
(2007) 10 AHC CK 0124
In the Allahabad High Court

Kailash Prasad

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 12-10-2007

Acts Referred:

Uttar Pradesh Urban Planning and Development Act, 1973 — Section 59(1)(a)

Citation : (2008) 1 AWC 361 : (2008) 1 UPLBEC 239

Hon'ble Judges : Sudhir Agarwal, J;S. Rafat Alam, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard Sri Arvind Kumar Srivastava, learned Counsel for the appellant great length. Learned Standing Counsel representing the respondents No. 1 to 3 was also heard.

2. This special appeal under Chapter-V Rule 8 of the High Court Rules is directed against the judgment dated 19.10.2005 passed by Hon"ble Single Judge dismissing Writ Petition No. 36630 of 2002 Kailash Prasad v. State of U.P. and Ors. filed against the order passed by the Principal, Janta Inter College Indrapur, District Gorakhpur (hereinafter referred, to as the "Institution") discontinuing the services of the petitioner as Class IV employee.

3. In brief it is not disputed that the petitioner, Kailash Prasad (hereinafter referred to as the "petitioner-appellant") was appointed on 16th May, 2001 by the Principal of the Institution without Laying obtained approval of the District Inspector of Schools, Gorakhpur (hereinafter referred to as the "DIOS") as required under Regulation 101, Chapter-III of the Regulations framed under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as the "Regulations") The Principal sent papers to the DIOS for granting approval subsequently but the same was Reclined on the ground that the. Appointment was made in violation of Regulation 101 and therefore, no approval can be accorded and payment cannot be made from State exchequer, whereupon the

Principal discontinued services of petitioner-appellant by order dated 20.7.2002 pursuant to the order dated 31.5.2002 of the District Inspector of Schools, impugned in the writ petition.

4. Learned Counsel for the petitioner contended that even if there was no order of approval passed by DIOS, he ought to have heard the appellant, considered the matter and should have passed appropriate order subsequently which would have validated the appointment of the petitioner from the date, approval is granted by DIOS, and non issuance of any order of approval ipso facto would not invalidate appointment made by the Principal on 16th May, 2001. He further contended that the appointment of the petitioner was made after issuance of advertisement and holding selection and, therefore, since the procedure of selection was followed, the appointment of the petitioner cannot be said to be wholly illegal but at best, it can be said to be an irregularity which was curable after obtaining approval from DIOS subsequently.

5. Having given our anxious thought, we do not find any force in the submissions made by the learned Counsel for the petitioner for the reason, that the issue involved in this case as to what is the effect of appointment without approval, has already been considered and decided in the case of Jagdish Singh etc. v. State of U.P. and Ors. 2006 (3) E.S.C. 2055 (All.)(D.B.) holding that "without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of any candidate. Requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory".

6. Learned Counsel for the petitioner however sought to argue that the judgment of this Court in Jagdish Singh (supra) needs to be considered by a larger Bench since it has not noticed the earlier Division Bench decisions of this Court in prabhu Narain Singh v. Deputy Director of Education Varanasi and Anr. 1977 (3) A.L.R. 391, Lalit Mohan Misra v. District Inspector of Schools 1979 A.L.J. 1025 and Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another, wherein it was held that an appointment made without approval ipso facto would not be illegal but may get validated from the elate, approval is granted by the competent authority subsequently.

7. We have considered this submission also carefully but but are unable by to agree. On the contrary we find that this Bench has already considered the above three cases in Special Appeal No. Special Appeal No. (87) of 2003, Joint Director of Education Azamgarh Region and Anr. v. Udai Raj Vishwakarma decided on 6.2.2007 wherein similar argument was Sought to be advanced on the strength of the aforesaid judgments but was repelled by this Court and it was held that appointment without prior approval is void ab initio. We may refer the relevant finding on this aspect recorded by the Court in Udai Raj Vishwakarma (supra) as under:

We thus proceed on to consider the effect of non-observance of the provision

pertaining to "prior approval". Para 2(3)(II) of Second Order requires "prior approval" before making appointment of a teacher in a short term vacancy. It is not a case of mere approval. In *Prabhu Narain Singh (Supra)* this Court had an occasion to consider the effect of lack of approval in making appointment of a teacher u/s 16-F of 1921 Act as it stood prior to amendment of the said provision by U.P. Act No. 16 of 1972. The selection was made by the selection committee on 2.8.1972 and I papers were forwarded, to DIOS who approved Selection and appointment vide order dated 10.8.1972. Thereafter the management passed resolution on 25.5.1973 terminating service of the petitioner Prabhu Naram Singh and communicating him by letter dated 18.6.1973 and also forwarding the said resolution to DIOS who refused to accord approval vide order date 13.7.1973. Whereagainst management preferred an appeal before Regional Deputy Director of Education, which was allowed on 13.5.1975 on the ground since Sri Prabhu Narain Singh was not appointed in accordance with Section 16-F of 1921 Act, no approval for termination was necessary. The Court noticed as a matter of fact that Sri Prabhu Narain Singh after his selection was given charge and started working as a teacher before DIOS accorded approval and it was actually accorded on 10.8.1972. Referring to Section 16-F(1) read with Regulation 6, Chapter-III and Regulation 16 Chapter II of the regulations framed under 1921 Act, this Court held that merely if a letter of appointment is withheld by the management it would not result in denial of right to be appointed to an approved candidate as a teacher due to the purposeful lapse on the part of the management and the management cannot take advantage of its own wrong though approval was accorded by the DIOS. It held further that once a selection has been made by the selection committee and accorded approval by the appropriate authority, the performance of act by the management of issuance of letter of appointment under Regulation 16 Chapter II is a mere ministerial act since, management is bound to appoint him and issue letter of appointment. It has no option otherwise at all. In these circumstances, this Court held that the appointment of Sri Prabhu Narain Singh cannot be said to be inconsistent with Section 16-F(1) of the Act read with Regulation 6 Chapter-III and Regulation 16 Chapter-II of the Regulations and therefore before termination, approval of DIOS was necessary. Considering the effect from Regulation 16 Chapter II in the scheme of the Act and the Regulations framed there under the Court after referring to an earlier Division Bench judgment in *Janta Inter College Nagra v. District Inspector of School Balia and Ors.* Civil Misc. Writ. Petition No. 4497 of 1969 decided on 26.11.1971 observed that once a person has been selected by, a selection committee and his name has been approved by the DIOS, the Committee of Management is bound to appoint him and the Manager is bound to issue a letter of appointment for which the Committee of Management is bound to grant the officer authorization. It is held that the issuance of appointment letter in such circumstances was a mere ministerial act, non-observance thereof would not disentitled a person who otherwise is entitled to be treated as appointed under the statute. In our view we aforesaid judgment has no application to the facts and provisions applicable in this case particularly since

Section 16-F talked of "approval" and not "prior approval." It is true that approval u/s 16-F was required after making selection and before issuing appointment letter but the legislature in its wisdom has used the word "approval" and not "prior approval" though in the Second Order it has used the words "prior approval" which have a definite connotation and purpose behind it. Further there is no provision like Regulation 16 Chapter III available in 1982 Act and the rules regulations framed thereunder. This Court considered the effect of certain regulations in that case which are not applicable in the case in hand. The provisions considered therein were different and not *pari materia* with those contained in Second Order.

Lalit Mohan Misra (Supra) was also case of appointment made in 1971 inasmuch as the committee of management passed resolution on 23rd.1971 for appointing Lalit Mohan Misra and others as Demonstrator and papers sent to DIOS for approval. In anticipation of approval, the management allowed Lalit Mohan Misra and others to join the institution on 31.7.1971. The approval was accorded by the DIOS on 3.8.1971 whereafter the appointment letters were issued. The appointees thereafter Wife formally allowed to join on 4.8.1971. After five years of their working, the DIOS issued a letter on 9.11.1976 amending approval order dated 3.8.1971 stating that Lalit Mohan Misra and others would be treated as having been placed on probation w.e.f. 31.7.1971 i.e. three days prior to the date when the approval was accorded and accordingly also confirmed them. On representation made against the aforesaid order dated 9.11.1976 it was held by me DIOS vide order dated 17.8.1977 that Sri Lalit Mohan Misra and others will be deemed to have joined w.e.f. 48.1971 and not earlier thereto, whereagainst a writ petition was filed wherein the aforesaid view take by DIOS on 17.8.1977 was upheld. Considering Section 16-F of 1921 Act and Regulation 6 Chapter III and Regulation 16 Chapter 11 of the regulations, this Court held that though the management has got no right to appoint a person awaiting approval of the DIOS or the Deputy Director of Education, as the case may be, but the said appointment will become legal and regular only from the date approval is accorded by the competent authority and the prior working of the person will not confer any benefit qua the appointees. It also held that DIOS has no authority to subsequently pass an order modifying the date of appointment. In our view the aforesaid judgment considered the provisions which were differently worded framing different scope and the dispute involved in the aforesaid case was also totally different.

Coming to the third judgment relied on by the petitioner namely Ashika Prasad Shukla(Supra) it is no doubt true that this Court with reference to para (3)(II) of the Second Order and relying on the judgment of this Court in Lalit Mohan Misra (Supra) observed that the appointment if made prior to approval or decided approval would become effective from the date of approval or deemed approval but since this issue was not considered by the Hon'ble Single Judge in the judgment under appeal before the Court, the DIOS was directed to look into this aspect whether the pre-requisite conditions for deemed approval were satisfied

or not and thereafter pass an appropriate order. Thus it cannot be said that it lays down a law that an appointment made before prior approval would be valid after expiry of the period necessary to attract deemed approval and cannot be treated to be a binding precedent on this issue.

On the contrary where the statute specifically provides "prior approval" before passing any order, what its effects would be has been considered on some other cases which we propose to refer as under:, Bide 11 of U.P. Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975 provides that no service can be terminated without prior permission from the District Basic Officer. A Division Bench of this Court in Shailja Shah v. Executive Committee, Bharat Varshiya National Association and Anr. 1995 (25) A.L.R. 88 held that expression "prior approval" and "approval" connotes different situation. where a statute uses the term "prior approval" anything do tie without prior approval is nullity. Where a statute employs expression "approval", however, in such cases subsequent ratification can make the act valid.

Section 59(1)(a) of U.P. Urban Planning and Development Act, 1973 provides for "prior approval". The Apex Court in U.P. Avas Evam Vikas Parishad and Anr. v. Friends Cooperation Housing Society Ltd. and Anr. 1995 (Supple.) (3) S.C.C. 456 held that "prior approval" and "approval" are two different connotations and if the statute does not mention "prior approval" what is material would be only "approval", the earlier judgment in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, was also referred where it was held that the word "prior" and "previous" may be implied if the contextual situation or circumstances justify such reading and the Act which requires only approval, the action holds good until it is disapproved.

Section 9 of the 1971 Act provide for "prior approval". In Director of Education and others Vs. Gajadhar Prasad Verma, , it was held that the absence of "prior approval" would riot have an effect of creation of post and therefore the Slate is not obliged to reimburse salary to the management without "prior approval" of the Director or the competent authority under the Act. In Shiv Gorakh Nath Charitable Society, Kanpur and Ors. v. Cantonment Board, Kanpur and Ors. 1997 (3) A.L.R. 616, a Division Bench while considering the effect of "prior permission" held where construction is made without "prior permission" a "post permission" cannot be granted and the construction, so made, has to be dismantled. Same view has been taken by another Division Bench" in Vivek Srivastava v. Union of India and Ors. 2005 (3) E.S.C. (Alld.) 1790 -(Para. 51).

8. In view of the aforesaid exposition of law, the appointment or the appellant made on 16th May. 2001 by the Principal cannot be said to be legal or valid conferring any right on the petitioner to claim salary or any other benefit on the basis thereof. Hence, it cannot be said that the Principal in any manner erred in law in passing the order dated 20th July 2002, impugned in the writ petition, discontinuing services of the petitioner/appellant and the Hon"ble Single Judge,

therefore, cannot be said to have erred, legally or factually, in any manner, in dismissing the writ petition. The appeal, therefore, lacks merit and is, accordingly, dismissed. No order as to costs.