

(1997) 12 AHC CK 0103
In the Allahabad High Court
Case No : C.M.W.P. No. 24908 of 1988

Ram Bahadur

APPELLANT

Vs

District Inspector of Schools, Kanpur Dehat and others

RESPONDENT

Date of Decision : 03-12-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Intermediate Education Act, 1921 — Section 16G

Citation : (1998) 2 AWC 970

Hon'ble Judges : O.P. Garg, J

Bench : Single Bench

Advocate : J.N. Verma, A.K. Sachan, Kalyan Singh and K.K. Tripathi, for the Appellant;

Final Decision : Dismissed

Judgement

O.P. Garg, J.—By means of this writ petition under Article 226 of the Constitution of India, it is prayed that the order dated 9.12.1988 passed by the District Inspector of Schools (for short "D.I.O.S."), Kanpur Dehat be quashed and the respondents be directed not to create any hindrance in the functioning of the petitioner on the post of Daftari in Adarsh Kisan Higher Secondary School. Hanse Mau, Pukhrayan, Kanpur Dehat. Counter and rejoinder-affidavits have been exchanged. Heard Sri J. N. Varma, learned counsel for the petition and Sri K. K. Tripathi, learned counsel for the respondent No. 3 as well as the learned standing counsel on behalf of the D.I.O.S., Kanpur Dehat.

2. Briefly stated, the facts of the case are that a vacancy on the post of Daftari had fallen vacant in the institution, known as Adarsh Kisan Higher Secondary School. Hanse Mau, Pukhrayan, Kanpur Dehat. The petitioner who was working on the post of Peon, having been appointed by Committee of Management in the year 1982, was promoted on the post Daftari and a proposal for approval of his appointment on promotion as Daftari was sent to D.I.O.S., Kanpur Dehat on 3.12.1985. The requisite approval was granted by the D.I.O.S. on 5.3.1986

(Annexure-1 to the writ petition). Respondent No. 3-Vidya Sagar, who is also a Peon in the same institution, challenged the appointment of the petitioner as Daftari and made a representation to the D.I.O.S. on 30.3.1986. The representation of the respondent No. 3-Vidya Sagar was allowed and by order dated 9.12.1988 (Annexure-2 to the writ petition), the appointment of the petitioner on the post of Daftari was cancelled and it was directed that the respondent No. 3--Vidya Sagar shall be appointed on the post of Daftari in the pay scale of Rs. 315-440 on the ground that respondent No. 3 was senior to the petitioner as he was appointed on 1.7.1981 while the petitioner was appointed as Peon on 5.10.1982. It is this order dated 9.12.1988. which has been challenged by the petitioner in the present writ petition.

3. The case of the petitioner, in brief, is that the respondent No. 3 was not entitled to be promoted to the post of Daftari as there were certain complaints against him and adverse remarks were Incorporated in his service record ; that he was only a Vth class pass while according to the petitioner, he had appeared in the High School Examination and after perusing his service record, the Committee of Management has promoted him on the post of Daftari. It was also urged that the D.I.O.S., Kanpur Dehat having once granted approval to the promotion of the petitioner, had no authority or jurisdiction to cancel or review the said order and, therefore, the impugned order dated 9.12.1988 is illegal.

4. In his counter-affidavit, Vidya Sagar, respondent No. 3 has taken the plea that for promotion to the post of Daftari. the essential requirements were that the incumbent sought to be promoted must be the seniormost class IV employee, that he has put in five years continuous service. It was also asserted that the respondent No. 3 had appeared in the High School Examination as a private candidate and his Roll Number was 130580. According to respondent No. 3, the petitioner was promoted to the post of Daftari without his knowledge and when he came to know that the petitioner has been promoted and his salary for the promoted post of Daftari is being drawn, he immediately moved the D.I.O.S., Kanpur Dehat by making the representation on 10.3.1986, which was followed by a number of reminders.

5. It is an indubitable fact that the respondent No. 3 is senior in service to the petitioner. The petitioner was appointed in 1982 while the respondent No. 3 was appointed on 1.7.1981. In the seniority list, which is contained in Annexure C.A.-1 to the counter-affidavit of respondent No. 3. the name of the petitioner appears at serial number 16 and his date of appointment has been recorded as 5.10.1982 while the respondent No. 3 is placed at serial number 14 and his date of appointment is mentioned as 1.7.1981. Undoubtedly, the respondent No. 3 was senior to the petitioner. There is a Government Order No. 4086/15-8-30, 681 of 1977, dated 10.8.1970. which provides that the seniormost official of class IV cadre should be promoted as Daftari and in case of promotion to the post of Daftari, the employee should have passed Vth class while, if there is direct recruitment to the post of Daftarl, the candidate should be VIIITH class

pass. There is no dispute about the fact that both the petitioner as well as respondent No. 3 were VIIIth class pass. By virtue of the fact that respondent No. 3 was senior to the petitioner, he was entitled to be appointed on the post of Daftari. The appointment of the petitioner in preference to respondent No. 3, who was senior, was, therefore, in flagrant violation of the rules and the Government Orders. Learned counsel for the respondent No. 3 placed reliance on the provisions made in Chapter III (Condition of Service) of U. P. Intermediate Education Act, 1921. In Section 16G of the Act, it is provided that a class IVth employee shall be considered for promotional post if he has put in five years substantive service and that the promotion shall be made on the basis of seniority subject to rejection on the ground of being unfit. In the instant case, the petitioner has admittedly not completed five years continuous substantive service on 3.12.1985, which is the date on which a proposal was sent for approval to his promotion by D.I.O.S. as the petitioner was appointed only on 5.10.1982. Even on the date of approval, i.e., 5.3.1986, the petitioner had not completed five years continuous service. Therefore, promotion of the petitioner on the post of Daftari was bad in law on two specific grounds--firstly, that he had not put in five years continuous substantive service, and, secondly, he was not seniormost class IV employee. The respondent No. 3 was directed to be appointed on 9.12.1988 by the D.I.O.S. On that date, he had completed more than five years" continuous substantive service and since he was the seniormost class IV employee, in any case, senior to the petitioner, he was entitled to promotion to the post of Daftari in preference to the petitioner. These were the considerations which swayed the D.I.O.S., Kanpur Dehat to cancel or review the earlier order of approval dated 5.3.1986 granted in favour of the petitioner.

6. The respondent No. 3 had not lost time in challenging the appointment of the petitioner. The approval to the appointment of the petitioner was accorded on 5.3.1986. The Respondent No. 3 made a representation to the D.I.O.S. on 30.3.1986 and when the D.I.O.S. failed to pass any order, he sent reminders. Ultimately, the D.I.O.S. issued notice to the petitioner, respondent No. 3 and the Principal/Manager of the institution fixing 7.9.88 to produce the relevant records and for hearing, a copy of which is contained in Annexure-C.A. 5 to the counter-affidavit. The submission of the learned counsel for the petitioner that the order dated 9.12.1988 was passed without affording an opportunity of hearing to the petitioner therefore, turns out to be wrong. D.I.O.S. has informed the petitioner also about the representation of the respondent No. 3 and had given an opportunity to appear before him on a particular date on which the matter was to be considered.

7. The learned counsel for the petitioner vehemently argued that the D.I.O.S. has no power to review his order and consequently, by the impugned order dated 9.12.1988 he could not review or recall his earlier order dated 5.3.86. In support of his contention, the learned counsel placed reliance on *Mehar Singh v. D.I.O.S., Saharanpur and others* 1985 UPLBEC 629 (DBj, in which it was observed that it is well settled that review is a creature of statute. There can be no review unless

the law provides for it. There is nothing in the U. P. Intermediate Education Act or the Regulations framed thereunder giving power of review to the D.I.O.S. This case is not of much help to the petitioner for one simple reason that in the said decision, it has been observed that review of an order granting approval by D.I.O.S. is permissible when the order was obtained by fraud or misrepresentation or by mistake. In Havaladar Singh Vs. U.P. Shiksha Nideshak, VII Mandal and Others, it was held with reference to power of review by Deputy Director-that normally Deputy Director has no power to review his order granting approval, but in respect of an order of approval obtained by fraud or misrepresentation, it is open to him to reopen the matter to hold enquiry and set aside the order granting approval. In Committee of Management, Adarsh Inter College, Manikpur v. Director of Education, Higher Secondary, U. P., Lucknow and others 1981 UPLBEC 174 the similar view was taken with regard to the power of review to be exercised by D.I.O.S.

8. I have given thoughtful consideration to the matter and find that D.I.O.S., Kanpur Dehat was not debarred from making an enquiry into the matter, particularly when the respondent No. 3 brought it to his notice that the appointment of the petitioner has been against the provisions of law and the Government Orders. It was within the competence of the D.I.O.S., Kanpur Dehat to make an enquiry into the matter and after satisfying himself that the earlier order dated 5.3.1986 was passed on account of wrong facts and under some misapprehension of facts he could recall or set aside the said order.

9. In the result, I find that the appointment of the petitioner in preference to respondent No. 3 on the post of Daftari by way of promotion was clearly against the provisions of law and the Government Orders. The petitioner was not eligible for promotion as he had not put in five years continuous substantive service on the date on which he was promoted or papers for approval were sent and the actual approval order was issued. The D.I.O.S.. Kanpur Dehat has rightly set aside the order dated 5.3.1986 by a subsequent order dated 9.12.1988 on the representation of the respondent No. 3.

10. The writ petition is devoid of merit and substance. It is accordingly dismissed. The interim order passed on 23.12.1988 in favour of the petitioner is hereby vacated.