

(1997) 09 AHC CK 0015

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 5078 of 1980

Dharmendra Kumar Saxena

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 24-09-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1997) 3 UPLBEC 1929

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Vinod Swaroop, for the Appellant; S.C. and H.N. Tripathi, for the Respondent

Judgement

D.K. Seth, J.—The petitioner was suspended in contemplation of an inquiry by an order dated 18th May 1973. A dispute was raised before the Labour Court as to the validity of the said order. The Tribunal had held against the delinquent. The Labour Court by Award dated 29-11-1977 had held that the suspension of the petitioner was justified and legal and therefore he was not entitled to any relief. A writ petition, being Civil Misc. Writ Petition No. 5287 of 1978, was preferred by the petitioner. By an order dated 10-7-1979 the said writ petition was allowed and the Award of the Labour Court dated 29-11-1977 was quashed. The Labour Court was directed to adjudicate the dispute. Therefore, while allowing the employer to adduce fresh evidence to substantiate the order of suspension, the said case was registered as Adjudication case No. 429 of 1974, which was reheard and decided again by an order dated 6th December 1979, contained in Annexure-I" to the writ petition. The Labour Court had held that the order of suspension appears to have been cancelled by the Board of Directors. Therefore no fresh adjudication on the point was called for. The workman concerned, Sri Dharmendra Kumar Saxena, would be entitled for full pay during the period of suspension from 16th May 1973 to 29th November, 1977 on the basis of cancellation of the order of suspension with effect from 16th May 1973. This order stares on the face of the respondents, so far as the question of suspension

is concerned. It appears that the inquiry against the petitioner was also dropped and, therefore as it appears from the facts of this case, there was nothing against the petitioner, by reason whereof his increments or regular pay could have been with-held. The Bank had accordingly passed a resolution dated 18-10-1979, permitting the petitioner to get all payments which were with-held together with respective increments. He was also accorded promotion by the same resolution, which is Annexure-"2" to the writ petition. The said resolution of the Committee of Management dated 18th October 1979 was stayed by an order dated 15-1-1980 by the Deputy Registrar, Co-operative Societies, Bareilly, which is Annexure-CA1 to the Counter affidavit, filed by the respondents Bank, From the said order, it appears that the grant of promotion was contrary to Regulation 5 (ii)(b) of U. P. Cooperarive Societies Employees Service Regulations, 1975 hereinafter referred to as the said Regulation and the grant of with-holding salary is also contrary to the Regulation 84 of the said Regulations. Therefore the Committee of the society was asked to show cause as to why the said resolution should not be cancelled or anualled, or to reconsider the resolution. Pursuant thereto the Committee of Management had forwarded the reconsidered resolution dated 23-2-1980, but the Deputy Registrar, Co-operative Societies Bareilly, was not satisfied with the same. Accordingly by an order dated 17th March 1980 he has pointed out that the resolution dated 23-2-1980 has not satisfied the requirement of notice dated 15-1-1980. Therefore he had asked for sending certain further particulars, as specified in seven Items in the said letter dated 17-3-1980, contained in Annexure-4 to the writ petition and till the furnishing of such particulars the operation of the said resolution was stayed. The said resolution dated 23-2-1980 was with regard to the grant of promotion of the petitioner. The petitioner had obtained stay of operation of the order to the extent by which the resolution No. "4" dated 23-2-1980. was stayed. So far as the other part was directed to be complied with. Learned counsel for the petitioner Sri Vinod Swarup contends that the said part has not been complied with. In the meantime the petitioner has also retired from service.

2. Sri Vinod Swarup, learned counsel for the petitioner contends that until and unless the said order as contained in Annexure-4 to the writ petition is quashed the respondent may ask for the refund of salary, already received by him, pursuant to the interim order passed in the present writ petition. Learned counsel for the petitioner assailed the said order, contained in Annexure 4 to the writ petition and Annexure 5" by which the promotion was cancelled on the ground that the same was contrary to the orders passed by the learned Tribunal and, therefore, the same cannot be sustained.

3. Sri H.N. Tripathi, learned counsel appearing on behalf of respondents, on the other hand contends that the petitioner could not have come before this Court in writ jurisdiction without exhausting his remedy u/s 98 (n) of the U.P. Co-operative Societies Act, which provides for filing an appeal from the orders passed u/s 128 of the Act, under which the impugned notice, as contained in Annexure-CA-1 to the counter affidavit and Annexure-4 to the petition were

issued. He next contends that the petitioner is not eligible and entitled for promotion because the alleged promotion was granted contrary to Regulation 5 (ii) (b) of 1975 Regulations. He further contends that the order of the learned Tribunal was obtained through an illegal fraudulent compromise between the petitioner and the Chairman of the Committee of Management. Therefore, the order of the Tribunal cannot be sustained. He further contends that on the merit of the case the petitioner is neither eligible and entitled for promotion nor to the increments which were sought to be given to the petitioner by means of said two resolutions as contained in Annexure "2" and "3" to the writ petition respectively.

4. I have heard Sri Vinod Swarup, learned counsel for the petitioner, Sri H. N. Tripathi, learned counsel appearing on behalf of respondents and the learned Standing counsel at some length. The first question that the appeal lies, does not stand to reason for the simple reason that the impugned orders, being Annexures "4" and "5" to the writ petition does not come within the purview of Section 98 of the Co-operative Societies Act, 1965 (herein after referred to as the said Act). So far as the order contained in Annexure "4" to the petition is concerned, the same is only an order to show cause purporting to give an opportunity to the Co-operative Societies in terms of proviso to Section 128 of the said Act, by which he may require the society to reconsider the resolutions. But appeal u/s 98 (n) is provided only against an order passed by the Registrar u/s 128 annulling any resolution or cancelling any order, By the impugned order, contained in Annexure 4 to the petition, no order was cancelled neither any resolution was annulled By the said order the resolution was purported to be stayed till the decision is taken.

5. Section 128 of the said Act empowered the Registrar to :

"(i) annul any resolution passed by the Committee of Management or the general body of any Co-operative society ; or

(ii) cancel any order passed by any officer of a Co-operative society.

If he is of the opinion that the resolution or the order as the case may be, is not covered by the objects of the society, or is in contravention of the provisions of this Act, the rules or the bye-laws of the society.....

Provided that the Registrar shall, before making any order, require the committee of management, general body or officer of the Co-operative society to reconsider the resolution, within such period as he may fix but which shall not be less than fifteen days, and if he deems fit may stay the operation of that resolution or the order during such period."

In the present case, as seen from the order contained in Annexure 4, since neither any resolution was annulled nor any order was cancelled it does not fit in within the ambit of Section 98 (n) of the said Act. The grant of stay pending decision u/s 128 proviso has not been made appealable. Therefore, the said order, Annexure 4 to the petition, cannot be said to be appealable. Therefore, the

contention that the remedy by way of appeal is available to the petitioner, as contended by Sri H.N. Tripathi, cannot be said to be acceptable Therefore the contention that the remedy by way of appeal is available to the petitioner, as contended by Sri H.N. Tripathi, cannot be sustained.

6. But the fact remains that by the said resolution excepting the order staving operation of the order there was nothing by which the petitioner could have been aggrieved Sri Vinod Swarup, learned counsel for the petitioner contends that the said show cause notice was issued long after 30 days in view of sub-rule (2) of Rule 130 of the U.P. Co-operative Societies Rules, 1968 (hereinafter referred to as the said Rules), the same cannot be sustained. But the fact remains that the notice was issued on 17-3-1980 whereas the resolution was taken on 23-2-1980. It is only 22" days after the resolution was taken. Therefore, the said contention of Sri Vinod Swarup cannot be sustained Sri Vinod Swarup, further contends that in the order contained in Annexure-4 the order dated 15-1-1980 was also included which is beyond the prescribed period under sub-rule (2) of Rule 130 of the said Rules. But the facts remains that the petitioner has not challenged the order dated 15-1-1980. Then again by a supplementary affidavit, as contended by Sri Vinod Swarup, learned counsel for the petitioner it is pointed out that intimation of the resolution dated 18-10-1979 was given to the Deputy Registrar on 27-12-1979, Therefore, it was only after "19" days namely on 15-1-1980, Annexure-CA 1 to the counter-affidavit was issued Thus it appears that the said order was issued well within 30 days from the date of reference. Therefore, mere inclusion of the said order dated 15-1-1980, in the order contained in Annexure 4 to the petition, does not mean that the provision under Rule 130 was resorted to only by means of that order dated 17-3-1980, and therefore, it will not be hit by mischief of Rule 130 (2) of the said Rules. This was only in furtherance of the earlier order issued. Therefore, the contention of the learned counsel for the petitioner cannot be accepted.

7. Mr. Vinod Swarup, had raised two fold contention while challenging the order contained in Annexure 4. One was that it was hit by the time frame provided in Rule 130 (2) of the said Rules and the other that the Registrar had no jurisdiction to grant stay of the resolution. The first contention has already been answered as above. The second contention cannot stand to reason in view of the proviso to Section 128 of the said Act as quoted hereinbefore. In as much as the proviso specifically empowers the Registrar to "stay the operation of that resolution or the order during such period."

8. Now by order dated 15-1-1980 only particulars were asked for on certain ground, that the promotion was against Regulation 5 (ii) (b) of 1975 Regulations. However, Sri Vinod Swarup concedes that since the petitioner has already retired he is not insisting on the question of promotion. But he is insisting on the question of payment of salary, "which has rightly been granted to him. The reference made under Regulation 5 (ii) (b) of 1975 Regulations shows that such promotion would be for a duration of six months without the approval of the

Selection Board only stop gap measure and such promotion cannot continue beyond six months. Therefore, it is very fairly conceded by Sri Vinod Swarup that the petitioner cannot insist on the question of promotion since the promotion was not given by the U. P. Co-operative Institutional Service Board (hereinafter referred to as the Board).

9. The order in Annexure 4 deals with the resolution dated. 23-2-1980 which has two parts. One part relates to grant of promotion. The other part relates to payment of salary. These parts are connected with the order contained in Annexure CA 1 to the counter affidavit.

10. So far as the promotion is concerned the same can be made only through the Board in view of Regulation 5 (i) (b) of the said Regulations which provides that :

"(i) Recruitment for all appointments in a Co-operative society shall be made through the Board whether the recruitment is-

(a) direct; or

(b) by promotion from employees already in the service of the society; or

(c)"

Therefore the alleged promotion on the face of it, as appears from Annexure 3, is contrary to Regulation 5 (i) (b) and as such void even without the concession of Mr. Swarup.

11. So far as step gap promotion under Regulation 5 (ii) is concerned the same can be made :

"(ii) Notwithstanding anything contained in Clause (i) no reference to the Board shall be necessary in the following cases.

(a)

(b) When the Managing Committee or any other authority competent to make the appointment proposed to fill up as stop gap measure for a period not exceeding six months a part by promotion from amongst the employees in the just below cadre on the principle of Seniority subject to the rejection of unfit."

Provided that any appointment thus make without consultation with the Board shall in every case, cease to have effect from the date on which the period of six months expires and the employees promoted to the higher post shall unless he has already been reverted to his original post within the said period of six month deemed to have reverted from that date to the post held by him immediately before such promotion.

Provided further that the employee appointed to the higher post under this sub-clause shall, in no circumstances, be promoted under this sub-clause to any still higher post within the said period of six months, nor shall be appointed under this sub clause to the same post again after his reversion under the first proviso".

Thus promotion without reference to the Board can be made by the Managing Committee only, (i) as a stop gap measure, (ii) for a period not exceeding six months, (iii) from amongst the employees just below the cadre, (iv) on the principle of seniority subject to rejection of unfit and such appointment shall (i) cease on expiry of six months when (ii) the appointee shall be deemed to have been reverted to his original post unless (iii) he is reverted earlier and that (iv) in no circumstances he can be promoted to still higher a post within the said period of six months, (v) nor he can be appointed once again under first proviso after reversion.

12. In the present case the resolution dated 23-2-1980 contained in Annexure-2 does not conform to Regulation 5 (ii) (b). Inasmuch as it does not appear to be a promotion in the nature of stop-gap measure nor it appears to be limited by six months Therefore even without the concession of Mr. Swarup the said resolution cannot be sustained because of its being contrary to Regulation 5 (ii) (b) on the fact of it.

13. Then again by resolution dated 24-3-1980 contained in Annexure-5 the promotion was stayed by the committee of Management. The operation of the said resolution was not stayed by this court by the interim order dated 4-8-1980 passed in the writ petition. However, Mr. Swarup having conceded not to press the writ petition in respect of the promotion it is not necessary to deal with the said Annexure-"5" any further,

14. Thus it appear that the petitioner shall not be entitled to any kind of benefit including pecuniary or otherwise i. e., salary etc. of the promotional post. Though however he was only entitled to the pay/salary etc, of the post held by him without the promotion. If by virtue of the interim order passed in this writ petition the petitioner has obtained any such benefit he is liable to refund the same-Retirement benefit if any has to be calculated and paid on the basis of this substantive appointment without the promotion. If any amount paid In excess thereof the petitioner is liable to refund and the society is entitled to recover the same.

15. Now with regard to the question of payment of increments is concerned it appears from the order of the Tribunal that the period of suspension was treated to be period of full pay. The enquiry has also been dropped and nothing has been drawn to my notice to show that there was any inquiry initiated against the petitioner and the petitioner was punished. It was also not brought to my notice that the order of the Labour Court, contained in Annexure-"1" to the petition was set aside or modified by any superior court or recalled by the same court. Therefore the said order, as contained in Annexure-"I" to the petition stares on the face of the Committee of Management with regard to the question of entitlement of the petitioner for full salary during the period of suspension from 16- 5-1978 to 29 11-1977. In view of the said order the petitioner was entitled to all increments and other benefits of payment as were available to him, had he not been suspended during the said period.

16. Sri Tripathi learned counsel for the respondent contend that, the petitioner was reinstated on the understanding that the period of suspension shall be treated on suspension. Therefore, he was estopped from challenging the said order contained in Annexure-CA 1, But the fact remains that the said question could be agitated before the labour Court in the said Adjudication case No. 428 of 1974 where the same was reconsidered by order dated 6th December 1990, But the said question, though not taken should be deemed to have been taken on the principle of constructive res judicata since the said question has already been decided by means of award of the learned Tribunal, directing that the workman concerned will be entitled to full pay during the period he remained under suspension and the said order having not been challenged it is no more open. Sri Tripathi further contends that the petitioner is not eligible to get benefit of increments and full salary for the said period,

17. The order as contained in Annexures-4 and 5 to the writ petition, dated 17th March 1980 and 25/26th March 1980 respectively with regard to promotion do not require any interference in view of the concession rightly made in his usual fairness by Sri Vinod Swarup, learned counsel for the petitioner.

18 In the result the said two resolutions so far as it relates to the grant of salary and increment for the period between 16-5-1973 to 29-11-1977 is concerned" is hereby affirmed The petitioner shall be eligible to get all consequential benefits in that respect only, The petitioner shall not be entitled to the promotion or any benefit arising thereout. If any amount is received in excess on account of interim order the same is liable to be refunded by the petitioner to or recoverable from the petitioner by the society by adjustment from the retrial benefits if any, or otherwise, as observed earlier.

19. The writ petition thus stands partly allowed. There will, however, be no order as to costs.

20. Let a copy of this order be given to the learned counsel for the petitioner on payment of usual charges within a week.