(1997) 05 AHC CK 0183

In the Allahabad High Court

Case No : Second Appeal No. 2768 of 1984

Kaneez Fatima APPELLANT

Vs

Principal, Hamidia Girls Inter College and Another RESPONDENT

Date of Decision : 14-05-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114
Specific Relief Act, 1963 — Section 34
Uttar Pradesh Intermediate Education Act, 1921 — Regulation 1, 10, 11, 12, 13

Citation : (1997) AWC 257 Supp

Hon'ble Judges : R.K. Mahajan, J

Bench : Single Bench

Advocate : Radhey Shyam, S.D. Dwivedi and Satish Dwivedi, for the Appellant; Vinod Mishra, for the Respondent

Final Decision : Allowed

Judgement

R.K. Mahajan, J.—This is a second appeal against the judgment and decree dated 16.7.1984 passed by Sri D. N. Shukla, 1st Additional District Judge, Allahabad allowing Civil Appeal No. 664 of 1978 and setting aside the judgment and decree dated 23.10.1978 passed by Sri S. K. Srivastava, Munsif IXth, Allahabad decreeing Original Suit No. 210 of 1974 in between Kaniz Fatma and Principal, Hamidia Girls Inter College, Allahabad and Anr.

2. The brief facts to understand and the controversy are mentioned hereinunder:

The Plaintiff-Appellant Smt. Kaniz Fatma claims that she was appointed by the Principal of Hamidia Girls Inter College, Allahabad as Laboratory Assistant in the college in December, 1971 and was put on probation in accordance with the provisions, of Intermediate Education Act. Her claim was that the probation period was for one year and immediately after the probation period was over, she is deemed to have been confirmed. It appears that she proceeded on leave but when she reported for duty on 4.3.1974 along with the medical certificate, she was not permitted to attend her duties by the Defendant No. 1. Thereafter she sent medical certificate through registered post regarding her fitness which was received on 10.4.1974 but of no avail. It also appears as per allegations that she was terminated during the pendency of the suit and amendment was made in the plaint. The termination is bad as she was not given any opportunity to be heard and it is against the regulations framed under the Intermediate Education Act, 1921 (hereinafter referred to as the Act) as no charge-sheet was given to her nor any enquiry was conducted nor any notice was given. On these allegation, she filed the suit for permanent injunction and declaration.

The case of the Defendant-Respondents is that the Plaintiff was a temporary employee and was not confirmed, She was not regularly appointed either by the management or by any authority. She could not show the order of appointment. So she being a temporary employee, her services were dispensed with.

The trial court found that the Plaintiff deemed to have been confirmed after the expiry of the probation period of one year and as such termination, without applying the regulations framed under the Act, is illegal and inoperative and she is entitled to remain in service. The trial court has decreed the suit.

Feeling aggrieved, the Defendants filed an appeal before the lower appellate court. The appeal was allowed by the appellate court and set aside the judgment and decree of the trial court. The lower appellate court took the view that the Appellant was not having a letter of appointment, she was not appointed. She also suppressed the fact of termination order and she was not confirmed and so the view of the trial court was not correct. Consequently, the lower appellate court allowed the appeal, Feeling aggrieved, instant second appeal has been filed in this Court.

3. The appeal was admitted on the following substantial questions of law:

1. Whether a Class IVth employee of an institution like the present one stood confirmed after the expiry of the period of probation under Regulation 11 of Chapter III of the U.P. Intermediate Education Act, 1921 as it stood in 1974 ?

2. Whether the society which runs a college is a necessary party in a suit challenging his dismissal order filed by Class IVth employee of the college against the Principal of the college who is the appointing and dismissing authority of such an employee even if the employee concerned has no grievance against the society nor such a society is appellate or revisional authority under the Act.

4. I have heard the learned Counsel for the parties and perused the material on record. 1 allow the appeal on the following reasonings:

5. In order to appreciate the submissions, I would like to mention Regulations 6, 7 and 8 framed under the Act in Chapter III (Conditions of Service). The same are quoted as under:

6. All appointments shall be made under formal orders or letters of appointment

with the sanction of the appointing authority.

7. A person selected for substantive appointment against a clear vacancy shall be placed on probation from the date of joining duty.

8. The period of probation shall be one year whether a person is a direct recruit or has been promoted from a lower grade in the service of the institution to a higher grade.

6. The relevant regulation, which is most important, is 22 of the said Chapter. The same is being quoted as under:

22. Ministerial and inferior servants.--The Committee of Management is the appointing authority in respect of the clerk including a librarian, and the Principal or Headmaster in respect of the inferior servants. The appointment, probation (period for which will be one year) and confirmation of clerks including a librarian and inferior servants shall mutatis mutandis be governed by Regulations 1, 4 to 15 and 21 foregoing.

7. Regulation 25 of the Act would also be referred:

25. The services of a temporary employee (other than a pobationer) or of probationer during the term of his probation, may be terminated at any time by giving him one month''s notice or one month''s pay in lieu thereof.

8. The argument of the Appellant''s counsel is that the period of probation is for one year and there is nothing adverse against the Appellant and as such the management was not competent to terminate her services even she was a temporary employee. There is a basic principle of service jurisprudence that unless outer limit of probation is mentioned, the employee will not be confirmed automatically after the expiry of that limit. The idea of keeping the employee on probation is on trial or test period and nothing more or less. The employee is given time to test suitability. The employer also cannot in the grab of that suitability pass a punitive order which is stigmatic. In this case, the employer did not accept her joining report and thereafter medical certificate. It shows unreasonable action on the part of the employer. The termination shows bias though the order is couched in such a manner so to give colour of a simpliciter termination. In my view, it is not a simpliciter termination. It is stigmatic. In Inder Singh and Others Vs. Union of India (UOI) and Others, , it was observed that a person, who remains absent from employment, he should be given an opportunity to be heard and should not be straightaway kicked off from service. After all, it is a question of livelihood and nobody can be deprived of livelihood. The Legislature in its wisdom has made some regulatory checks by way of inserting Regulations 36, 37 and 38 of the Act. They need not be quoted in extenso. The purpose of these regulations is that charge-sheet has to be submitted and the same has to be served and minimum enquiry is to be conducted by the appointing authority/managing authority and opportunity of effective hearing is to be given. After observing the natural principle of justice,

the Committee of Management has to send the complete report together with all connected papers to the Inspector or Regional inspectress as the case may be, for approval of action proposed by it. As for deliquent employee, under Regulation 31, punishment of an employee would require the prior approval of the Inspector on Regional Inspectress. In this case, this was not done and this important aspect is lacking. I am of the considered view that the lower appellate court has ignored this aspect of the matter and has reversed the finding of the trial court without any justification. Therefore, the approach of the lower appellate court is not warranted under law and by facts.

9. Regarding the confirmation of the Appellant, the submission of the learned Counsel is that the probation period as mentioned in the regulation is one year and the period of one year has expired whether she was on leave or otherwise. There are so many authorities to the effect that if the employee is not confirmed and the maximum period prescribed as one year has expired, there is automatic confirmation. To this effect, a Division Bench of this very High Court (consisting of Hon. Palok Basu and Hon. I. M. Quddusi, JJ.) in the case of Vishnu Prabaker Misra v. State of U.P. and Ors. 1996 (3) ESC 87 , has been relied upon by the learned Counsel for the Appellant in which it was held as under:

Service Law--Termination of service--Employee of Chhatrasal Graim Bank--Legality of--Petitioner appointed as Field Supervisor his service terminated vide order dated 16.4.85 on probation of period of two years, on charge of misappropriation of fund--No notice served--Enquiry not conducted--Confirmation letter not issued after probation period--Probationer, whose period of probation neither extended nor discharged from the service at the end of period of probation--If he is allowed to continue in the post on completion of maximum period of probation deemed to be confirmed to the post--Hence--Termination order of Petitioner liable to be quashed.

10. In this case, the famous ruling of the State of Punjab Vs. Dharam Singh, , was also relied upon to the effect that if the maximum period of probation mentioned has elapsed, there could be automatic confirmation. So it was necessary for the management to hold enquiry with respect to the Appellant as she has become a confirmed employee even otherwise the order is stigmatic, as mentioned above and suffers illegality as no approval was obtained for her discharge which is a safe guard for arbitrary discharge even in case of a temporary employee.

11. Coming to the next submission that there is no appointment letter and the society, which runs the school, was not impleaded as a party. This argument is negatived by the statement of Principal Sri Shamim Ahmad (D. W. 1) who said that the Plaintiff was appointed on 8.2.1972. The Principal has authority under Regulation 22 of the Act to that effect. The Appellant has filed so many applications in the trial court for production of the relevant record showing her appointment as well as the service record but no appointment letter was produced despite court''s directions. It is submitted by the learned Counsel for

the Appellant that adverse inference may be withdrawn u/s 114(g) of the Evidence Act. He has taken me through the orders of the trial court dated 22.8.1978; 29.8.1978 and 30.8.1978 to produce the document regarding her appointment. It is a well settled principle of law that if the record in possession of the Defendant was not produced despite of specific orders, an adverse inference should be drawn as has been held by the Supreme Court in the case of Gopal Krishna Ji Ketkar v. Mohammad Haji Latif and Ors. AIR 1968 SC 1414 . So the trial court was correct in its view regarding her appointment and confirmation. The: appellate court fell in error in reversing that finding.

12. Now the next question which arises for consideration, is that since the Principal was the appointing authority and it cannot be now said that she had no authority to appoint her under Regulation 22 of the Act. It is also not disputed during the course of argument that the institution is receiving grant-in-aid and run by the society. It is a recognised school. This fact has not been controverted during the course of arguments. The right to education has been interpreted as fundamental right by the Apex Court in Unni Krishna''s judgment and in view of this, the public function is performed by the society in running the schools. The schools are aided by the Government in financial grant. In case there is a financial grant, the staff etc. were given grade at par with the Government. It cannot be said that the suit for declaration cannot be maintained against the Defendant-Respondent. The concept of declaration is regarding the existing right of Government servant. It may be against a Government body or statutory or quasi-statutory or non-statutory body to seek declaration. If a person can get relief under Article 226 of the Constitution, why he should be debarred in declaratory suit.

13. Sri Vinod Misra, learned Counsel for the Respondents, submitted that the suit for declaration does not lie at all and at the most, the Plaintiff could file a suit for damages and in support of his contention, he has relied upon a decision of Supreme Court in the case of Smt. J. Tewari v. Smt. Jawala Devi Vidya Mandir and Ors. 1980 All LJ 1870, in which it was held as under:

Specific Relief Act (47 of 1963), Section 34--Educational institution registered under Societies Registration Act (1860)--Termination of principal--Termination though unlawful, principal entitled only to decree for damages and not to a declaration of continuing in service.

There is no dispute about the ratio of this ruling but in the facts and circumstances of the present case, it is not applicable because it is a public institution performing public duty of imparting education and suit for declaration lies against the public authority to get declared the right and can enforce the rights after declaration. In the case of Smt. J. Tewari v. Smt. Jawala Devi Vidya Mandir and Ors. (supra), it was held that the suit does not bar, specially the suit for declaration. In the decision cited, there was the question of breach of clause 10 of the agreement, regarding the declaration of existing rights. So in the facts and circumstances, the suit for declaration lies.

14. There is only one problem in this case. In this State, peculiar circumstances are prevailing and it takes long time to get a case decided. Half of the litigants'' time is spent in getting justice as in this case, the suit filed in 1974. It would not be and extreme injustice to the Appellant if he is non-suited on technical ground. The litigants expected justice i.e. what is due to them, to get their "due" they should not suffer for technicalities of law which are beyond their control. In the present case, the Appellant has come to the civil court. The civil court enjoys the power of declaration and setting the things right after declaration of the existing rights, she is asked that should claim damages which means that she should again spend two decades in court to get the relief. Every litigant expects that he should get what is "Due" to him. Keeping the facts and circumstances of the case, I am of the view that this Court should ignore the technicality and grant the relief, as claimed by the Plaintiff-Appellant. In this view of the matter, I do not agree with the submission of the learned Counsel for the Respondents that the suit for declaration was not maintainable.

15. Sri Vinod Misra, learned Counsel for the Respondents, has also argued that the Plaintiff-Appellant did not produce the relevant documents regarding her appointment and this claim has already been negatived in the earlier part of this judgment as the management also did not produce the record when she appointed. The another argument that she did not join the society is of no avail as the Principal is the appointing authority.

16. It may be pointed out that in a second appeal, the Court can always look into the aspect if there is wrong approach in the interpretation of law by the appellate court and also to see the flimsy approach in the interpretation of evidence. This view was taken by the Supreme Court in the case of Major Singh Vs. Rattan Singh (Dead) by LRs. and others, .

17. In the result, the appeal succeeds and is allowed with costs. The judgment of the lower appellate court is set aside and that of the trial court is restored.