorakhpur University and is dated 20th October, 1988. It is true that the burden lay upon the petitioner to establish by clinching and unimpeachable evidence to show that he was duly qualified on the date of occurrence of the vacancy. Sri Raj Kumar Jain, learned Senior Counsel appearing for the petitioner submitted that on the face of the degree and the examination programme (a copy thereof has been filed along with the rejoinder affidavit) and the averments made in the rejoinder affidavit that the result was declared in the month of August, 1988, leaves no room of doubt that the petitioner did possess the requisite minimum qualification on the relevant date. Much emphasis was laid by Sri P.S. Baghel on the copy of the marks sheet filed as Annexure-2 to the writ petition. It is dated 25th October, 1989. Be that as it may the fact remains that in the marks sheet of M.A. (Final) Year Economics 1988 Exams it is mentioned therein that it is of M.A. Final Year Economics 1988 examination as also in the degree dated 20th October, 1988. Evidently the degree of M.A. Economics issued by Gorakhpur University is dated 20th October, 1988. Therefore, the contention of the learned Counsel for the petitioner that the result of the examination was declared in August, 1988 can not be said to be without any substance. It is fortified by the fact that the degree itself is dated 20th October, 1988. However, in view of decision under question No. 1 it is not necessary to dwell further upon this issue as it has become more or less academic.

Question No. 3.

24. Learned Counsel for the petitioner in view of the averments made in para 20 of the writ petition submitted that the post of Economics Lecturer has not yet been notified to Commission and, therefore, the question of making ad hoc appointment u/s 18 of the Act does not arise. In the counter affidavit filed by respondents there is no denial of the aforesaid fact, except in the counter affidavit of respondent No. 3, wherein it has been stated that requisition for the post of Lecturer Economics was sent by the Committee of Management through District Inspector of Schools. Copy of the receipt of the reacquisition by District Inspector of Schools has been annexed as Annexure-8 to the afore sated counter affidavit. Sri Raj Kumar Jain, learned Senior Counsel for the petitioner submitted that the averments made in para 20 of the writ petition having been denied by the said respondents, the stand of respondent No. 3 in the counter affidavit does not deserve any consideration. His argument is that Section 18 of the Commission Act as it stood at the relevant point of time prior to its amendment (prior to Its substitution by Act No. 24 of 1972) the pre requisite condition to invoke the power to offer appointment by the Management was to notify a vacancy to the Commission in accordance with the provisions of the Act.

25. Elaborating the argument he further submitted that the Committee of Management was not competent to offer ad hoc appointment to a teacher on permanent vacancy. In support thereof reliance was placed on Full Bench judgment of this Court in Radha Rajada and Ors. v. Committee of Management (1994) 32 UPLBEC 1551. On the other hand it was submitted by the learned

Counsel for the respondent that power to make regular promotion under Regulation 6 of Chapter 2 of U.P. Intermediate Education Act and under Rule 9 of the U.P. Secondary Education Service Commission Act 1983 is there. It may be noted here that the aforesaid Rule 9 was amended in the year 1993 and Rule 9-A and Rule 9-B were inserted. Rule 9 as it existed at the relevant time is reproduced below:

9. Procedure for appointment by promotion -(1) Where any vacancy is to be filled by promotion, all teachers working in L.T. or C.T. grade, who possess the minimum qualifications and have put in at least 5 years continuous service as teacher in the concerned subject on the date of occurrence of vacancy shall be considered for promotion without their having applied for the same.

(2)...

(3)The Management shall prepare a list of teachers, referred to in sub rule (1), and forward it to the Commission through the Inspector with a copy of seniority list, service record (including the character rolls) and a statement in the proforma given in Appendix "A"

(4)...

(5) Commission shall, after calling for such additional information as it may consider necessary, intimate the name of selected candidate or candidates to the Inspector with a copy to the Manager of the institution.

26. Certain decisions such as Dr. Raman Kumar Pandey v. Sukh Ram Pal Singh Sherawat 1995 (1) ESC 744, Rakesh Kumar Kaushik v. DIOS 1993 (2) ESC 450, Subhash Prasad v. Regional Selection Committee 2004 Allahabad Law Journal 3711 and Brahm Dutt Tripathi v. State of U.P. and Ors. (2005) 2 UPLBEC 1713 have been relied upon by the learned Counsel for the parties. It is not appropriate on the facts of the present case to examine the aforesaid issue in view of decision taken by me in question No. 1. However, it may be added that the said point as rightly been accepted by the learned Counsel for the petitioner cuts both the ways. Question No. 3 is, therefore, left undecided.

27. Before saying omega to the case it may be placed on record that Sri P.S. Baghel, leaned counsel appearing for the contesting respondent No. 3 strenuously submitted that the academic record of respondent No. 3 is better and seniority is not criteria for promotion for the post of Lecturer. Be that as it may it is for the authority concerned who are better placed to consider the aforesaid submission if the said submission is permissible under law. The court refrains itself to say any thing on this issue as the same was neither examined nor was subject matter of issue before the authority concerned. To be fair to the petitioner Sri Jain submitted that the seniority is the criteria for promotion. These submissions have been noted to keep the record straight.

28. It may also be added here that the learned Counsel for the parties were not in issue on point that the relevant date for consideration of the respective

qualification of the candidate is the date of occurrence of vacancy. Otherwise also this is the acknowledged legal position. A reference can be made on Rakesh Kumar v. DIOS (supra) and Dr. Raman Kumar Pandey v. Sukh Ram Singh (supra).

29. The up shot of the above discussion is that the vacancy on the post in question arose on 1st March, 1990 and on that the petitioner was duly qualified and was legally in the zone of consideration for promotion and has been illegally left out by taking erroneous view of the law by respondent Nos. 1 and 2 that the post fell vacant in June, 1989.

30. It may be noted that appointment of respondent No. 3 was subject to the final decision in the writ petition vide order dated 3rd January, 1992.

31. Thus, the resolution dated 23.12.1990 of the Committee of Management dated 23.12.1990 (Annexure -11 to the writ petition) and approval dated 21st August, 1991 given by respondent No. 1 (Annexure-12 to the writ petition) can not be sustained and are hereby quashed. The respondents are directed to consider the case of promotion to the post of Lecturer Economics vacated by Ram Pati Pandey a fresh in the light of the observations made above in accordance with law.

32. The writ petition succeeds and is allowed with costs quantified at Rs. 3000/- Each respondents are directed to pay Rs. 1000/- to the petitioner.