

(2002) 05 AHC CK 0009

In the Allahabad High Court

Case No : C.M.W.P. No's. 26990 of 1994 and 35871 of 2000

Girjesh Kumar Saxena and Others

APPELLANT

Vs

Director of Higher Education, U.P., Allahabad and Others

RESPONDENT

Date of Decision : 23-05-2002

Acts Referred:

Citation : (2002) 3 AWC 2233 : (2002) 2 UPLBEC 1785(1)

Hon'ble Judges : S.K. Singh, J

Bench : Single Bench

Advocate : A.K. Singh, Yashpal Chaturvedi, G.K. Singh and V.K. Singh, for the Appellant; Brij Mohan, Devendra Kumar, V.K. Shukla and S.C. Dwivedi, S.C., for the Respondent

Final Decision : Allowed

Judgement

S.K. Singh, J.—By means of this writ petition, the petitioners have prayed for quashing the orders dated 25.7.2000 as contained in Annexures-11 to 13 of the writ petition and the order dated 28.7.1999 passed by the Director of Higher Education, U.P., Allahabad in so far it relates to withholding of petitioner's salary. A further prayer has been made for payment of arrears of petitioner's salary and also current salary.

2. There is a post graduate college in district Auraiya known as Janta Mahavidyalaya, Ajitmal, Auraiya affiliated to Chatrapati Sahuji Maharaj Vishwavidyalaya, Kanpur. An advertisement was published in daily newspaper "Aaj" and "City Pioneer" dated 28.2.1994 inviting applications for the appointment of the post of Cataloguer, Assistant Accountant and Junior Lab Assistant. The post of Cataloguer and Assistant Accountant was one each and the post of Junior Lab Assistant was two in number. It has been stated in para 5 of the writ petition that the post of Cataloguer was published with the permission of the Director of Education and other posts were advertised after permission of the Regional Higher Education Officer. After interview, the recommendation of the Selection Committee was placed before the Committee of Management who in its

meeting dated 2.8.1998 approved the recommendation. The papers regarding petitioner's selection were also sent to the Regional Higher Education Officer who by orders dated 25.8.1998, 8.9.1998 and 26.8.1998 granted approval to the petitioner's selection. The aforesaid orders have been annexed as Annexures-4 to 6 to the writ petition. The appointment letters were issued to the petitioners and they started working. All the petitioners were also paid their regular salary month to month from the date they started working. It appears that on 20.7.1999, the Director of Higher Education wrote a letter to the manager of the College in which, it was stated that certain irregularities were reported in the appointment of the petitioners in respect to which enquiry was going on and, therefore, it was directed that the petitioner's selection shall not be confirmed and their salary were also stopped. The petitioners were called upon for hearing by the Joint Director of Higher Education vide letter dated 21.9.1999 upon which, the petitioners appeared, hearing was done but nothing could be done in the matter and the petitioner's salary was stopped. In the meantime, the Manager of the College also served a notice dated 25.7.2000 to the effect that the petitioners will not be permitted to work. It is this action of the respondents, which has been challenged by the petitioners in this writ petition. It appears that during the pendency of this petition, on account of direction given by this Court in Writ Petition No, 28920 of 1998 filed by one Sanjay Dubey, validity of appointment of present petitioner was examined by the educational authorities for which an order of the Joint Director of Education (Higher Education) dated 26.2.2002, has been brought on record. It appears that so far as the present petitioners are concerned, the matter has not been finally adjudicated and simply it has been mentioned that in respect to the petitioner's claim, counter-affidavit in detail and stay vacation application has already been filed. In view of this, pleadings as has been set forth before this Court, will have to be examined and rival claims will have to be decided.

3. Learned counsel for the petitioner submits that in view of the facts stated in the counter-affidavit, it is clear that all the posts on which the petitioners have been appointed were to be filled by the direct recruitment. It has been argued that main ground which has been mentioned by the respondents in the counter-affidavit happens to be that the Director of Higher Education has issued a letter on 21.2.1998 informing the Manager/Principal of all the non-Government Colleges not to make any selection/ appointment of the employees in the affiliated non-Government colleges for the reason that some rules are to be framed in this respect. Learned counsel submits that this approach of the respondents is totally unwarranted and it is for this reason, petitioner's selection cannot be held to be illegal. It has also been argued that on account of a complaint by one of the member of Selection Committee, earlier the District Magistrate passed an order not to proceed with the selection and thereafter, on 15.6.1998, the District Magistrate permitted to proceed with the selection. The permission as given by the District Magistrate dated 15.6.1998 is Annexure-1 to the rejoinder-affidavit.

4. Learned standing counsel on the facts so stated in the counter-affidavit submits that the Director of Higher Education has full authority to issue restraint letter to the manager/ principal of the college from making appointment in view of some proposed amendment in the relevant rules, dealing with the selection and appointment of employees in the affiliated non-Government college.

5. In view of the aforesaid facts as has come before this Court, by way of arguments and the pleadings, it appears that the concerned authority has not passed any order cancelling the petitioner's selection/ appointment on the ground of irregularity either in publication or in the selection or in the process so adopted and the impugned order appears to have been passed solely on the ground that the impugned exercise of selection of the petitioner appears to be unwarranted on account of issuance of letter by the Director of Education prohibiting appointment on account of some proposed amendment in the rules. It has been held that by concealing this fact and without placing correct facts, approval was obtained and, therefore, the petitioners are not entitled to get salary. It is to be pointed out that if there is statutory rule providing a mode for appointment, the selection process will have to take place in accordance thereof, unless at the time of selection/appointment, the rules are changed. The Director of Higher Education, till existence and continuance of prevailing rule, appears to have no authority to prohibit the performance or continuance of the process by issuing restraint letters. Unless the relevant amendment is brought in the rules, it cannot be said that the appropriate authority is not empowered to proceed with the selection/ appointment on available post. There is another reason for this, i.e., even if amendment is brought in the existing rule, unless expressly or by necessary implication, it is found to be retrospective, the amendment will have to be read having prospective effect. If a post is available and there is need of making appointment, the competent authority has every right to proceed to fill up the post, of course, in accordance with the prevailing law. The administrative instructions/circulars/orders cannot be permitted to override the existing statutory rules. In this respect, reference can be made to a decision of the Apex Court given in the case of K. Kuppusamy and Another Vs. State of T.N. and Others, . The relevant observation of the Apex Court in the case of Puttaswamy (supra), is being extracted hereunder :

"..... .They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a decision to amend the rules does not mean that the rule stood obliterated. Till the rule is amended, the rule applies."

6. In the case in hand, petitioners have placed on record, advertisement as published in daily news paper dainik "Aaj" and "City Pioneer". It was published with due permission of the concerned authorities. The selection committee met and on the basis of quality marks, the petitioners were selected. The selection/ appointment of the petitioner was duly approved by the Regional Higher Education Officer. The petitioners started working on their respective posts and

started getting salary also. In view of this, on the cause of action on which this writ petition has been filed, the petitioners are entitled to get relief from this Court. The facts as has come on record and also the orders of the Director of Higher Education, speaks about some enquiry in the matter and, therefore, on the facts so available, enquiry has to be finalised either way but so far as the petitioners are concerned, as on today, their selection/appointment was duly approved, they started working and, therefore, till the final adjudication of the matter, they are entitled to get salary. The ground as has been mentioned in the counter-affidavit that there is some proposal to amend the rules and for that reason, letter was issued asking the manager/principal not to make appointment and, therefore, selection having been made by concealing this fact, is not valid, cannot be accepted. On the aforesaid ground, the validity of the petitioner's selection cannot be negated. It will be for the concerned authority to examine the validity of the petitioners' selection, which as claimed has been made after due publication in two daily newspapers, i.e., "Aaj" and "City Pioneer" by properly constituted selection committee. The appropriate orders will be passed in respect to the entitlement of the petitioners after giving opportunity to the petitioners/ management and all the concerned parties. As has been submitted on behalf of the respondents that the enquiry is going on and the Joint Director of Education is seized of the matter, in view of the decision of this Court, now the matter will be examined on merits and suitable orders will be passed.

7. In other connected writ petition, i.e., Writ Petition No. 26990 of 1994, there appears to be a claim about the post of Accountant which in view of the facts as stated in the counter-affidavit filed by the State, is to be filled by promotion and therefore, it will also be examined by the competent authority.

8. Accordingly, this writ petition succeeds and is allowed. The petitioners will continue in service and they will receive their arrears and the current salary, subject to the final adjudication of the matter by the concerned competent authority dealing with all points, in the light of the pleadings as has come before this Court. Parties will bear their own costs.