
(2010) 12 AHC CK 0235

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 44932 of 2007

Lallan Prasad Srivastava

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 21-12-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 2 ADJ 270

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Sudhir Kumar Singh and A.K. Dubey, for the Appellant;

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Petitioner has sought a writ of mandamus commanding the respondents to re-fix his pension in view of grant of selection grade etc. in the light of the order dated 20.4.2004 passed by Deputy Directory of Education, Madhyamik, Azamgarh Mandal, Azamgarh (Annexure 3 to the writ petition) and to pay pensionary benefits accordingly. The petitioner claims to have been appointed as Lecturer (English) in Ratsad Inter College, Ballia on 28.10.1955. He remained absent from 1.7.1966 to 20.9.1973. Thereafter he joined as Lecturer in P.N. Inter College, Chhapra Dubey, Ballia on 21.9.1973 and retired therefrom on 30.6.1984. It is said that both the institutions where the petitioner worked were recognised Colleges governed by U.P. Intermediate Education Act, 1921 (hereinafter referred to as "1921 Act") and were receiving grant-in-aid from the State Government. It is also apparent from the record that his service as Lecturer were recognised as permanent with effect from 21.9.1973 by District Inspector of schools, Ballia (hereinafter referred to as "DIOS, Ballia") vide order dated 8.7.1983 (a copy whereof has been placed on record as Annexure-1 to the writ petition). It is not his case that the aforesaid order was ever challenged by him before any appropriate forum till the date of his retirement or even thereafter within a reasonable time. He claims to have made several

representations before the authorities concerned for giving due credit to his earlier service for the purpose of pension and thereafter filed writ petition No. 7964 of 2002 seeking following reliefs:

(i) Issue a writ, order or direction in the nature of mandamus commanding the respondents to re-fix the pension of petitioner in view of selection grade salary and make the payment of arrears of pension in the light of his selection grade salary.

(ii) Issue any other writ petition or direction which this Hon"ble Court may deem fit and proper in the facts and circumstances of the case.

(iii) Allow the writ petition with costs in favour of the petitioner.

2. This writ petition was disposed of at the threshold, i.e., at the admission stage on the very first date vide judgment dated 22.2.2002 vide the following order:

During course of argument, learned counsel for the petitioner comes up with the prayer that in the event, the petitioner makes a representation before the concerned authority, a direction may be given to take appropriate decision in respect to the claim of the petitioner as has been pleaded in the writ petition. On the facts of the present case, it will be better if the petitioner is asked to make a fresh representation detailing his grievance.

After hearing learned counsel for the parties and in view of the submission as has been made on behalf of the petitioner, it is hereby directed that in the event, the petitioner makes a representation before the concerned authority alongwith certified copy of this order, and a copy of writ petition, the concerned authority will decide the same by a reasoned and speaking order in accordance with law preferably within a period of three months from the date a certified copy of this order alongwith representations received by the concerned authority.

With this direction, writ petition is disposed of finally.

3. Pursuant to the aforesaid judgment, Sri, A.K. Singh, the then Deputy Director of Education (Secondary), Azamgarh Mandal, Azamgarh has passed the impugned order. It says that the period of absence from 1.7.1967 to 30.6.1973, claimed to be the service rendered in primary schools maintained by Basic Education Parishad though record in respect thereof was not available in the office of the concerned Basic Education Officer and in absence of any material to verify the same, petitioner"s claim that his absence during the said period is accepted on medical ground in compliance of High Court"s order dated 22.2.2002, and the earlier order dated 30.5.2002 is modified accordingly. Despite this order, since the aforesaid period was not given due credit by the authorities, the petitioner claims to have made certain representations and then filed this writ petition in 2007.

4. A counter-affidavit has been filed on behalf of respondent No. 4 sworn by Yogendra Kumar Singh, the then DIOS, Ballia on 14.10.2008. It is admitted that

petitioner's claim for giving due credit for the period of 1.7.1967 to 30.6.1973 for pensionary benefits was allowed by respondent No. 2, i.e., Deputy Director of Education (Secondary), Azamgarh and responsibility lay upon the Treasury authorities to give effect the aforesaid order. Since treasury officer is not a party to the writ petition, hence reply on his behalf is not possible.

5. The petitioner filed an impleadment application to implead Treasury Officer, Ballia as respondent No. 6 which was allowed on 6.10.2010. In the meantime, on 20.8.2010, this Court also passed an order directing DIOS, Ballia to produce entire service record of petitioner including the record relating to decision taken in pursuance of the order dated 22.2.2002 of this Court. On 6.10.2010, this Court observed that there was no direction given by the Court that any part of service of the petitioner has to be recognised in a particular manner. Hence, wherefrom the then Deputy Director of Education found that he had to comply Court's order in a particular way, as mentioned in his order dated 20.4.2004, which was also stated in para 6 of counter-affidavit filed on behalf of respondent No. 4. This Court thus directed respondent Nos. 2, 3 and 4 to appear and explain the circumstances.

6. Sri A.K. Singh, who by now had been posted as Senior Treasury Officer, has stated in his separate affidavit that order has been passed on its merit after taking into consideration the relevant facts and reference to the Court's order dated 22.2.2002 is only with an intention to clarify that direction to decide representation was being complied with. He has filed an affidavit sworn on 12.11.2010 wherein he said that service record of petitioner contain a certificate dated 6.7.1985 issued by District Basic Education Officer, Ballia verifying that from 1.7.1967 to 30.6.1973, petitioner had worked in the institutions maintained by Basic Education Board. However, later on, in 2003 when enquiry was made, the District Basic Education Officer, Ballia said that no document relating to petitioner's service of the aforesaid period is available in his office and on that basis, he verified on 5.6.2003 that the petitioner did not function between 1.7.1966 to 20.9.1973 as Teacher (Lecturer) in any of educational institution maintained by Basic Education Board. He has also filed photocopy of service book of the petitioner showing that on 30.6.1966, the petitioner proceeded on leave without pay. The Principal, Ratsad Inter College, Ballia had verified service of the petitioner in the aforesaid College from 28.10.1955 to 30.6.1966 only. However, there is an endorsement of the year 2001 stating that leave without pay from 30.6.1966 to 20.9.1973 is verified from the record as correct on medical ground. He has also stated that the order dated 22.4.2004 was passed by him when he was holding officiating charge of said office of Deputy Director of Education.

7. The short question up for consideration is whether petitioner can be allowed benefit for the purpose of pension etc. treating his period of absence from 1.7.1966 to 20.9.1973 as qualified service particularly in view of order dated 20.4.2004 and also whether this order is bona fide and a valid order, which this Court should recognise while considering question of granting relief to the

petitioner under Article 226 of the Constitution and equitable extraordinary jurisdiction. In other words, what this Court would like to examine whether order, the petitioner whereupon has founded his case, is such which has been passed by the authority concerned in a bona fide and honest exercise of power or it is a case which is result of an unholy collusion and nexus between the parties to confer a right upon a person, who was not otherwise entitled for the same. Looking into the above two aspect, this Court cannot be oblivious of the following facts:

8. The petitioner retired on attaining the age of superannuation on 13.6.1984, His service prior to his joining at P.N. Inter College, Chhapra Dubey, Ballia in 1973 was verified by Principal, Ratsad Inter College, Ballia only from 28.10.1955 to 30.6.1966. His service book contains an entry about his leave without pay from 30.6.1966 to 20.7.1973. The relevant entries in the service book do not mention any reason with respect to the period treated to be as leave without pay. It however also mentions that his service at P.N. Inter College, Chhapra Dubey, Ballia is approved with effect from 21.9.1973. The endorsement at the bottom that the period of absence treated as leave without pay was on medical ground appears to have been mentioned sometimes in 2001, but at whose instance and on what basis it was done so is not evident from record. The words "medical ground" have been mentioned later on and clearly appears to be in a different ink and writing. What was the occasion to make such an entry after almost 17 years from the date of retirement of petitioner is also not clear. The petitioner approached this Court for the first time in 2007, i.e., almost after 18 years from his retirement for seeking benefit of earlier service of seven years. It is pursuant to order dated 22.2.2002 passed by this Court, Sri Upendra Kumar, the then Deputy Director of Education (Secondary) passed order on 30.5.2002 considering service record of petitioner and noticing that petitioner's claim of remaining absent for almost more than seven years on the ground of ill health while during the said period he also claimed to be serving in schools of the Basic Education Board is not believable and correct.

9. After the aforesaid order of Deputy Director, the petitioner made a representation dated 1.7.2002 stating that the said order was passed without giving opportunity to him, i.e., by sending letters at the address where the petitioner was not residing. He made another such representation on 7.12.2002. It appears that he also submitted letter dated 15.7.2002 in the office of DIOS, Ballia disputing his working with effect from July, 1967 to 20.9.1973 and requested for its verification afresh. Thereafter, the petitioner's case, it appears, was reopened by Deputy Director of Education by issuing a letter dated 21.12.2002 asking the petitioner to appear with record on 3.1.2003. The then Deputy Director of Education, after hearing the petitioner on 3.1.2003, issued a letter dated 25.1.2003 to District Basic Education Officer, Ballia requiring him to verify the earlier certificate granted by District Basic Education Officer about petitioner's aforesaid working between 1.7.1967 to 20.9.1973. The District Basic Education Officer, Ballia by his letter dated 5.1.2003, informed the DIOS as

under:

10. Sri A.K. Singh took over charge of the office of Deputy Director of Education on 15.10.2003. Thereafter he passed the order dated 20.4.2004. Nothing has been said by the petitioner as to how and why for almost 18 years he kept silence over the matter and did not raise any dispute.

11. Now coming to the period of leave which are permissible and qualified for qualifying service for the purpose of pension, it would be appropriate to have some of the provisions of Civil Service Regulations, which in general are applicable in the case in hand as also stated by Sri A.K. Singh, the then Deputy Director of Education in para 21 of his affidavit dated 12.11.2010, which reads as under:

21. That the earlier order by which the representation of the petitioner was decided passed on the basis of the finding that during the period of 1966 to 1973, the petitioner has worked in some other institution as well as in other schools of Basic Shiksha Parishad being such the aforesaid service period could not be counted for the purpose of pension of the petitioner but said findings could not find support in view of the enquiry report submitted by the B.S.A., Ballia as well as service book as submitted by the College authorities being such the said decision dated 20.4.2004 was taken at the level of the deponent by considering the relevant records available in the office to be correct and while passing the said order there was no otherwise intention and collusion on the part of the deponent alongwith the petitioner but said order was passed on the bona fide impression as per understanding of the deponent in accordance with law being as per Articles 400, 419B and 487 of C.S.R. Regulation, it is clear that only that period of service alongwith payment of salary would be counted for the purpose of pension as qualifying services but if any exception leave is granted on medical ground, the same shall also be counted as qualifying services for the purpose of pension and taking into cognizance of the same, the order impugned dated 20.4.2004 was passed as per limited understanding of the deponent.

12. Article 408 Civil Service Regulations reads as under:

408. Notwithstanding anything contained in Article 407, all periods of leave with allowance, except the leave refused under Fundamental Rules 86 or 86-A, shall count as service.

Extraordinary leave shall qualify for pension if it was granted:

- (i) On medical certificate by competent medical authority
- (ii) due to his inability to join or re-join duty on account of civil commutation or
- (iii) for prosecuting higher technical and scientific studies.

Extraordinary leave taken on other grounds is treated as non-qualifying and, therefore, a definite entry is to be made in the service records to that effect. Entries regarding service being qualifying or otherwise are required to be made

simultaneously with the event. Even where this is not done, it should still be possible to rectify the omission during the period allowed for preparatory action i.e. from two years in advance of the retirement date upto eight months before retirement i.e. 16 months before the date of retirement. At the end of the period, however, when the actual preparation of the pension papers is taken in hand (i.e. as laid down in paragraph 2 (kha) above) no further enquiry into past events or check of past records should be undertaken. Specific entries in the service record regarding non-qualifying period/periods will be taken note of and such period/periods excluded from the service. All spells of extraordinary leave not covered by such specific entries will be deemed to be qualifying service.

13. Government order dated 13.12.1977 also clarify the position in this regard and para 3 thereof reads as under:

14. At the time of retirement or immediately thereafter, the service record of petitioner mentions his absence from 30.6.1966 as "leave without pay" but does not mention any reason thereof. The Principal of the College, where he was working at that time has also verified his service only upto 30.6.1966 and not thereafter. All these entries were verified in 1985 to 1987 but did not contain anything else except that the period is treated as leave without pay. No reason or explanation is given. It was never challenged by petitioner that this period has to be verified as qualifying service since it was on account of a medical certificate produced by him before the competent authority, who accepted it. It appears that after more than one and half a decade from the date of retirement, the petitioner thought of claiming benefit of his absence of seven years for the purpose of pension and that is how the record was made in 2001 and onwards. How and in what circumstances it so happened is not clear from the record. District Basic Education Officer in his letter dated 5.6.2003 though has verified that office of District Basic Education Officer was not sanctioned in District Ballia between 1966 to 1973, and that in 2003, the record of that period was not available, but has not said that the certificate issued by District Basic Education Officer, Ballia in July 1985 was not correct. If after 18 years, the record was not available, it is not surprising. On that basis, it could not have been said or treated that the certificate issued by District Basic Education Officer, Ballia in 1985 was not correct. The respondent-authorities have also not tried to investigate into facts as to what prompted the petitioner to rake up this issue after one and half decade of his retirement.

15. The order dated 20.4.2004 has been passed by respondent No. 2 (which office was held by Sri A.K. Singh, a senior Treasury Officer on officiating basis for a short period) without looking into the question that the period of leave without pay, if allowed on medical certificate, only eligible to qualify for pension and not otherwise. There is no whisper in any order that for these six or seven years, the petitioner had submitted any medical certificate and this period was sanctioned as leave without pay on medical certificate so as to be recognised as qualifying service. The petitioner's claim was that he was ill. Mere claim of illness is not

sufficient but it should have been supported by medical certificate which is accepted by competent authority while treating absence as "leave without pay". The service book as it was verified between 1984 to 1987 for the purpose of pension etc. did not mention any such thing. For the first time, it appears to have been made sometimes in the year 2001 and this aspect has also been ignored by respondent No. 2. This clearly made all this dubious and collusive.

16. Learned counsel for the petitioner submits that delay even if occurred in resting his claim for the above period of seven years and more stood rectified when he approached this Court in Writ Petition No. 7964 of 2002 which was disposed on 22.2.2002 directing him to make representation to the Deputy Director of Education, respondent No. 2 pursuant whereunto initially the order was passed on 30.5.2002 but the same thereafter was modified on 20.4.2002. He, therefore, submits that delay and laches in this regard are of no consequence and cannot be looked into by this Court while considering his relief that the respondents should comply with the respondent No. 2's order dated 20.4.2004 for the purpose whereof the petitioner has come to this Court.

17. Having given my anxious consideration to the above submissions, I find it difficult to accept. In fact, it is not only inequitable but mischievous. It is now well settled, if there is extraordinary delay and laches, the same cannot be raked up by moving non statutory representations, obtaining an order from this Court to decide the representation and thereafter to approach the Court reopening the entire matter on merits based on the order passed by the competent authority pursuant to this Court's order.

18. Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. In New Delhi Municipal Council Vs. Pan Singh and Others, , the Apex Court observed as under:

It is trite that the discretionary jurisdiction may not be exercised in favour of those who approach the Court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction.

19. In Lipton India Ltd. and Others Vs. Union of India (UOI) and Others, and M.R. Gupta Vs. Union of India and others, , it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time.

20. In The Oriol Industries Ltd. Vs. The Bombay Mercantile Bank Ltd., , it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in State of Orissa Vs. Pyarimohan Samantaray and Others, and State of Orissa and Others Vs. Shri Arun Kumar Patnaik and Others, and the said view has also been followed recently in Shiv Dass Vs. Union of India (UOI) and Others, and New Delhi Municipal Council (supra). The aforesaid authorities of the Apex Court has also been followed by this Court in Chunvad Pandey Vs. State of U.P., . This has been followed in Punjab Financial Corporation Vs. Surya Auto Industries .

21. In *S.S. Balu and Another Vs. State of Kerala and Others*, , the Apex Court held that it is well settled principle of law that delay defeats equity. It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit. In *Yunus (Baboobhai) A Hamid Padvekar Vs. State of Maharashtra through its Secretary and Others*, , the Court referred to the observations of Sir Barnes Peacock in *Lindsay Petroleum Company v. Prosper Armstrong Hurde etc.*, (1874) 5 PC 239, and held as under:

Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

22. It is true that *ex facie* the relief sought by the petitioner is quite innocuous and simple one, but in effect it is nothing but to involve this Court in a mischievous, collusive and illegal action in which role of the concerned authority is also not above board. The order dated 20.4.2004 in its operative part has been written in such a manner as if the period from 1.7.1966 to 20.9.1973 as qualifying service is being taken pursuant to some direction of this Court though the judgment dated 22.2.2002 nowhere shows any such direction. Secondly, despite of certificate of 1985 issued by District Basic Education Officer having not been found to be forged or fictitious, merely because after 18 years, i.e., in 2003, the relevant record was not found in the same office, the respondent No. 2 could draw a conclusion, which no person of ordinary prudence could have drawn in the above facts and circumstances. Lack of bona fide on the part of the officer concerned who passed order dated 20.4.2004 cannot be ruled out. In fact, when I required learned Standing Counsel to show as to which part of the order dated 20.4.2004 decides the issue on merit after considering all these aspects as mentioned above, he could not explain anything and said that whatever has been stated in the affidavit by Sri A. K. Singh, who was holding the charge of office of respondent No. 2 and passed the order dated 20.4.2004, may be perused. This is suffice to explain everything. It is self speaking. It is true that normally this Court would not go beyond the record which is placed before it and ought not to have doubted an order which is in favour of the petitioner when not doubted by respondents, but where the parties are apparently in collusion, and this Court finds such a situation, it shall be wholly unjust to help such a litigant based on such an order which is vitiated on account of collusion rendering the order illegal.

Power under Article 226 is discretionary and equitable. Only when a person approaches this Court with clean hands, then he may be considered for grant of relief and not otherwise. A person who seeks equity must come with clean hands.

23. In Ram Saran Vs. I.G. of Police, CRPF and Others, , the Apex Court observed:

A person who seeks equity must come with clean hands. He, who comes to the Court with false claims, cannot plead equity nor would the Court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner.

24. In R. Vishwanatha Pillai Vs. State of Kerala and Others, , the Apex Court observed that a person, who seeks equity, must act in a fair and equitable manner.

25. The above discussion and the facts and circumstances of the case leaves no doubt in the mind of this Court that petitioner in this case is not entitled for any relief and the writ petition must fail. Besides, here is a fit case where this Court should direct the respondent No. 1 to look into the matter and make appropriate enquiry against the officer concerned who passed the order dated 20.4.2004 in dubious and suspicious situations, as discussed above, and take appropriate disciplinary proceedings against him without any further delay. A copy of this order shall be furnished by Registrar General to respondent No. 1 for information and compliance. The writ petition is dismissed with cost quantified to Rs. 25,000/- (Rs. twenty five thousand).