
(2012) 09 AHC CK 0051

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 6389, 6541, 6443, 6542, 7023, 7024 and 7037 of 2011

Mahila Mahavidyalaya

APPELLANT

Vs

Principal Secretary, and Others

RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 162, 309

Citation : (2013) 2 ADJ 69

Hon'ble Judges : Devendra Kumar Arora, J

Bench : Single Bench

Advocate : Anurag Verma, for the Appellant;

Final Decision : Allowed

Judgement

Devendra Kumar Arora, J.—Since in all the above writ petitions, the Government Order dated 6.1.2011 has been assailed by which a ban has been imposed by the State Government in making appointments of class IV employees in recognised and aided institutions, the same are being decided together by this common judgment and order. The Writ Petition No. 6389 (MS) of 2011 (Manila Mahavidyalaya, Kanpur thru. its Principal v. Principal Secretary, Finance, Lucknow and others) is taken up as leading case.

2. In this bunch of writ petitions, the petitioners pray for a writ in the nature of certiorari for quashing of the impugned Government Order No. Ve.Aa.-2-27/Dus-59 (M)/2008, dated 6.1.2011, issued by the Principal Secretary, Finance, Government of U.P., Lucknow, addressed to the principal secretaries and Directors of different departments. The subject of Government Order is up-gradation of sanctioned pay band and grade pay for class IV cadre of aided educational/technical educational institutions in the revised pay-scale pursuant to the recommendations of Vetan Samiti (2008). However, clause (2) of the Government Order has imposed a complete ban on the appointments of class IV posts in aided educational institutions. The petitioners further pray for a writ of

mandamus commanding the opposite parties to allow the petitioners to make appointment on class IV posts.

3. Facts of the case, in brief, as per leading case, axe that the petitioner-institution is a girls college of Kanpur, imparting education in various disciplines of Humanities, Commerce and Science at the graduate and post graduate levels and is permanently affiliated to Kanpur University. The institution is run by a Society duly registered under the provisions of the Societies Registration Act. In respect of the courses, the petitioner-institution is on the grant-in-aid list of the State Government and the salaries to the teaching and non-teaching staff of the college is being paid out of the salary payment account of the State Government.

4. The petitioner is aggrieved by clause (2) of the impugned Government Order dated 6.1.2011, issued by opposite party No. 1 whereby the State Government has imposed a complete ban on appointments on class IV posts in aided educational institutions.

5. Submission of learned counsel for the petitioners is that the said Government Order is a cryptic non-speaking order, and has been issued without application of mind. Only because, petitioner-institution is receiving aid, the autonomy of administration which includes appointments on class IV posts, cannot be totally restricted and such institutions cannot be treated as Government owned ones. Further submission is that the said Government Order is per se illegal and besides causing unwarranted restrictions on the functioning of autonomous institutions, it has the effect of crippling quality education in the State, as without the requisite staff, smooth functioning of the institutions is impaired to the complete detriment of espousing the cause of education.

6. Learned counsel for the petitioners further submitted that the rider contained in the Government Order seeks to take away the statutory right to make appointments on class IV posts from the petitioner-institutions which has been conferred upon it by virtue of the provisions of First Statute of the Kanpur University, rendering the condition ultra vires and per se unsustainable. The impugned Government Order is also in breach of the Mandate as given by the Hon"ble Supreme Court in the case of T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , followed in the case of Brahmo Samaj Education Society and Others Vs. State of West Bengal and Others, , in which the Hon"ble Supreme Court has held that receiving aid from State coffers cannot be treated as a justification for imposing of any restrictions on aided colleges.

7. In the instant case, the matter regarding the appointment, qualifications and other issues incidental to the service conditions of class IV Employees have been elaborately spelt out in the First Statutes of the Kanpur University.

8. Though in the instant writ petitions, the entire Government Order is under challenge but during the course of arguments, the learned counsel for petitioners confined himself only to para 2 thereof.

9. Thus, the petitioners are aggrieved by clause 2 of the Government Order dated 6.1.2011 by which the State Government has imposed a complete ban on appointments on class IV posts in aided educational institutions. The submission of learned counsel for the petitioner is that merely because the petitioner-institution is receiving aid, the autonomy of administration which includes appointments on class IV posts, cannot be totally restricted and such institutions cannot be treated as Government-owned ones. The State can regulate the manner of selection and appointment of employees and may prescribe requisite or minimum qualifications for the same but cannot impose a blanket ban on the appointments of class IV or other employees.

The relevant para 2 of the Government Order dated 6.1.2011 reads as under;

10. In some of the writ petitions, petitioners have been selected for appointment on class IV posts for various educational institutions affiliated to Kanpur University but educational authorities have denied approval or recognition to such selection in view of the ban, imposed vide para 2 of the Government Order dated 6.1.2011.

11. Learned counsel for the petitioners further submits that from reading of the First Statutes of the Kanpur University, it is evident that the power to make appointments of class IV posts is vested with the petitioner-institution. The statutes have not been amended in any manner whatsoever and consequently the restriction sought to be imposed on the petitioner's right to make appointments, is bad in law.

12. It has further been submitted by learned counsel for the petitioners that on issuing advertisement for appointment of class IV posts by the petitioner-institutions, the Regional Higher Education Officer, Kanpur (opposite party No. 3) sent a letter dated 16.3.2011 to the petitioner-colleges thereby apprising them that appointments made in violation of the Government Order dated 6.1.2011, would be held illegal. Then petitioners made a representation intimating the opposite party No. 3 that exercise for appointments on class IV posts has been undertaken in furtherance of the provisions enshrined under the First Statutes of the Kanpur University and that the statutory provisions can in no way be diluted or circumvented in any manner by a Government Order. However, no action was taken on petitioner's representation and on account of the embargo created by the impugned Government Order, the petitioner-institutions are handicapped to proceed with the appointments. Hence, these writ petitions.

13. Learned counsel for the petitioners, in support of his submissions, placed reliance upon a judgment of this Court in *Satya Narain Yadav Vs. State of U.P. and Others*, , in which it has been held that a Government Order cannot overrule the provisions of the Statute.

14. Learned counsel for petitioners has also placed reliance upon a case in *Lav Kush Pandey Vs. State of U.P. and Others*, , in which this Court while considering the G.O. dated 6.1.2011, pleased to observe that outsourcing not being a matter

of recruitment under the Act and Regulations, could not have been introduced by means of a Government Order. The relevant para 13 of the said decision reads as under:

13. The outsourcing, not being a matter of recruitment under the Act and the Regulations, could not have been introduced by means of a Government Order. It is also to be taken note of that in the instant case the vacancy had occurred on 28.2.2010, i.e. much before the issuance of Government Order dated 6.1.2011. Prior permission was granted by the Director of Education on 21.12.2010, i.e. before issuance of the aforesaid Government Order. The appointment, however, was made after issuance of the Government Order dated 6.1.2011 the vacancy having occurred prior to the Government Order dated 6.1.2011, cannot be taken to be a future vacancy so as to restrain the Principal from filling up the post for both the reasons aforesaid, viz. (1) the restraint order could not have been issued for banning the appointment on a clear vacancy of class IV post through regular process of appointment and substituting it by a new method of appointment which is not envisaged under the Act and the Regulations framed thereunder and also for the reason that the aforesaid ban, if at all is to be upheld then it has to be read down for appointments on future the issuance of the Governments Order dated 6.1.2011 and not for the vacancies which had occurred earlier.

15. Further, the petitioner has moved an application (C.M.A. No. 63727 of 2012) in Writ Petition No. 6389 (MS) of 2011 and similarly in other writ petitions praying therein that the instant writ petitions may be disposed of in terms of judgment and order dated 21.3.2012, rendered by this Court at Allahabad in Writ Petition Committee of Management, Lala Babu Baijal Memorial Inter College, Lodipur, Ghaziabad and Another Vs. State of U.P. and Others, by which Educational Authorities were directed not to obstruct the process of selection and appointment on class IV posts in Secondary Educational Institutions only on the basis of para 2 of Government Order dated 6.1.2011.

16. On 30.7.2012, a supplementary affidavit has been filed by one of the petitioners stating therein that the Government Order dated 6.1.2011 was challenged before this Court at Allahabad and the Hon"ble High Court vide order dated 21.3.2012 has been pleased to quash para 2 of the Government Order dated 6.1.2011.

17. The respondents-State of U.P. and its authorities have filed short counter-affidavit in some of the writ petitions and learned counsel for parties have agreed to read the said counter-affidavits in all matters.

18. learned Standing Counsel while opposing the writ petition, submitted that the Government Order dated 6.1.2011 was quashed to the extent of its applicability with regard to the Secondary Educational Institutions as would be evident from perusal of paras 67 and 68 of the judgment, reported in 2012(4) ADJ 586. So far as the Government Order dated 6.1.2011 and its applicability to the Higher

Education is concerned, it has been submitted by learned Standing Counsel that u/s 49 of U.P. State Universities Act 1973 (herein after referred to as the "Act, 1973" for short) powers have been given to frame Statutes of University on the matters detailed in Section 49 itself. Further, the State Government has issued a Government Order dated 20.7.2012 relating to the amendment which has to be made in the eligibility and conditions of service of the employees (non-teaching staff) of the affiliated and associated Degree Colleges. In the said Government Order, it has been provided that necessary amendments be made under the Statutes of the State Universities within 15 days in pursuance of the Government Order dated 6.1.2011, failing which the State Government after approval of the Chancellor shall amend the Statues of the Universities to the extent in the Government Order as per the directions issued u/s 50(6) of the Act, 1973. Thus, it is evident that a decision has already been taken by the State Government to amend the Statutes of the State Universities.

19. Learned Standing Counsel further submitted that the Government Order dated 6.1.2011 having been issued in furtherance of acceptance of 6th Pay Commission, the recommendations whereof have been accepted by Government, it is not open to petitioners to challenge the same partly while retaining benefit of recommendations of 6th Pay Commission in all other aspects.

20. I have heard submissions of learned counsel for parties and perused the record.

21. So far as recommendations relating to Pay Revision as made by 6th Pay Commission and accepted by Government is concerned, that is a different matter and it is not the case of respondents that Pay Commission had the jurisdiction to deal with matter of recruitment and appointment of employees and officers of Government. In my view, it would not be necessary for this Court to look into this aspect further for the reason that validity of Para 2 of Government Order dated 6.1.2011 has to be considered in the light of statutory provisions of the Act, 1973 and Statutes framed thereunder and also the Constitutional provisions.

22. The impugned Government Order, in the opening paragraph, deals with the subject, pay-scale, which is admittedly a condition of service and, therefore, there cannot be any apparent objection with regard to Legislative power or competence of the State Government in issuing the aforesaid Government Order. But Para 2 thereof deals with a subject which has nothing to do with revision of pay-scale as such. It hampers the power of Management or employer regarding recruitment and appointment of Class-IV employees in a recognised institution. Apparently, this power is not shown to be supported by any provision of U.P. State Universities Act, 1973 and the statutes framed thereunder. Once it is evident that the power is not referable to Act, 1973, or any other statute framed thereunder, this would be *ex facie ultra vires*. For this reason alone, this Court could have no hesitation in holding Para 2 of Government Order dated 6.1.2011, *ultra vires* and illegal in so far as it restrains the management of recognised and affiliated Educational Institutions with the Universities, governed by the

provisions of the Act, 1973 from recruiting and appointing non-teaching staffs, i.e., Class-IV posts.

23. Chapter XXI of First Statute of Chhatrapati Sahuji Maharaj University (formerly known as Kanpur University) relate to qualifications and conditions of service of non-teaching staff of the affiliated colleges. The relevant provisions are being reproduced as under:

21.01. In this Chapter, unless the context otherwise requires:

(1) "Class Four" means a post carrying a pay-scale lower than a pay-scale of a Routine Clerk and the expressions "Class Four" employee and "Class Four" staff shall be construed accordingly.

(2)....

(3) "Employee" means a salaried employee not being a teacher of a college and its grammatical variations and cognate expressions shall be construed accordingly.

(4)....

(5)....

(6)....

22.02 (1) Subject to the provisions of these Statutes the appointment to the posts referred to in Statute 21.03 shall be made by the Management of the college and appointment to the posts of Class Four employees shall be made by the Principal.

(2)....

(3).....

(4).....

21.03 (4) Appointment of employees shall be subject to the approval of the Director of Education (Higher Education), or an Officer authorised by him in this behalf. If the approving authority does not within two months from receiving the proposal for approval intimate its disapproval or does not send in respect of such proposal, any intimation to the appointing authority the approving authority shall be deemed to have approved the appointment.

(5).....

(6) (a)

(b) The Selection Committee for the appointment to the remaining posts referred to in. Clause (1) or Clause (3) either by direct recruitment or by promotion shall consist of:

(i) the Head of the Management or a member of the Management nominated by

him who shall be the Chairman;

(ii) the Principal of the college;

(iii) the District Inspector of Schools;

(iv) the District Employment Officer or an Officer authorised by him in this behalf.

(c) For the purposes of direct recruitment to the posts referred to in Clauses (1) and (3), the vacancy shall be advertised in at least two newspapers having adequate circulation in Uttar Pradesh and names of suitable candidates, shall also be obtained from the concerned District Employment Officer.

(d) Names of candidates for appointment to a post in class four shall be obtained from the concerned District Employment Officer. In the event of non-availability of suitable candidate in such manner the post may be advertised.

(e).....

(f) If the Management does not agree with the recommendation of the Selection Committee, it shall refer the matter to the approving authority alongwith reasons of its disagreement, and the decision of the said authority shall be final.

21.06. For appointment in a college to the posts specified below, the minimum qualification shall be as noted against each category:

(i) Clerical Staff.--For the post of Routine Clerk, Assistants, Head Clerk-cum-accountant and Head Clerk, Intermediate or an examination recognised by the State Government as equivalent thereto:

Provided that in the case of Head-Clerk-cum-Accountant and Head clerk experience on the post of Routine Clerk or Assistant, in a post-graduate or degree or Intermediate college for a period of at least ten years shall be necessary.

(ii)....

(iii)...

(iv)...

(v)...

(vi)....

(vii) Class Four Staff-For Class IV posts, passed class V from recognised school:

Provided that no educational qualification shall be required for the post of a sweeper but preference will be given to a person who is educated or is at least able to read and write Hindi in Devnagri script.

(viii).....

(2).....

(3).....

24. This Court while examining the status of Government Order vis-a-vis statutory rules, examined the various decisions of Hon''ble Apex Court, the analysis of the same is as under:

25. Hon''ble Apex Court in the case of Dr. Rajinder Singh Vs. The State of Punjab and Others, , pleased to hold that administrative instructions/circulars/orders cannot be a substitute for statutory rules and service rules cannot be amended by Government Order. The relevant para 7 of the judgment reads as under:

The settled position of law is that no Government Order, Notification or Circular can be a substitute of the statutory rules framed with the authority of law. The High Court was not justified in observing that even without the amendment of the Rules, class II of the service could be treated as class I only by way of notification. Following such a course in effect amounts to amending the Rules by a Government Order and ignoring the mandate of Article 309 of the Constitution.

26. In the case of T.N. Housing Board Vs. N. Balasubramaniam and Others, , the Hon''ble Supreme Court in para 6 pleased to hold that-

6..... Once the eligibility criteria is considered to be a pre-requisite for giving effect to the statutory Regulations, the purported executive instructions would not be applicable. Once it is held that relying on the basis of the executive instructions in terms of Regulation 28 (a), the Draftsmen who have been getting higher salary are given preference over the diploma-holder Junior Engineers, the eligibility criteria contained in the statutory Regulations would become otiose; the logical corollary thereof would be that the executive instructions would prevail over the statutory Regulations. Such a consequence would lead to an absurdity and in that view of the matter it must be held that the executive instructions cannot be given effect to.

27. In Mahadeo Bhau Khilare (Mane) and Others Vs. State of Maharashtra and Others, , it has been observed by Hon''ble Apex Court that:

Indisputably, the State of Maharashtra has framed recruitment rules. Any scheme by way of an executive instruction in terms of Article 162 of the Constitution of India, if violative of such statutory rules would not be legally sustainable.

28. In Sandur Micro Circuits Ltd. Vs. Commissioner of Central Excise, Belgaum, , the Hon''ble Apex Court in para 6 pleased to observe that-

6. The issue relating to effectiveness of a circular contrary to a notification statutorily issued has been examined by this Court in several cases. A circular cannot take away the effect of notifications statutorily issued. In fact, in certain cases it has been held that the circular cannot whittle down the exemption notification and restrict the scope of the exemption notification or hit it down. In other words, it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot

be imposed. The principle is applicable to the instant cases also, though the controversy is of different nature.

29. In Punjab Water Supply and Sewerage Board, Hoshiarpur Vs. Ranjodh Singh and Others, , while examining the control of State Government Statutory Bodies pleased to observe in paras 10, 14 & 19 which read as under:

10.... The State may have some control with regard to recruitment of employees of local authorities, but such control must be exercised by the State strictly in terms of the provisions of the Act. The statutory bodies are bound to apply the rules of recruitment laid down under the statutory rules. They being "State" within the meaning of Article 12 of the Constitution of India, are bound to implement the constitutional scheme of equality. Neither can the statutory bodies refuse to fulfil such constitutional duty, nor can the State issue any direction contrary to or inconsistent with the constitutional principles adumbrated under Articles 14 and 16 of the Constitution of India. The purported directions of the State were otherwise bad in law in so far as thereby the statutory rules were sought to be superseded. A circular letter further more is not a statutory instrument. It was not even issued by the State in exercise of the power under Article 162 of the Constitution of India. Even a scheme issued under Article 162 of the Constitution of India, would not prevail over statutory rules."

"14. Once it is held that the terms and conditions of service including the recruitment of employees were to be governed either by the statutory rules or rules framed under the proviso to Article 309 of the Constitution of India, it must necessarily be held that any policy decision adopted by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be illegal and without jurisdiction."

"19. It proceeded to issue the directions only on the basis of the purported policy decision adopted by the State. It failed to notice that a policy decision cannot be adopted by means of a circular letter and, as noticed herein before, even a policy decision adopted in terms of Article 162 of the Constitution of India in that behalf would be void. Any departmental letter or executive instruction cannot prevail over statutory rule and constitutional provisions. Any appointment, thus, made without following the procedure would be ultra vires.

30. Recently, in the case of Ajaya Kumar Das Vs. State of Orissa and Others, , the Hon"ble Apex Court pleased to reiterate that statutory rules can be amended by a rule or notification in the same way, rules have been framed. The relevant para 14 of the judgment reads as under:

14. Neither the Circular dated 18.6.1982 nor the subsequent Circular dated 19.3.1983 modifying the earlier Circular dated 18.6.1982 can override the statutory provision contained in Rule 74 (b) of the Code it is results in reduction of pay of the employee on promotion. That the Orissa Service Code has been framed under Article 309 of the Constitution of India, is not in dispute. It is well-settled that the statutory rules framed under Article 309 of the Constitution can

be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars.

31. In the instant case, it is admitted case of the opposite parties that the first statute of Chhatrapati Sahuji Maharaj University (Kanpur University) has not been amended till date. It has also come on record vide short counter-affidavit dated 14.8.2012 that the State Government while exercising the power u/s 50(6) of the Act, 1973, directed the Registrars of the Universities to amend their respective statutes within 15 days, failing which the State Government will take steps for amending the statutes with the prior approval of the Chancellor of the State Universities. The present position is that none of the universities has amended their statutes and apparently State Government has also not amended the concerned statute with respect to make recruitment on class IV post of the affiliated and associated colleges of the Universities and, therefore, the directions contained in Government Order dated 20.7.2011 cannot be acted upon till the first statute of the concerned universities is either amended by the respective universities or by the State Government in accordance with the provisions of the Act, 1973.

32. As far as the question of implementation of the Government Order dated 6.1.2011 is concerned, it is settled position of law that no Government Order, Notification or Circular can substitute the statutory provisions framed by the Authority in accordance with law as the Universities are the statutory bodies and its affiliated and associated colleges are governed with the provisions of the statutes framed under the provisions of the Act, 1973, therefore, this Court is of the considered view that para 2 of the Government Order dated 6.1.2011 cannot substitute the provisions of the first statute of the universities with respect to recruitment of class IV employees. In view of the above, all the above writ petitions are allowed. The concerned Educational Authorities/Director of Higher Education is hereby directed not to obstruct the process of selection and appointment on Class-IV posts in the Institutions affiliated/associated to any university governed with the provisions of the U.P. State Universities Act 1973 till amendment of concerned first statute of the respective universities.

There shall be no order as to costs.