
(2017) 02 AHC CK 0070
In the Allahabad High Court
Case No : Special Appeal No. 71 of 2017

Luxmikant Verma

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 02-02-2017

Acts Referred:

Citation : (2017) 3 ADJ 311 : (2017) 2 AllWC 1883 : (2017) 121 ALR 842

Hon'ble Judges : V.K. Shukla and Mrs. Sangeeta Chandra, JJ.

Bench : Division Bench

Advocate : Nripendra Kumar Dwivedi, Advocate, for the Appellant; Amit Kumar Srivastava, C.S.C, for the Respondent

Final Decision : Dismissed

Judgement

Mrs. Sangeeta Chandra, J.—The petitioner appellant is before this Court challenging the judgment and order dated 3.1.2017 passed by the Hon'ble Single Judge dismissing the writ petition filed by the petitioner challenging the order dated 21.4.2011 passed by the respondent no.2, Director Higher Education, U.P. Allahabad and praying for issuance of a mandamus commanding the authorities to regularise the services the petitioner in pursuance of judgment and order dated 11.6.2010 passed by this Court in Writ Petition No. 34508 of 2010.

2. The case set up by the petitioner appellant is that he was engaged on contractual basis as Rs. 2,500 per month as clerk by the Secretary of the Board of Management of D.B.S College, Govind Nagar, Kanpur, which is affiliated to Chattarapati Sahu Ji Maharaj University, Kanpur Nagar and salary of teachers and other employees of the institution are being paid by the State Exchequer under the Chapter (XI) A of the U.P State University Act, 1973.

3. The petitioner appellant has alleged in his writ petition and also this Special Appeal that since he was engaged on 2.12.2000 by the institution and he worked continuously as clerk and was duly qualified and despite several representations

he was not regularised and therefore he filed Writ Petition No. 34508 of 2010 *Laxmi Kant Verma v. State of UP and others*, wherein this Court had finally disposed of the writ petition on 11.6.2010 with a direction to the authorities that "if the petitioner is qualified for the post and is satisfactorily working, he shall be regularised in service from 2.12.2000 and shall be paid salary accordingly."

4. The Director in purported compliance of the order passed by this Court on 11.6.2010, noticed that the Management of Institution had engaged the petitioner appellant on a temporary basis in expectation of creation of posts as the Management had requested for 19 additional posts of clerks for the Institution in question and that the petitioner was appointed on non-existing post without following due selection process, nevertheless, vide his order dated 24.11.2010, directed that the petitioner be paid salary with effect from 2.12.2000 along with arrears subject to final decision of the writ petition.

5. From the record of the writ petition, it is evident that petitioner thereafter filed some representation to the Government and the Under Secretary, Higher Education, thereafter while sending a copy of the representation to the Director Higher Education asked him to decide the matter regarding regularisation and payment of arrears of salary in terms of judgment and order dated 11.6.2010 vide his letter dated 11.2.2011. (The letter has been filed at Page No.81 of the Paper Book)

6. The petitioner appellants case was considered by the Director Higher Education again and the Director Higher Education thereafter taking into account that the selection and appointment of the petitioner had been made without any sanctioned post of clerk and without following due process of law and without approval of the Competent Authority rejected the representation of the petitioner for grant of arrears of salary and for regularisation vide his order dated 21.4.2011.

7. The petitioner appellant thereafter filed Writ A No. 23901 of 2014 challenging the order dated 21.4.2011 alleging that it amounted to review of order dated 24.11.2010 passed by the earlier Director Higher Education and also amounted to sitting over the judgment and order dated 11.6.2010 passed by this Hon"ble Court Writ Petition No.34508 of 2010.

8. The Hon"ble Single Judge while considering the case of the petitioner has gone through the records of the writ petition very thoroughly and has quoted several paragraphs of the counter affidavit filed by the State Government in the aforesaid writ petition that payment of salary to teachers and other staff of recognised and aided higher education institutions are governed by Section 60(E) of the State Universities Act, 1973. It has been further stated in the counter affidavit that under Section 60(A) (iii) of the Act an "employee" is defined as one (a) in support of whose employment maintenance grant was being given by the State Government during the financial year 1974-1975 or (b) who was appointed to a post with the permission of the Director Education (Higher Education).

9. In the rejoinder affidavit the writ petitioner had stated that due to strength of students being increased the Management of institution had requested for creation of posts which was never done within the academic session by the State authorities and therefore the institution had engaged him on a temporary basis on fixed pay.

10. The Hon''ble Single Judge came to the conclusion that since the Director gives approval for appointing nonteaching staff only on duly created posts and after due process of selection in accordance with the Act and the "First statutes of the University" which was in fact not given and the writ petitioner had not been able to controvert the specific averments made in the counter affidavit regarding the inadmissibility of regularization and payment of salary to him in his rejoinder affidavit. The petitioner was not entitled to reliefs claimed by him.

11. The Hon''ble Single Judge has observed that undisputedly, the petitioner-appellant was never appointed against any duly created post by following any statutorily prescribed selection procedure and therefore was not covered under the definition of "employee" given under Section 60(A)(iii) of the State University Act and therefore also not entitled for payment of salary from the State Exchequer under Section 60(E) of the Act. In case the Management had engaged the petitioner on temporary basis without any post being duly created or without following any prescribed procedure for selections then the Management alone was responsible for payment of salary.

12. The petitioner-appellant before us in this appeal has again reiterated the arguments made before the Hon''ble Single Judge that his case had been considered on merits by the Hon''ble Single Judge in his earlier writ petition vide judgment and order dated 11.6.2010 and despite there being a specific direction that in case he was duly qualified and was working continuously then he be regularized with effect from 2.12.2000, the later writ petition stands dismissed.

13. It has been argued that it amounted to review of the judgment and order dated 11.6.2010 by a co-ordinate bench and also it amounted to review of the order passed by the earlier Director Higher Education dated 24.11.2010 by the new incumbent on the post vide his order dated 21.4.2011 which was not permissible under law as review is only applicable in judicial pronouncements by courts of law and is impermissible to an administrative authority passing an administrative order in an administrative capacity.

14. The learned standing counsel has reiterated the arguments made in the counter affidavit and stated that once Hon''ble Single Judge had come to the conclusion on the basis of documents on record that there was no duly created post on which the petitioner had been appointed by the Management of the institution by following the prescribed selection procedure under law, the appointment of the petitioner was illegal and therefore he should not be paid salary from the State Exchequer. The Hon''ble Single Judge had rightly dismissed the writ petition and there was no need for interference by us in appeal against

the said judgment.

15. Having considered the rival submissions of the parties we find that there are three issues which need to be decided in this appeal. Firstly, whether the appointment of the petitioner was merely irregular and not illegal and therefore due to long continuance in service with effect from 2.12.2000, his engagement should be regularized. Secondly, whether the judgment and order dated 11.6.2010 passed by the co-ordinate bench in the earlier writ petition filed by the petitioner had been ignored by the co-ordinate bench, in dismissing the writ petition of the petitioner and, lastly, whether the Director Higher Education in passing the impugned order dated 21.4.2011 had reviewed the earlier order passed by the same authority on 24.11.2010 and whether such review was impermissible as has been argued before us by the counsel for the petitioner-appellant.

16. With regard to the first issue before us, reference can be made to the judgment rendered in the case of Secretary, State of Karnataka v. Uma Devi (2006) 4 SCC 1, wherein a Constitution Bench had considered the arguments raised on behalf of the dailywage/ contractual/ adhoc/ temporary employees for regularization on the basis of long continuance, legitimate expectation and right to employment under the State and the Directive Principles of State policy as given in the Constitution. The arguments raised on behalf of such employees for regularization based on such principles as equality and long spells of service were rejected by the Constitutional Bench. However, in Paragraph 53 of the judgment rendered in the case of Uma Devi (Supra) the Hon"ble Court observed that there may be cases where irregular appointment (not illegal appointments) of duly qualified persons in duly sanctioned posts might have been made and the employees have continued to work for 10 years or more, but without the intervention of the orders of the Courts or of Tribunals. The question of regularization of such employees should be considered by the State and its instrumentalities as a one time measure, but there should be no further bypassing of the constitutional requirements and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

17. In the case of Uma Devi (Supra), the Hon"ble Court held that the Supreme Court under Article 32 and High Court under Article 226 should not issue directions for absorption/ regularization or permanent continuance of temporary, contractual/ casual/ dailywage or adhoc employees unless the appointment itself was made regularly in terms of the constitutional scheme. The judgment in the case of Uma Devi (Supra) was followed and clarified in the judgment rendered by the Supreme Court in State of Karnataka v. M.L. Kesari (2010) 6 SCC 247 and the decision in that case summed up the following three essentials for regularization:-

"(1) the employees have worked for 10 years or more,

(2) that they have so worked in a duly sanctioned posts without the benefit or

intervention of an interim order of any Court or Tribunal,

(3) they should have possessed the minimum qualifications stipulated for the appointment.

Subject to these three requirements being satisfied, even if the appointment process did not involved open competitive selection the appointment would be treated as "irregular" and not "illegal" and thereby qualified for regularization."

18. The difference between irregular and illegal appointments had been considered by the Hon"ble Supreme Court in the case of State of Karnataka v. G.V. Chandra Shekhar (2009) 4 SCC 342 also and the directions of the Hon"ble Court given earlier as to the availability of duly created and sanctioned post as one of the essentials for regularization along with possession of minimum qualifications and long continuance for 10 years or more have been reiterated.

19. The engagement of the petitioner-appellant was admittedly without any post by the Secretary of the Board of Management of D.B.S College and the appointment letter itself states that it was in anticipation of regular selection on post becoming available. In the rejoinder affidavit the petitioner-appellant has admitted that the Management of the institution had written to the Education Authorities for creation of 19 additional posts of clerks looking to the students strength but Education Authorities had not responded. The conclusion drawn by the Hon"ble Single Judge that the petitioner - appellant engagement was illegal and not irregular is therefore absolutely correct.

20. The second issue involved in the aforesaid case is whether the judgment and order dated 11.6.2010 passed in the earlier writ petition of the petitioner could have been ignored by the Hon"ble Single Judge sitting in coordinate jurisdiction. It is the petitioner - appellants case that on completing more than 9 years of service, he had approached this Court in earlier writ petition praying for regularization. From a perusal of the judgment and order dated 11.6.2010, it is apparent on the record that the said writ petition was disposed of by the Hon"ble Single Judge recording the submissions of the learned counsel for the petitioner alone, perhaps at the stage of hearing as fresh. The Hon"ble Single Judge at that time while disposing of the case had first recorded the submissions of the learned counsel for the petitioner and thereafter said that in view of the above submissions the authorities may call for the record and take a decision in the matter of regularization of the petitioner "If the petitioner is qualified for the post and is satisfactorily working, he shall be regularized in service from 2.12.2000 and shall be paid salary accordingly."

21. In the aforesaid judgment dated 11.6.2010 it is evident that the issue whether such appointment was irregular or whether it was illegal should have been determined but was not considered at all. This judgment dated 11.6.2010 is in the teeth of the Constitution Bench judgment rendered in the case of Uma Devi (Supra) in 2006 itself. Neither the statutory provisions viz. The State Universities Act, 1973 nor the First Statutes of Chhatrapati Sahu Ji Maharaj,

Kanpur Nagar, Kanpur were considered. The version of the Education Authorities was also not called for. Even in the order dated 24 November 2010, the then Director Higher Education has recorded that on the basis of students strength, the Management of the Institution had requested for creation of 19 additional post of clerks which posts were not duly created, but in anticipation of their creation, the petitioner appellant had been engaged on fixed pay of Rs. 2,500 per month without following due process of selection or getting the same approved by the Director Higher Education. The responsibility for payment of salary to the petitioner-appellant therefore was that of the Management of the institution, since in the judgment and order of the Court dated 11.6.2010 direction was for the Education Authorities to regularise the petitioner if he was qualified for the post and satisfactorily working, then in respectful compliance of the order the Director had passed an order providing for payment of salary to the petitioner along with arrears with effect from 2.12.2000 subject to final decision of Writ Petition No. 34508 of 2010. It escaped the notice of the Education Authorities that the Writ Petition No. 34508 of 2010 stood decided already.

22. The order dated 11.6.2010 finally disposing of Writ Petition No. 34508 of 2010 by another Hon"ble Single Judge as aforesaid could not be said to have any binding effect as the issue with regard to irregular or illegal appointment of the petitioner-appellant was never considered and determined. We therefore do not find any legal infirmity in the view taken by the Hon"ble Single Judge in the judgment and order impugned before us dismissing the later writ petition filed by the petitioner-appellant.

23. The third issue which needs to be considered is arising out of the arguments made by the learned counsel for the petitioner - appellant that the subsequent order of the Director Higher Education dated 21.4.2011 amounted to a review of the earlier order passed by the same authority on 24.11.2010 which was impermissible in law. A perusal of the order dated 21.4.2011 shows that the Director Higher Education has taken into account the fact that the earlier order passed by the Director Higher Education dated 24 November 2010 had been issued on misrepresentation and concealment of facts which is good ground for review.

24. The Hon"ble Supreme Court in the case of Major Chandra Bhan Singh v. Latafatullah Khan (1979) 1 SCC 321, and in the case of R. Sulochna Devi v. D.M.Sujatha (2005) 9 SCC 335 and in case of D. Ganesh Rao Pattnaik v. State of Jharkhand (2005) 8 SCC 454, has held that an administrative order passed on misrepresentation or concealment or on the basis of wrong appreciation of law can certainly be reviewed by the administrative authority.

25. The counsel for the petitioner-appellant has also argued that the petitioner-appellant had continued to work in the institution with effect from 2.12.2000 and upto January 2017 when his writ petition was dismissed by the Hon"ble Single Judge and therefore a lenient view should have been taken as has been taken by the Hon"ble Supreme Court in the case of D.M. Premkumari v. Divisional

Commissioner, Mysore Division and Others (2009) 12 SCC 267. We have considered the afore cited judgment carefully and suffice, it would be to mention that in the aforesaid judgment, the Supreme Court has observed in paragraphs 11 and 16 thus".

"(11) Having given our anxious consideration to the case pleaded by the learned counsel for the parties, we are of the view, that, it would not be desirable to decide this case on merits. If we have to do it, we might have to tell the appellant that she might have to go out of the employment. This, in our opinion, would cause great hardship and injustice to the appellant."

"(16) In view of the above discussion and keeping in view the peculiar facts and circumstances of the case, we dispose of this appeal, without going into the merits of the case. In order to do complete justice, we direct the respondents herein, not to dislodge the appellant from the post of primary school teacher. This order of ours shall not be treated as a precedent in any other case."

26. In the facts, reasons and circumstances mentioned herein above, it is evident that the petitioner-appellants appointment was wholly illegal and without any post and without following the due process of selection as prescribed under the law. Hence, his case could not be directed to be considered for regularization as only irregular and not illegal appointments can be regularised.