
(2011) 04 AHC CK 0072
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No's. 61552 and 66596 of 2008

Naushad Alam

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-04-2011

Acts Referred:

Constitution of India, 1950 — Article 13(1), 13(2), 29, 30, 30(1)
Uttar Pradesh Intermediate Education Act, 1921 — Section 16F, 16FF, 9(4)

Citation : (2011) 4 ADJ 609

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Judgement

Sudhir Agarwal, J.—Both these matters relate each other and hence are being decided by this common judgment.

2. Writ Petition No. 61552 of 2008 is directed against three orders. One is dated 18th August, 2008 (Annexure 5 to the writ petition) whereby District Inspector of Schools, Azamgarh (hereinafter referred to as "DIOS") Respondent No. 3 has informed Manager, Shibli National Inter College, Azamgarh (hereinafter referred to as "College" that proposal for appointment of Naushad Alam (Petitioner) on the post of Assistant Clerk is being disapproved since matter of compassionate appointment in the aforesaid College is pending.

3. Second impugned order in this writ petition is dated 23rd August, 2008 whereby DIOS has invited applications for appointment on compassionate basis against existing vacancies which included the vacancy in question i.e. of Assistant Clerk occasioned due to retirement of Sri Abdul Qadeer. The third order is dated 18th August, 2008 whereby DIOS has recommended Respondent No. 6 (Atharu Ebad) for appointment on the post of Assistant Clerk in the vacancy in question in the College directing the competent authority to issue letter of appointment forthwith.

4. Learned Counsel for the Petitioner contended that in view of proviso to Regulation 103 of Chapter III, right to claim compassionate appointment in not

available to the heirs of the employees of minority institution and hence impugned orders are wholly illegal and void ab initio.

5. No counter affidavit has been filed on behalf of Respondent Nos. 1 to 3. The Respondent Nos. 4 and 5, however, have filed counter affidavit through Sri S.K. Anwar Advocate. It is said that a Selection Committee was constituted by Committee of Management consisting of the following:

1. Sri Abu Saad Ahmad (President)
2. Sri Shamim Ahmad (Secretary).
3. Wasi Uddin (Joint Secretary)
4. Sri Niyaz Ahmad Jamili (Manager)
5. Sri Abu Mohd. Khan (Principal)

6. The committee interviewed 11 candidates including the Petitioner as well as Respondent No. 6 for the post in question and prepared merit list. It found that only two candidates i.e. Petitioner and one Mohd. Shahid were conversant with typing which was the essential qualification and accordingly made recommendation-in favour of the Petitioner pursuant whereunto the resolution was passed by Managing Committee for appointment of Petitioner as "Assistant Clerk".

7. It is said that DIOS has no authority under law to interfere in appointment of the teaching and non-teaching staff in a minority institution. Regulations 101 to 107 do not apply to minority institutions. It is said that any other view would make the Regulations violative of Article 30 read with Sections 16-F and 16-FF of U.P. Intermediate Education Act, 1921 (hereinafter referred to as the "Act 1921").

8. Respondent No. 6 initially filed a short counter-affidavit through Sri J.P. Singh, Advocate stating that his father late Sri Ali Ebad was Lecturer (Urdu) in the College and died on 30th December, 2006. His application for compassionate appointment was forwarded by Manager of the College to DIOS on 23rd June, 2007. The Principal also forwarded name of Respondent No. 6 for compassionate appointment to DIOS on 26th June, 2007. When the matter was pending, new manager, who was interested in fresh appointment, proceeded to hold selection and fixed 5th June, 2008 for interview. DIOS, in the circumstances, issued a letter on 4th June, 2008 directing Manager not to hold any selection on 5th June, 2008, but ignoring thereto, selection proceedings were completed and resolution was passed in favour of Petitioner. He however admits that he knows little typing but claims that relaxation in the matter of requisite qualification is provided in the rules.

9. A detailed counter affidavit has also been filed by Respondent No. 6 where also similar averments have been made.

10. Learned Counsel for the Petitioner contended that Regulation 103, which

provides a right to the dependent of a deceased employee to claim appointment on compassionate basis specifically says that such provisions shall not be applicable to minority institution.

11. However, there was an amendment by notification dated 9th August, 2001 whereby the proviso to Regulation 103 was repealed and a new regulation without proviso was substituted. Regulation 103 before notification dated 9th August, 2001 and as it stand subsequent to notification dated 9.8.2001 is reproduced as under:

Prior to 9.8.2001

103. Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure, dies during service period, then one member of his family, who is not less than eighteen years in age, can be appointed on the post of teacher in trained graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment:

Provided that anything contained in this regulation would not apply to any recognised aided institution established and administered by any minority class.

Explanation. - For the purpose of this regulation "member of the family" means widow or widower, son, unmarried or widowed daughter of the deceased employee.

Note. - This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after 1 January, 1981.

On & After 9.8.2001

103. Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure, dies during service period, then one member of his family, who is not less than eighteen years in age, can be appointed on the post of teacher in trained graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment:

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Note. - This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after 1 January, 1981.

Thus the real distinction between two above is the "proviso".

12. The validity of notification dated 9th August, 2001 deleting proviso to Regulation 103 came to be challenged in writ petition Committee of

Management, MAH Inter College and Anr. v. District Inspector of Schools, Ghazipur and Ors. 2002 (2) UPLBEC 1742. This Court held the said notification violative of Article 30 of the Constitution and hence quashed the same.

13. It is thus contended that earlier Regulation continued to operate, and, hence no right was available to an employee, teaching or non teaching, of minority institution, to claim a vested right of compassionate appointment therefore, the impugned orders are wholly illegal and without jurisdiction.

14. Per contra, learned Counsel appearing for Respondents No. 6 stated that decision of learned Single Judge in Committee of Management, MAH Inter College and Anr. (supra) came to be considered by a Division Bench in Civil Misc. Writ Petition Nos. 12157 of 2003 with 33298 of 2002 (Governing Body of the Registered Society Designated as St. Andrew's College Association, Gorakhpur v. State of U.P.) decided on 27th August, 2003 and the Division Bench expressed its disagreement with the view of the Hon'ble Single Judge. Hence, it is contended that decision of Hon'ble Single Judge in Committee of Management MAH Inter College (supra) stood overruled by the Division Bench judgment. In the existing provisions, right to compassionate appointment is available to all irrespective of the nature of institution. It is thus contended that no interference is called in the orders impugned in this writ petition.

15. Having heard Sri J.A. Azmi for the Petitioner, learned Standing Counsel for Respondent No. 3, Sri S.K. Khurshid Anwar for Respondent Nos. 4 and 5; and, Sri J.P. Singh for Respondent No. 6, in my view, the short question up for consideration would be, "whether the decision of Hon'ble Single Judge in Committee of Management M.A.H. Inter College (supra) in so far as it quashed the notification dated 9th August, 2001 survive with respect to the consequences of its decision on notification dated 9th August, 2001; and; what is the effect of disagreement expressed by the Division Bench in St. Andrew College Association (supra).

16. If the answer comes in favour of the Petitioner, no further enquiry may be necessary in the case in hand.

17. The Hon'ble Single Judge in Committee of Management M.H. Inter College (supra) having considered the issue observed in paras 23, 27 and 28 of the judgment as under:

23. The question now arises as to what relief is to be granted. Two options are open. One that the provisions of Regulations 103 to 107 be read down as in applicable to minority institutions and to quash the recommendations made by the District Inspector of Schools and the other: to also strike down the notification dated 9.8.2001 impugned in this writ petition. It has already been held that if the Regulations are applied to a minority institution they would infringe Article 30(1) read with Article 29 and, therefore, the recommendations made by the District Inspector of Schools are liable to be quashed.

27. As the notification substituting the new Regulation 103 only repeals the proviso and otherwise re-enacts the old Regulation entirely has the effect of creating confusion about the true legal position on the issue of minority rights, it is necessary to strike down it and not merely to read down the provisions of Regulations 103 to 107 as inapplicable to minority institutions. It does not require emphasis that subordinate legislation by the notification on an issue so sensitive as minority rights without application of mind and which does not, according to the admission of the State itself bring out the true intention casts doubt upon the bona fides of the Government itself upon the minority question and cannot be tolerated to exist.

28. In the result, both the writ petitions are allowed. The Notification No. 5834/15-7-2 (1)/90, dated 9th August, 2001 (Annexure-1) and also the order of the District Inspector of Schools, Ghazipur dated 27.12.2001 in Writ Petition No. 4308 of 2002 are quashed and the order dated 8.11.2001 (Annexure-4) passed by the District Inspector of Schools. Muzaffarnagar and the notification dated 9.8.2001 (Annexure-5) in Civil Misc. Writ Petition No. 43328 of 2001 are quashed.

18. It is not disputed by learned Counsels for the parties that the very notification dated 9th August, 2001, which was issued to bring about an amendment by substitution in Regulation 103 was challenged in the above matter and has been quashed by Hon"ble Single Judge.

19. Learned Counsel for the parties also stated that the judgment attained finality since it was not taken in appeal either by filing an intra Court appeal or before the Apex Court. The result of the judgment therefore is that notification dated 9th August, 2001, whereby amendment was made in Regulation 103 Chapter III of Regulations framed under U.P. Intermediate Education Act, 1921 stood quashed and no longer survive.

20. The matter before Division Bench in St. Andrew's College Association (supra) pertain to higher education and statute 39 Chapter 23 of statutes of Gorakhpur University was up for consideration before Division Bench which itself did not make any distinction in the matter of dying in harness appointments in the colleges governed by the said statute but it was contended that said statute has to be read in a manner so as to apply only to general institutions and not to minority institutions otherwise it would be violative of Articles 29 and 30. The Division Bench considered the matter and observed that the said restriction would be applicable so far as Teaching posts are concerned but cannot be applied to Class III and Class IV posts. In this regard decision of Hon"ble Single Judge, which relates to Secondary Educational institutions, governed by Act 1921 Act, was considered and in para 15 of the judgment, the Division Bench said as under:

15. Learned Counsel for the Petitioner has invited our attention to the decision of a learned single Judge of this Court in Committee of Management, M.A.H. Inter College and Another Vs. District Inspector of Schools, Ghazipur and Others, in which a contrary view has been taken by the learned single Judge. The learned

single Judge was of the view that since an appointment on compassionate grounds is not made on merit since there is no competition with the candidates from the open market hence it cannot be said that a direction for making such appointments in minority institutions will be conducive to efficiency and standards of education in the said institution. We respectfully disagree with the reasoning given by the learned single Judge. As held by the Supreme Court in TMA Pai's case (supra) a regulation for the welfare of teacher does not infringe the right of a minority institution under Article 30 of the Constitution. We do not see how appointment on a Class III or Class IV post will affect the standard of education in a minority institution. After all, a Class III post is not a teacher's post.

21. Having said so, the Division Bench in paras 19, 20 and 21 said as under:

19. As regards the decision of the Supreme Court in N. Ammad v. Manager, Emjay High School 1998 (6) SCC 764, all that has been held in that decision is that the management has full freedom to appoint any person as Head Master. This again has nothing to do with compassionate appointment on a Class III post. Hence this decision is also distinguishable.

20. We see no reason why humanitarian regulations, such as the kind which has been impugned in this petition, cannot be made for minority institutions. We cannot see how such humanitarian measures of the kind with which we are dealing in this petition can be said to infringe the right under Article 30 of a minority institution.

21. It may have been a different matter if the compassionate appointment was sought to be made on the post of Head Master or teacher, and there it possibly could have been said that this infringes the right of the minority institution under Article 30 of the Constitution. Since teaching work is certainly related to the standard of education imported. That is not the case here. Here we are concerned with an appointment on a Class III post in a minority institution on compassionate ground. We see no violation of Article 30 of the Constitution in such a case, or in case of a Class IV post.

22. It is thus evident that reasoning followed by Hon''ble Single Judge in Committee of Management, MAH Inter College (supra) to quash the notification dated 9th August, 2001 were not approved by the Division Bench in St. Andrew's College Association (supra) and the Division Bench expressed its disagreement with the said reasoning. The said disagreement has been noticed specifically in the following words:

We respectfully disagree with the reasoning given by the learned Single Judge.

23. It is no doubt true that decision to this extent of Hon''ble Single Judge cannot be said to be a good law any longer after the aforesaid Division Bench judgment but the question up for consideration in this case is entirely different. The Division Bench judgment would not operate as to had the effect of setting aside

the Hon"ble Single Judge's decision in Committee of Management, MAH Inter College (supra) since the Division Bench judgment was not passed in appeal arising out of the aforesaid Hon"ble Single Judge's judgment but it was in a different matter governing different statute and different context. Therefore, so far as decision of Hon"ble Single Judge is concerned, the orders or provisions, which have been quashed or declared illegal therein, would not revive. The judgment of Hon"ble Single Judge having attained finality would take within its sweep whatever has been done therein. This effect could have been nullified only in appeal and not otherwise. The notification dated 9th August, 2001 having been quashed by the Hon"ble Single Judge in Committee of Management, MAH Inter College (supra) it would not stand revived by the Division Bench decision in St. Andrew's College Association (supra) which has nothing to do either with the Secondary Educational Institutions or U.P. Intermediate Education Act, 1921 or Regulation 103 mentioned in notification dated 9th August, 2001 which purported to have been issued u/s 9(4) of Intermediate Education Act, 1921 since the Division Bench was only concerned with a case pertaining to higher educational institutions governed by the U.P. State Universities Act, 1973 and the statutes framed thereunder i.e. Gorakhpur University Statute.

24. Now, the second aspect, whether declaration of an amending provision would have the effect of revival of old provision or it stood wiped out from the statute book. This has to be seen in the light of the decision whereby the provision has been struck down. Whenever a statute, whether principal or subordinate legislation, is struck down, being violative of provisions of the Constitution, and in particular fundamental rights under Part III of the Constitution, in view of Article 30(2) of the Constitution, such a statute is void ab initio. It is like a stillborn provision incapable of repeal or substitution of an existing provision.

25. In *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, considering the doctrine of still-born piece of legislation a Constitution Bench said,

If a law is on a field not within the domain of the legislature, it is absolutely null and void, and a subsequent cession of that field to the legislature will not have the effect to breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment.

26. In *Saghir Ahmad Vs. The State of U.P. and Others*, the Court examined challenge to the Constitutional validity of U.P State Transport Act, 1951 under which the State was enabled to run Stage Carriage Service to the exclusion of others. In exercise of its power under the Act, the State Government made a declaration extending the act to a particular area and frame a scheme for operation of the stage carriage service on certain routes. At the relevant time the

State did not have the power to deny citizen of his right to carry on transport service. However, after the Constitution (First) Amendment Act of 1951, the State became entitled to carry on any trade or business either by itself or through Corporation owned or controlled by it to the exclusion of private citizens wholly or in part. One of the question raised was whether the Constitution (First) Amendment Act could be invoked to validate an earlier legislation. The Court held that the Act was unconstitutional at the time of enactment and therefore it was stillborn and could not be vitalized by a subsequent amendment of the Constitution removing the constitutional objection and must be re-enacted. Hon"ble Mukherjea, J. speaking for the Court referred to Prof. Cooley in his work on "Constitutional Limitations" (Vol. I page 384) and said:

a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted.

The Hon"ble Court further observed that it is of the view that this is a sound law.

27. This view was reiterated in *Deep Chand v. The State of U.P. and Ors.* AIR 1958 SC 648, where the Court said that a plain reading of Article 13(2) indicates, without any reasonable doubt, that prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still-born law.

28. Again another Constitution bench in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, reiterated the above view in para 22 of the report. It says,

..it must be held that unlike a law covered by Article 13(1) which was valid when made, the law made in contravention of the prohibition contained in Article 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse.

29. This has been followed recently in *Rakesh Vij Vs. Dr. Raminder Pal Singh Sethi and Others*,

30. In the case in hand, Hon"ble Single Judge in his judgment dated 30th April, 2002 held the amendment sought to be brought in Regulation 103 by notification dated 9th August, 2001 violative of Article 30 of the Constitution, and in fact, had quashed the same. That being so, unless the judgment is set aside, its effect i.e. quashing of notification, would continue, meaning thereby, Regulation 103, as it was existing and operating before the issuance of notification dated 9th August, 2001 would continue to hold the field.

31. That being so, since there is a clear provision by way of proviso to Regulation 103 that the provision pertaining to compassionate appointment would not apply to minority institutions, in my view, DIOS had no authority or jurisdiction to direct the Management of the College to make appointment from a claimant of compassionate appointment. The college Management therefore had rightly

made its selection. In the absence of any other reason, the same could not have been disapproved only on the ground that a candidate claiming compassionate appointment had to be appointed on the post in question.

32. In the result, the writ petition No. 61552 of 2008 is allowed. The impugned order dated 18th August, 2008 (Annexure 5 to the writ petition) is hereby quashed. The DIOS is directed to consider the proposal and resolution of management of the college afresh with respect to the selection for appointment of Petitioner on a Class III post in accordance with law and in the light of the observations made above and to pass a fresh order with regard to his financial approval within one month from the date of production of a certified copy of this order, after giving due opportunity of hearing to all concerned parties.

33. Writ petition No. 66596 of 2008 has been filed by Atharul Ebad, Respondent No. 6 in writ petition No. 61552 of 2008, seeking a mandamus directing Respondent No. 3 to take steps for implementation of his orders dated 18th August, 2008 and 31st August, 2008, the two orders, which have been challenged by Naushad Alam in Writ Petition No. 61552 of 2008.

34. Since the orders dated 18th August, 2008 and 31st August, 2008 are quashed, writ petition No. 66596 of 2008 must have to fail. It is accordingly dismissed.

35. There shall be no order as to costs.