

**(2011) 09 AHC CK 0094**

**In the Allahabad High Court**

**Case No : Special Appeal No"s. 896 and 750 of 2010**

Manish Kumar Rai

APPELLANT

Vs

Vivek Kumar Rai and Others

RESPONDENT

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**Date of Decision : 27-09-2011**

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2012) 1 ADJ 172 : (2012) 3 AWC 3086

**Hon'ble Judges :** Sunil Ambwani, J;Kashi Nath Pandey, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## **Judgement**

1. We have heard Sri Krishna Ji Khare, learned counsel for the appellant in Special Appeal No. 896 of 2010. Sri R.N. Singh Senior Advocate alongwith Sri K.S. Kushwaha appears for the appellant in Special Appeal No. 750 of 2010. Sri R.P. Pandey appears for respondent No. 1. Learned standing counsel appears for respondent Nos. 2 to 6. No one appears for respondent No. 7 - Committee of Management. The Special Appeal No. 896 of 2010, has been filed against the judgement dated 26.4.2010, by which the writ petition filed by Sri Vivek Kumar Rai, as a Member of the Committee of Management, and complainant against the compassionate appointment of Manish Kumar Rai (appellant), for quashing the order of Director of Education (Basic), U.P., Lucknow dated 29.10.2009, whereby he had held that the appellant was entitled to compassionate appointment, was allowed, and while setting aside the order, the Director of Education (Basic) was directed to pay Rs. 50.000/- as cost - both to Sri Vivek Kumar (petitioner-respondent No. 1) and Manish Kumar Rai (appellant), who was arrayed as respondent No. 7 in the writ petition. The amount was directed to be paid by the Director by way of bank draft drawn from the salary account, failing which the Secretary was directed to recover the amount from the salary account of the Director, and transmit the same to the petitioner and respondent No. 7.

2. The Director of Education (Basic), U.P. Lucknow has also filed a Special Appeal

No. 750 of 2010, which has been connected to this Special Appeal, against the award of costs. He has relied upon orders passed by the Supreme Court in which the Supreme Court has directed that exemplary costs should not be imposed normally; it should be sparingly imposed, to advance justice, and not for threatening.

In the present case, the dispute arose out of the complaint made by Sri Vivek Kumar - the petitioner in Writ Petition No. 17864 of 2010, to the Director of Education (Basic), U.P., Lucknow against the appointment of Sri Manish Kumar (respondent No. 7 in the writ petition and appellant in Special Appeal No. 896 of 2010) on the death of his father on 16.7.2005, serving as a teacher in Netaji Laghu Madhyamik Vidyalaya, Khukundawa, Kopaganj, District Mau, which was an unaided institution.

3. The date on which Sri Manish Kumar made an application for compassionate appointment has not been brought on record. His father had died on 16.7.2005. He was considered for appointment by the Regional Level Committee on 29.5.2007, and was appointed as Assistant Teacher on 25.6.2007. The institution was brought on the grant-in-aid list on 2.12.2006.

4. The substance of the complaint was that the dependent of a teacher, serving in an unaided institution, could not be given compassionate appointment in an aided institution. By the time when the application for compassionate appointment of Sri Manish Kumar was to be considered, the institution has been brought on the grant-in-list, and therefore, he could not be given appointment on compassionate ground in the aided institution.

5. The Director of Basic Education, U.P. in his order dated 29.10.2009 found that Sri Manish Kumar was entitled to compassionate appointment, and issued directions for payment of salary.

6. Learned Single Judge has found that the Director of Basic Education under the impugned order dated 29.10.2009, did not examine the issues as to whether Sri Manish Kumar could be offered compassionate appointment in an aided Junior High School or not. He held that since on the date of death of Sri Vinod Kumar the father of Sri Manish Kumar (respondent No. 7 in the writ petition), the mother of Sri Manish Kumar was employed in an institution, which was not receiving aid from the State Government, the proviso to Government Order dated 4.9.2000, was not attracted. The Director of Education (Basic) found that the appointment of Sri Manish Kumar on compassionate ground was in accordance with the Government Orders, and the order of the Management dated 18.6.2009, terminating his employment was illegal.

7. The learned Single Judge summoned the Director of Education (Basic) in the Court alongwith his personal affidavit on 15.4.2010, for explaining that even after noticing in the impugned order, that the father of Sri Manish Kumar had expired in an institution, which was not on grant-in-aid list of the Government and despite the Government Order being categorical that compassionate

appointment can be offered to the dependent of an employee of aided institution only, why he upheld the appointment, and directed for payment of salary.

8. The Director of Education (Basic) filed his affidavit, in which he stated in paragraphs 10 and 11 that there are three Government Orders on the subject, namely, Government Orders dated 25.9.1991, 31.1.1997 and 22.7.2000. However, in para 9 of the affidavit, he has stated that since sole ground of termination of services of Sri Manish Kumar was that his appointment was made in violation of Government Order dated 4.9.2000, and the direction issued by the Court in writ petition No. 44403 of 2009 was also with regard to applicability of the said Government Order, therefore, he has basically gone through the applicability of the Government Order dated 4.9.2000, in deciding the representation.

9. Learned Single Judge, not being satisfied with the affidavit of Director of Basic Education, passed an order on 15.4.2010, requiring the Secretary, Basic Education, U.P. Lucknow to appear and explain the stand of the Government through his affidavit. The Secretary, Basic Education U.P. Lucknow filed his personal affidavit in which it is stated in para 7 that the Government Orders mentioned above namely dated 25.9.1991, 31.3.1997 and 22.7.2000, provide for compassionate appointment to the dependent of teaching and non-teaching staff working in aided institutions.

10. Learned Single Judge thereafter examined the provisions of compassionate appointment and asked the counsel appearing for the Basic Education, to find out whether any compassionate appointment has been offered to any dependant of a teacher/employees, who had expired in harness serving in an unaided recognized institution. The Standing Counsel informed the Court, after getting information from the department, that since 1991, when the first Government Order was issued, all the concerned authorities have interpreted the same, in one and same manner i.e. no compassionate appointment is to be offered to any dependent of an employee working in an unaided recognized institution. The learned Single Judge thereafter passed an order awarding cost as follows:

It is, thus, clear that the Director of Education (Basic) and respondent No. 7 have made an attempt to confuse the real issue and the Director, for the reasons best known to him, has deliberately not considered as to whether respondent No. 7 could infact be offered compassionate appointment in an aided Junior High School or not being a dependent of an employee, who expired during harness, while working in an unaided institution. He has deliberately brushed aside the real issue and proceeded to deal with the issue as to whether the mother of respondent No. 7 was getting salary from the State Exchequer on the date of death of her husband or not. Such approach of the Director and explanation furnished by him in his affidavit before this Court are only an attempt to justify his illegal orders and to confer uncalled for benefit on the chosen one.

The Director of Education (Basic) being the Highest Officer of the State is

expected to know the intent of the Government Orders.

The Director did not have the courage to take a stand in the matter and has very conveniently stated on oath that the Government Orders are on record and he has examined the matter only with reference to the Government Order dated 4th September, 2000, i.e. as to whether the Committee of Management rightly terminated the appointment of respondent No. 7 because of employment of the mother in another recognised institution. Such deliberate omission on the part of the Director to not to consider the entitlement of respondent No. 7 for compassionate appointment, at the first instance, only results in fraudulent withdrawal of money from the public exchequer. Such approach of the Highest Officer of the Education Department cannot be approved he has to be put to terms.

Accordingly, the order passed by the Director of Education (Basic) dated 29th October, 2009 is quashed. The present writ petition is allowed with cost of Rs. 50,000/- to be paid by the Director of Education (Basic) to the petitioner and further a like amount to be paid to respondent No. 7, who, because of illegal order of the Director was led to believe that he has been validly appointed on compassionate ground and did not seek employment elsewhere. This amount of Rs. 50,000/- each shall be paid by the Director to the petitioner and respondent No. 7 within one month from today by way of bank draft drawn from salary account, failing which the Secretary shall recover the same from the salary account of the Director and shall transmit the same to the petitioner and respondent No. 7 immediately thereafter.

11. After hearing learned counsel for the parties, we are unable to appreciate as to how a simple matter of compassionate appointment, to the dependent of a deceased, who was serving in an unaided institution, and which subsequently brought on the grant-in-list, in which the only question involved was whether dependent of an employee who was working in an unaided institution and whose mother is also employed in an unaided institution, could be offered compassionate appointment, the Director of Education (Basic), U.P. and Secretary of Basic Education, U.P. at Lucknow were summoned by the Court, alongwith their affidavits.

12. The Supreme Court has repeatedly observed that the High Courts, ordinarily, should not summon the senior officials of the government and that should only be done in a very rarer and exceptional cases, when there are compelling circumstances to do so.

13. In *State of Gujarat Vs. Turabali Gulamhussain Hirani and Another*, , the Supreme Court observed as follows :

6. A large number of cases have come up before this Court where we find that learned Judges of various High Courts have been summoning the Chief Secretary, Secretaries to the government (Central and State), Director Generals of Police, Director, CBI or BSF or other senior officials of the government.

7. There is no doubt that the High Court has power to summon these officials, but in our opinion that should be done in very rare and exceptional cases when there are compelling circumstances to do so. Such summoning orders should not be passed lightly or as a routine or at the drop of a hat.

8. Judges should have modesty and humility. They should realize that summoning a senior official, except in some very rare and exceptional situation, and that too for compelling reasons, is counter productive and may also involve heavy expenses and valuable time of the official concerned.

9. The judiciary must have respect for the executive and the legislature. Judges should realize that officials like the Chief Secretary, Secretary to the Government, Commissioners, District Magistrates, senior police officials etc. are extremely busy persons who are often working from morning till night. No doubt, the ministers lay down the policy, but the actual implementation of the policy and day to day running of the government has to be done by the bureaucrats, and hence the bureaucrats are often working round the clock. If they are summoned by the Court they will, of course, appear before the Court, but then a lot of public money and time may be unnecessarily wasted. Sometimes High Court Judges summon high officials in far off places like Director, CBI or Home Secretary to the Government of India not realizing that it entails heavy expenditure like arranging of a BSF aircraft, coupled with public money and valuable time which would have been otherwise spent on public welfare.

10. Hence, frequent, casual and lackadaisical summoning of high officials by the Court cannot be appreciated. We are constrained to make these observations because we are coming across a large number of cases where such orders summoning of high officials are being passed by the High Courts and often it is nothing but for the ego satisfaction of the learned Judge.

11. We do not mean to say that in no circumstances and on no occasion should an official be summoned by the Court. In some extreme and compelling situation that may be done, but on such occasions also the senior official must be given proper respect by the Court and he should not be humiliated. Such senior officials need not be made to stand all the time when the hearing is going on, and they can be offered a chair by the Court to sit. They need to stand only when answering or making a statement in the Court. The senior officials too have their self-respect, and if the Court gives them respect they in turn will respect the Court. Respect begets respect.

12. It sometimes happens that a senior official may not even know about the order of the High Court. For example, if the High Court stays the order of the Collector of suspension of a class-III or class IV employee in a government department, and certified copy of that order is left with the Clerk in the office of the Collector, it often happens that the Collector is not even aware of the order as he has gone on tour and he may come to know about it only after a few days. In the meantime a contempt of Court notice is issued against him by the Court

summoning him to be personally present in Court. In our opinion, this should not be readily done, because there is no reason why the Collector would not obey the order of the High Court. In such circumstances, the Court should only request the government counsel to inform the concerned Collector about the earlier order of the Court which may not have been brought to the notice of the Collector concerned, and the High Court can again list the case after a week or two. Almost invariably it will be found that as soon as the Collector comes to know about the stay order of the High Court, he orders compliance of it.

14. In *State of U.P. and Others v. Jasvir Singh and Others* JT 2011 (1) SC 446, the Supreme Court observed :

7. It is a matter of concern that there is a growing trend among a few Judges of the High Court to routinely and frequently require the presence, in Court, of senior officers of the government and local and other authorities, including officers of the level of Secretaries, for perceived non-compliance with its suggestions or to seek insignificant clarifications. The power of the High Court under Article 226 is no doubt very wide. It can issue to any person or authority or government, directions, orders, writs for enforcement of fundamental rights or for any other purpose. The High Court has the power to summon or require the personal presence of any officer, to assist the Court to render justice or arrive at a proper decision. But there are well settled norms and procedures for exercise of such power.

8. This Court has repeatedly noticed that the real power of Courts is not in passing decrees and orders, nor in punishing offenders and contemnors, nor in summoning the presence of senior officers, but in the trust, faith and confidence of the common man in the judiciary. Such trust and confidence should not be frittered away by unnecessary and unwarranted show or exercise of power. Greater the power, greater should be the responsibility in exercising such power. The normal procedure in writ petitions is to hear the parties through their counsel who are instructed in the matter, and decide them by examining the pleadings/affidavit/evidence/documents/material. Where the Court seeks any information about the compliance with any of its directions, it is furnished by affidavits or reports supported by relevant documents. Requiring the presence of the senior officers of the government in Court should be as a last resort, in rare and exceptional cases, where such presence is absolutely necessary, as for example, where it is necessary to seek assistance in explaining complex policy or technical issues, which the counsel is not able to explain properly. The Court may also require personal attendance of the officers, where it finds that any officer is deliberately or with ulterior motives withholding any specific information required by the Court which he is legally bound to provide or has misrepresented or suppressed the correct position.

9. Where the State has a definite policy or taken a specific stand and that has been clearly explained by way of affidavit, the Court should not attempt to impose a contrary view by way of suggestions or proposals for settlement. A

Court can of course express its views and issue directions through its reasoned orders, subject to limitations in regard to interference in matters of policy. But it should not, and in fact, it cannot attempt to impose its views by asking an unwilling party to settle on the terms suggested by it. At all events the Courts should avoid directing the senior officers to be present in Court to settle the grievances of individual litigants for whom the Court may have sympathy. The Court should realize that the state has its own priorities, policies and compulsions which may result in a particular stand. Merely because the Court does not like such a stand, it cannot summon or call the senior officers time and again to Court or issue threatening show-cause notices. The senior officers of the government are in-charge of the administration of the State, have their own busy schedules. The Court should desist from calling them for all and sundry matters, as that would amount to abuse of judicial power. Courts should guard against such transgressions in the exercise of power. Our above observations do not of course apply to summoning of contemnors in contempt jurisdiction.

15. In *R.S. Singh v. U.P. Malaria Nirikshak Sangh and Others* Civil Appeal No. 5600 of 2006 decided on 9.3.2011, the Supreme Court observed :

7. There is no doubt that the High Court has power to summon these officials, but in our opinion that should be done in very rare and exceptional cases when there are compelling circumstances to do so. Such summoning orders should not be passed lightly or as a routine or at the drop of a hat.

8. Judges should have modesty and humility. They should realize that summoning a senior official, except in some very rare and exceptional situation, and that too for compelling reasons, is counter productive and may also involve heavy expenses and valuable time of the official concerned.

16. In the present case there was absolutely no necessity to call for Director of Education (Basic) U.P. Lucknow and the Secretary of Basic Education, U.P. Lucknow to appear in the Court after the counter-affidavits were filed, and a clear stand was taken before the learned Single Judge that since the sole ground of termination of the services of the petitioner Shri Manish Kumar was that his appointment was made in violation of Government Order dated 4.9.2000, therefore, decision was taken on the applicability of the Government Order dated 4.9.2000 in deciding the representation. In the affidavit of the Secretary, Basic Education, U.P. Lucknow it was mentioned that the Government Orders dated 25.9.1991, 31.3.1997 and 22.7.2000 provide for compassionate appointment to the dependent of the teaching and non-teaching staff working in aided institutions. The writ petition could well have been decided on these affidavits.

17. We may observe here and rule that in every case an officer is summoned by the Court, the Court must record reasons as to why presence of the officer is required both for the purposes of serving the directions issued repeatedly by the Supreme Court, to summon officers only in rare and exception case, as well as informing the concerned officer, the reasons and the purpose for which he is

required to attend the Court. The Standing Counsel must in view of the law laid down by the Supreme Court, as above remind the Court to record such reasons, which may be communicated by him to the officer.

18. We may also observe here by way of caution that these principles, which have been made applicable to the executive officers, also apply to the judicial officers perhaps with more rigour. The High Court should not summon the judicial officers at the Bar of the Court except for extraordinary and compelling circumstances for which reasons should be recorded in the previous order before summoning the judicial order. In any case the judicial officer should not be asked to appear in open Court before the lawyers and litigants. The Government Counsels appearing in the Court must draw the attention of the Court to the judgments of the Supreme Court and this Court, and request the Hon"ble Judge hearing the matter (except in the contempt cases, where the Court may, if it is prima facie satisfied, require a person to appear to explain his conduct), record reasons for summoning the officer.

19. In the present case, compassionate appointment could not be given to Sri Manish Kumar Rai as his mother was also employed though in an unaided institution. The question whether dependent of a teacher serving in an unaided institution could be given employment in an aided institution can be seen with another angle also, namely, that Sri Manish Kumar was not claiming appointment in some aided institution. He sought appointment in the same institution in which his deceased father was serving. He could be denied appointment on the ground that during the pendency of his application for appointment, the institution was brought on the grant-in-aid list. The appellant Manish Kumar Rai was not entitled for compassionate appointment.

20. The compassionate appointment is offered to allow the family of the deceased employee to tide over the financial crisis, and to save the family from penury vide Umesh Kumar Nagpal Vs. State of Haryana and Others, ; Director of Education (Secondary) and Another Vs. Pushpendra Kumar and Others, ; General Manager (D and PB) and Others Vs. Kunti Tiwary and Another, ; Union Bank of India and Others Vs. M.T. Latheesh, and General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and Others, . In the present case, mother of appellant was serving in an another unaided institution, which was also got brought on the grant-in-list, on the same date when the institution in which her late husband (father of appellant) was serving was brought under the grant-in-aid.

21. For the aforesaid reasons, we uphold the finding of the learned Single Judge that the appellant Manish Kumar Rai was not entitled for compassionate appointment.

22. In the present case there was absolutely no need to summon the Director of Education (Basic) U.P. and Secretary (Basic Education) U.P. to the Court. There was nothing incorrect or misleading in their statements on which the Court could have awarded the costs. The costs were awarded against the Director of Basic

Education U.P. without any justification. The Government Orders were clear on the subject and that the Director of Education (Basic) did not, in our opinion, made any attempt to confuse the real issue. If there was any legal issue to be decided, it was for the Court to decide the same and not to force the Director of Education (Basic) U.P., understand the issue. We also do not find any thing on the record, to draw the conclusions that the Director of Education (Basic) had made an attempt to justify the orders to confer any benefit on any person, which could result in fraudulent withdrawal of money from public exchequer.

23. The costs are awarded in legal proceedings to either mitigate the cost of litigation, or the hardships, which may have been caused to the other party. The costs are not awarded by way of penalty, on any person including a government officer, who is discharging his duties, unless mala fide intentions or deliberate misleading is established. Wherever the costs are proposed to be awarded, by way of compensating the other party over and above the cost of litigation, the Court must give an opportunity to such persons to show-cause, and to hear him on the question of awarding the costs.

24. In the present case we find that the costs have been awarded against the Director of Education (Basic) in favour of the petitioner for leading him to believe that he has been validly appointed on compassionate ground and for which he did not seek employment elsewhere. There is no foundation for this presumption, nor do we find that any such facts or circumstances were pleaded by the petitioner. The awarding of cost was not in terms with the settled principles of law, which require observance of the principle of natural justice before directing any amount to be paid by way of penalty.

25. Before parting with this case we may observe that any observations made against an officer, who has not come prepared, as no reasons have been recorded in the order to summon him, on any issue of fact or law to defend himself, made against him in the order, may affect his career and reputation. The Courts are established to protect the rights of persons and not to violate them. It is also settled that no observation should be made against any person in the judgment, which may affect him in any manner in his career. In the matter of "K" a Judicial Officer, In re (2001) 3 SCC 54, the Supreme Court observed that the primary purpose of pronouncing a verdict is to dispose of the matter in controversy between the parties before it. A judge, is not expected to drift away from pronouncing upon a controversy, and to sit in judgment over the conduct of the judicial or quasi judicial authority, or the parties before him and indulge in criticism and commenting thereon, unless such conduct comes, of necessity under review and the expression becomes part of reasoning to arrive at a conclusion necessary to decide the main controversy. So far as possible a judge should avoid derogatory and disparaging remarks. Nonetheless, subtle irony, detectable only by the cognoscenti, is useful in conveying a key point in the reasoning of a judge. Sobriety, cool, calm and poise should be reflected in every action and expression of a Judge. The Special Appeal No. 896 of 2010 filed by

Manish Kumar Rai is dismissed. The Special Appeal No. 750 of 2010 filed by the Director of Education (Basic), U.P. Lucknow is allowed. The orders awarding cost against him are set aside. We expunge the observations made by the learned Single Judge against the Director of Basic Education. These observations shall not used against him in the Department, or for any purpose.