

(1975) 01 AHC CK 0034
In the Allahabad High Court
Case No : Second Appeal No. 3649 of 1966

Krishna Kumar Srivastava

APPELLANT

Vs

Arya Vidya Sabha, Kashi

RESPONDENT

Date of Decision : 03-01-1975

Acts Referred:

Citation : (1975) 01 AHC CK 0034

Hon'ble Judges : M.P.Mehrotra, J

Final Decision : Allowed

Judgement

Mehrotra, J.

This second appeal by the plaintiff arises out of a suit for a declaration that the plaintiff is still continuing in service of the defendant No. 4 as the Head Clerk in his substantive post and that the order of dismissal dated January 27, 1961, passed against the plaintiff by the defendant No. 3 is null and void and ineffective. The trial court decreed the suit but on appeal the lower appellate court reversed the decree of the trial court and dismissed the suit. Hence this second appeal by the plaintiff.

The brief facts are these: The defendantrespondent No. 1, Arya Vidya Sabha, Kashi runs three educational institutions at Varanasi. One of these institutions is known as D.A.V. Degree College. The plaintiff was appointed a clerk in the said Degree College on December 5, 1945. Subsequently, he became the Head Clerk in the said institution on May 12, 1958 and it has not been disputed that he was a permanent incumbent in that post. The said institution is affiliated with the Benaras Hindu University and that fact is also admitted. The plaintiff was suspended on September 13, 1960, and was subsequently dismissed on January 27, 1961, by the defendant No. 3 who happened to be the then Secretary and Manager of the institution. The dismissal was with retrospective effect, i.e., from September 13, 1960. In the suit the plaintiff challenged the order of dismissal on various grounds, The defendants contested the suit on various grounds but it is not necessary to notice all of them in the instant appeal. The trial court, after

framing the necessary issues, as stated above, decreed the suit. The main ground on which the plaintiff succeeded was that there was violation of Ordinance 11, clause (v) of the Ordinances printed at page 385 of Part VI of the Calendar of the Benaras Hindu University (196263). In brief, the effect of the provisions contained in the said Ordinance is that the approval of the Executive Council of the University should be obtained while terminating the service of a member of the staff of an affiliated College. The trial court held that no such approval was obtained in the case of the plaintiff and, therefore, his dismissal from the post of which he held was in contravention of the aforesaid provision contained in Ordinance 11, clause (v). On appeal, the lower appellate court held that there was no written contract between the parties as required by the said Ordinance No. 11 and, therefore, no right could be founded on the basis of the provision contained in clause (v) of the said Ordinance. To put the view point of the lower appellate court in the words which have been used in its judgment:

"The freedom of the contracting parties to settle terms has not been absolutely taken away, but has been restricted in the sense that the written contract shall embody the points enumerated in clause (v). There is no provision in the Act brought to my notice that if the parties fail to reduce the contract between them to writing or to incorporate the terms of clause (v) in the contract or they agree to different or contrary terms their act would be illegal or the contract between them would be void and unenforceable. The penalty for disobeying of violating the directions given in rule 11 (v) is to be visited on the College under rule 4 or 9 and the penalty is that the privileges may not be granted or may be withdrawn. But it is clear that in the absence of a contract the rule does not state that the person appointed to the staff will have the right ensured under clause (v). The rule does not lay down that the benefits of rule 11 (v) will ipso facto accrue to the member of staff and on implied contract will be deemed to exist between the parties to that effect." In the instant appeal Shri Sidheshwari Prasad, the learned counsel for the appellant, has submitted that the approach of the lower appellate court as set out in the passage extracted above from the judgment of the said court is erroneous in law and stands condemned in view of the subsequent pronouncement of the Full Bench decision of this Court in Vaish College (Society), Shamli v. Sri Lakshmi Narain A.I.R. 1974 All. 1. The Full Bench had to consider certain provisions contained in the Acts and statutes framed thereunder relating to the Agra University and the Meerut University. There also certain affiliated Colleges and their Managing Committee were in the picture. It was laid down:

"The service of a teacher including the principal of the affiliated colleges in question is not purely contractual and is regulated and controlled by the provisions of the Meerut Act and the Statutes. The Management of the two colleges concerned acts as a statutory body or statutory functionary when it takes action to terminate the service of a teacher. The teacher will be entitled to an appropriate injunction and a declarator of statutory invalidity of the action taken against him in terminating his service by the Management in violation of

any provision of the Meerut Act and Statutes."

Shri Sidheshwari Prasad, on the basis of the Full Bench decision, submitted that the absence of a written contract in the instant case will not change legal position and the employer could not set up an absence of such contract with a view to abridge the rights given to the employee under the Statute in question. He relied upon the observations contained in para 17 of the judgment of the Full Bench:

"Subsection (1) of Section 28 of the Meerut Act enacts that every teacher in an affiliated college shall be appointed under a written contract which shall contain such terms and conditions as may be prescribed. Subsection (3) enacts that every decision by the Management of an affiliated college to dismiss or remove from service a teacher, shall be reported forthwith to the ViceChancellor and, subject to the provisions contained in the Statutes shall not take effect unless it has been approved by the ViceChancellor. Here at this stage it is proper to note that in 1964 when Sri Laxmi Narain was appointed permanent principal of the Vaish College and his appointment was approved by the ViceChancellor of the Agra University as found by the Courts below, no written contract as contemplated by subsection (1) of Section 25C of the Agra Act was executed but before us the learned counsel for the parties proceeded on the basis that his appointment was in order as if he was appointed under a written contract."

Shri Sidheshwari Prasad has emphasised that in the instant case also it has not been contended on behalf of the other side that the plaintiffappellant was not a permanent Head Clerk in the employ of the institution. In fact, he says that it has been admitted by the other side that the plaintiff was a permanent incumbent of the said post and the case has been fought out on the said basis throughout. Therefore, the absence of a written contract is of no legal significance in the instant case also.

Shri Rajendra Kumar, the learned counsel for the respondents, has supported the judgment of the lower appellate court on the grounds contained therein and has additionally submitted that the Full Bench case is distinguishable on the ground that the material provisions which were considered in that decision differed substantially from the provisions contained in the Benaras Hindu University Act of 1915 and in the Statute and Ordinances framed there under. He has also submitted that Ordinance 11 should be deemed to be confined to the teaching staff and should not be interpreted to take in the case of nonteaching staff as, according to him, there was no power in the University to frame an Ordinance dealing with the conditions of service of the nonteaching staff at the material stage when the plaintiff was dismissed from his post. In this connection he has drawn my attention to Section 18(k) of the Benaras Hindu University Act as it stood prior to its amendment by the amending Act of 1966. Before the amending Act the said provision read as under:

"18(1) Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely,

(k) the emoluments and terms and conditions of service of teachers of the University;"

However, subsequently by the Amendment Act the expression "teachers" was replaced by the expression "employees". Learned counsel has emphasised the point that only after the amendment effected in 1966 it was open to the University to frame Ordinances dealing with the emoluments and terms and conditions of service of the nonteaching staff. Therefore, Ordinance 11 would be beyond the competence of the University in case it be interpreted to refer to nonteaching staff before the Amendment Act of 1966.

Having heard the learned counsel I am of the view that the instant case stands governed by the pronouncement of the aforesaid Full Bench decision of this Court in *Vaish College (Society), Shamli v. Sri Lakshmi Narain A.I.R. 1974 All. 1*. In my view, the lower appellate court was not right in denying the protection to which the plaintiff was entitled under Ordinance 11, clause (v) merely on the ground that no written contract between the parties was forthcoming in the case. Firstly, this contention was not raised in the written statement and the question undoubtedly is a mixed question of fact and law. As stated above, it was not disputed by the defendants that the plaintiff was a permanent Head Clerk of the Institution and the case proceeded on that footing. In such a situation, the lower appellate court was not right in founding its judgment on the ground that there was the absence of a written contract between the parties. That is one aspect of the matter. Further, as stated above, the institution cannot be allowed to take advantage of such a situation as it was equally its duty to have obtained a written contract if that was considered to be absolutely essential in the circumstances of the case. With respect, in my view, before the Full Bench learned counsel were justified in not raising any contention on the basis of the absence of a written contract as was the case there too. Therefore, the fact that no written contract was tendered in evidence is devoid of any significance in the instant case. Shri Rajendra Kumar, learned counsel for the respondent, submitted that even though the expression "all members of the staff" has been used in Ordinance 11, still, it should be confined only to the teaching staff because under Section 18 (1) (k) Ordinance could be framed only in respect of the teachers of the University. This contention does not seem to be tenable. It should be seen that Ordinance 11 is contained in Chapter VII of the Ordinances of the Benaras Hindu University Calendar Part VI. Now, the said Chapter contains Ordinances which have been framed regulating the admission of institutions to the privileges of the University. In the preamble or the opening part it is stated:

"Under Section 15(2) of the Benaras Hindu University (Amendment) Act, 1951, the following Ordinances shall determine the admission of the Colleges, Institutions and High Schools to the privileges of the University."

It is, therefore, obvious that the Ordinance in question namely, Ordinance 11, was framed not with reference to Section 18 (1) (k) but has been framed with reference to Section 15(2) of the said Act. In other words, the Ordinance in

question is a condition for the grant of affiliation to a College. The Full Bench clearly held, following the judgment of the Supreme Court in *Prabhakar Ram Krishna Jodh v. A. L. Pande* (1965) 2 S.C.R. 713 that a provision like the one contained in Ordinance 11 is framed as a condition of affiliation for the benefit of the teachers of the affiliated College. To quote from the judgment of Justice Asthana (as his Lordship then was):

"As pointed out by the Supreme Court in Jodh's case such provisions are made by the University in exercise of its powers of affiliation granted by law to the University and are made with the object of affording protection to the teachers of the affiliated college against any arbitrariness of the Management in the interest of efficiency in the field of education. When a college is admitted to the privilege of affiliation or association with the University, its Management is bound by the conditions of affiliation imposed by the University under the Act incorporating such University and the Management cannot be heard to say with impunity that though it has not complied with the conditions thus imposed and at its sweetwill has put an end to the service of the teacher, will pay damages to him if the termination is found to be wrongful."

I also do not agree with the learned counsel for the appellant that the Ordinance in question should be deemed to be beyond the Ordinance making power in case an interpretation be placed that Ordinance 11 refers to the nonteaching staff also. As I pointed out above, the Ordinance has been framed with reference to Section 15 (2) and lays down a condition which has to be complied with by a College desirous of seeking affiliation. Undoubtedly, the Act has given the University the right "to admit colleges and institutions including high schools, within the aforesaid mentioned limits to such privileges of the University subject to such condition as it thinks fit." Therefore, the University is within its right in imposing the condition and, in my view, there is nothing to prevent the University to impose such a condition by framing an Ordinance to that effect.

Lastly, Shri Rajendra Kumar contended that the instant case fell in the line of *Vidya Ram Misra's* case (3) decided by the Supreme Court and reported in *Vidya Ram Misra v. Managing Committee, Sri Jai Narain College* A.I.R. 1972 S.C. 1450. In that case it was laid down in the Head Note:

"A lecturer appointed by Managing Committee of a College affiliated to Lucknow University does not hold any office of public employment or status, which is capable of protection.

Statute 151 framed under the Lucknow University Act (1920) only provides that the terms and conditions mentioned therein have to be incorporated in the contract to be entered into between the college and the lecturer concerned. It does not say that the terms and conditions have any legal force, until and unless they are embodied in the contract. Without the contract they have no vitality and can confer no legal rights.

Where, therefore, services of the lecturer appointed by reason of a contract

having no legal force, between himself and the Managing Committee, which is not a statutory body, were terminated by the latter, the lecturer cannot have any cause of action on breach of the law but only on breach of the contract. Hence, he has a remedy only by way of a suit for damages and not by way of application under Art. 226."

In my view and respectfully following the Full Bench I hold that the instant case falls in the line of Jodh's case (2) and not in the line of Vidya Ram Misra's case (3). It is important to note that the Supreme Court in Vidya Ram Misra's case (3) emphasised as follows:

"As already indicated, Statute 151 does not lay down any procedure for removal of a teacher to be incorporated in the contract; so, clause 5 of the contract can, in no event, have even a statutory flavour and for its breach, the appellant's remedy lay elsewhere."

In the instant case, Ordinance 11 (v) clearly provides that the ground on which the services could be terminated shall be the same as those which are in the case of the employees of the University provided that the question of termination is decided by a special meeting of the managing committee and approved by the Executive Council of the University and such a term is bound to be contained in the written contract. Vidya Ram Misra's case (3) is, therefore clearly distinguishable from the instant case. I should like to emphasise that in the courts below it was never contended on behalf of the defendants that Ordinance 11 was in any manner in excess of the ordinance making power of the University or was in any other manner defective or bad in law. There are no pleadings to that effect and, therefore, no issue was struck between the parties and I do not think that the contention can be allowed to be raised in the second appeal.

In the result, the appeal succeeds and is allowed. The judgment of the lower appellate court is set aside and that of the trial court restored. However, the parties shall bear their own costs throughout the litigation.