
(2010) 08 AHC CK 0055
In the Allahabad High Court
Case No : C.M.W.P. No. 14474 of 2010

Dr. Anand Kumar

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-08-2010

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2010) 6 AWC 5618

Hon'ble Judges : Sunil Ambwani, J;Kashi Nath Pandey, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sunil Ambwani and Kashi Nath Pandey, JJ.—Heard Shri T. A. Khan, learned Counsel for the Petitioner. Learned standing counsel appears for the State Respondents. Shri R. N. Singh, Senior Advocate assisted by Shri G. K. Singh and Shri V. K. Singh have appeared for Dr. Vinit Kumar Mishra-Respondent No. 5.

2. By this writ petition, the Petitioner-a Bachelor of Dental Surgery (B.D.S.) from Rama Dental College, Kanpur, affiliated to Dr. Bhim Rao Ambedkar University, Agra awarded in the year 2008, has prayed for directions to quash the order dated 24.3.2007 of the Principal, Baba Raghav Das Medical College, Gorakhpur allowing Dr. Vinit Kumar Mishra-Respondent No. 5 to work on the permanent post of Demonstrator in the Department of Dental Surgery of the Medical College. By the same order, he has allowed the payment of salary to Dr. Vinit Kumar Mishra from the financial year 2007-2008 as permanent Demonstrator, and until the pay is revised, he has been allowed to draw Rs. 9,000 per month.

3. It is submitted by Shri T. A. Khan, that the post of Demonstrator is by way of an opportunity given to the fresh B.D.S. graduates, to work in the department for a period of one year. By Government order dated 5.8.1993, forty two posts of Demonstrators were sanctioned to be filled up every year by selection through a Selection Committee. There was no post of Demonstrator sanctioned in the

Dental Surgery Department of the B.R.D. Medical College. There was severe shortage of teaching staff in the Dental Surgery Department of the Medical College. The State Government, therefore, decided to transfer one post of Demonstrator from Microbiology Department to the Department of Dental Surgery.

4. Dr. Vinit Kumar Mishra-Respondent No. 5 passed B.D.S. Course in December 2003, and was preparing for P.G. Course. His father was serving as Junior Engineer (Civil) in the Medical College. Since he was living in the Medical College campus, he made a request to the Director General, Medical Education and Training, U. P. Lucknow to allow him to work as Honorary Demonstrator/Non-P.G. Resident. His application was accepted by the Director General, Medical Education and Training U.P., on 12.2.2004, and he was allowed to work on honorary basis on which he joined on 20.2.2004. The Principal of the Medical College made a request on 7.5.2004 to transfer one post of Demonstrator of Microbiology Department. The request of the Principal was accepted on 13.5.2004 by the Director General, Medical and Health Services U.P., in the interest of the patients and the students in the department. The requisite sanction was given to transfer the post on 11.6.2004.

5. The Respondent No. 5 thereafter applied for appointment on the post of Demonstrator. The Principal allowed him to work on the post for a period of one year with a condition that on the expiry of one year from 11.8.2004 (the date of appointment) his services will come to an end, without any further orders. He was also allowed to be paid the wages for the post.

6. It appears that immediately, on the expiry of his term, on 11.8.2004, Dr. Vinit Kumar Mishra filed a Writ Petition No. 56170 of 2005 in the High Court, in which the following orders were passed on 22.8.2005:

We have heard Sri M. D. Singh Shekhar, learned Counsel for the Petitioner and the learned standing counsel appearing for Respondents.

Counter affidavit on behalf of the Respondents may be filed within one month. Rejoinder affidavit may be filed within three weeks thereafter.

List thereafter.

Until further order of this Court, parties are directed to maintain status quo as exists today.

Sd/- V.M. Sahai, J.

Sd/- Sabhajeet Yadav, J.

22.8.2005

7. The writ petition was ultimately dismissed as infructuous on 2.1.2008, on the ground that the services of Dr. Vinit Kumar Mishra have been regularized.

8. Learned Counsel for the Petitioner submits that there was no question of

regularization of services of Dr. Vinit Kumar Mishra on the post of Demonstrator, which was not a permanent post. The post was sanctioned for Department of Microbiology, and transferred to the Department of Dental Surgery in the exigencies of the shortage of the teaching faculty in the Department. In any case the appointment was to be made every year by the Selection Committee. Dr. Vinit Kumar Mishra was not appointed by any Selection Committee, and has continued on the post completely blocking the chances of fresh graduates for an opportunity to learning in the department. He has not been, and could not be regularised on the post.

9. It appears that subsequently, some correspondence was made with regard to salary of Respondent No. 4 on which the State Government gave its opinion that since by the appointment, the post which was dormant, has been activated, and thus there is no objection, if Dr. Mishra is paid salary. It is apparent that the State Government was not aware of full facts in which the post was sanctioned and transferred from the Department of Microbiology to the Department of Dental Surgery. It was not a dormant post, but was a transferred post on which the appointment was to be made every year by the selection committee.

10. In the report of the Finance Controller submitted with regard to some allegations on the financial irregularities caused on payment of salary to Dr. Mishra, it is stated that on 22.7.2005 the "Prakalan Samiti, Uttar Pradesh wrote a letter in pursuance to the directions issued by Hon'ble Minister of State, Medical Education on 8.8.2005 to extend the period of services of Dr. Mishra on which a Government order was issued on a reference of the Chief Minister on 2.9.2005 to extend his services. The Finance Controller thereafter recorded that since the Government has overriding powers to grant salary under Government order dated 28.10.1957, the conditions could have relaxed the requirement of any rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner.

11. Learned Counsel for the Petitioner points out that by a wholly illegal and arbitrary procedure, the services of Respondent No. 5 were continued. Initially he took advantage of interim orders passed by this Court to maintain status quo, after the period of his appointment has come to an end, and thereafter on the intervention of some Minister, apparently at his behest and the Chief Minister. The rules of appointment were given a go-by and that the services of Dr. Mishra were extended and the payment of salary was sought to be justified. The State Government, instead of acting in accordance with the rules, committed breach of the rules, to the detriment of candidate, who could be given an opportunity to work on the post.

12. Shri R. N. Singh, senior advocate submits that the Petitioner has no locus standi to challenge the impugned order inasmuch as he became eligible for the post only in the year 2010, and has challenged the orders after three years. He has relied upon a Full Bench judgment of this Court in P.K. Malik Vs. State of U.P., Vice Chancellor University of Allahabad and Executive Council, University of

Allahabad, in which the decision was taken by the State Government by Government order dated 17.10.1998, to treat the posts of Instructor in the University as Lecturers and payment of salary, was upheld on the ground that the State Government can, as an employer, issue directions to exempt any statutory condition, and thus the person holding the post of Instructor could be given the status of lecturer.

13. In the present case, we find that the cause of action has arisen to the Petitioner as a fresh graduate to be given an opportunity with fundamental right of equality in employment, under Article 16 of the Constitution of India, to the eligible persons to compete for the post. He became eligible in the year 2010, and thus he cannot be non-suited on the ground that he has challenged the order after three years. Further, we do not find any such conscious exercise of powers by the State Government after taking into consideration of the facts and circumstances to relax any condition of appointment, convert the post of Demonstrator into a permanent post on which a person may be appointed for an indefinite period, with no channel of promotion.

14. The Respondent No. 5 was not appointed after following the procedure provided in the Government order dated 5.8.1993 by which the post of Demonstrator was sanctioned and out of which one of the post was transferred to the Department of Dental Suregery. It is admitted to the Respondents that Dr. Mishra was not appointed after following any advertisement and selection by a Selection Committee. No selection committee was constituted. He had initially applied to work on honorary basis and thereafter managed to secure appointment by back door for one year. The order of the High Court, by which the status quo was directed to be maintained, was infructuous inasmuch as the period of one year had expired on 11.8.2004, and the order was passed on 22.8.2004. In any case after the dismissal of the writ petition, nothing survives to give benefit of the interim order to Dr. Mishra.

15. On the aforesaid facts, we find that the appointment of Dr. Vinit Kumar Mishra-Respondent No. 5 as Demonstrator in Dental Surgery Department of the Medical College was not made in accordance with law. He continued on the post without any authority, and that the post should be treated to be vacant for being filled up every year in accordance with the Government order dated 5.8.1993 from fresh graduates, giving them opportunity to serve and pursue their studies. Since the order of payment of salary to Dr. Vinit Kumar Mishra passed by the State Government, has not been challenged and that he had actually worked on the post, we do not propose to make any orders to recover the salary.

16. The writ petition is allowed. The impugned order dated 24.3.2007 passed by the Principal, Baba Raghav Das Medical College, Gorakhpur is quashed. The post of Demonstrator in the Dental Surgery Department of the Medical College shall be treated to be vacant, and shall be open for selection from fresh graduates in accordance with the Government order dated 5.8.1993.