

(2013) 05 AHC CK 0195

In the Allahabad High Court

Case No : Writ Petition No. 579 (S/S) of 2008 (with W.P. Nos. 1882 (S/S) of 2001 and 7404 (S/S) of 2006)

Ranvijay Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 08-05-2013

Acts Referred:

Citation : (2013) 05 AHC CK 0195

Hon'ble Judges : Devendra Kumar Upadhyaya, J

Judgement

Devendra Kumar Upadhyaya, J.

The issues involved in these three petitions are intertwined, hence, with the consent of learned counsels appearing for parties they are being decided by the following common judgement and order.

Heard Sri Ramesh Pandey, learned counsel for petitioner in Writ Petition No.579 (S/S) of 2008; Rajvijay Singh vs State of U.P. and others and in Writ Petition No. 1882 (S/S) of 2001, Sri Vinay Tripathi, learned counsel for petitioner in Writ Petition No. 7404 (S/S) of 2006 and Ms. Kirti Srivastava, learned Standing Counsel appearing for State in all the writ petitions.

Sri Vinay Tripathi, learned counsel for Committee of Management does not press the prayer (iii) made in Writ Petition No. 7404 (S/S) of 2006 at this juncture. He prays that the Committee of Management of the Institution concerned may be permitted to raise its grievance regarding creation of post of Lab Assistant before appropriate authority.

To bring home relevant facts of the case, it is to be noticed that Sri Sukhpal Inter College, Tirhut, Sultanpur is an Intermediate Institution duly recognized under the relevant provisions of U.P. Intermediate Education Act. The affairs of the institution are governed by the provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as "Education Act 1921") and Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other

Employees) Act, 1971 (hereinafter referred to as " Payment of Salaries Act 1971") as well as U.P. Secondary Education (Services Selection Board) Act, 1982 (hereinafter after referred to as "Board Act 1982").

The institution has been running since long time and in the year 1984 was accorded recognition under the relevant provisions of Education Act 1921 for admitting its students to the examination conducted by the Board of High School and Intermediate Education, Allahabad, (hereinafter referred to as "Board") for agriculture group in intermediate section. The said recognition was granted to the institution by the Board on 27.06.1984. Pursuant to the recognition granted by the Board for agriculture group of intermediate section of the institution, the District Inspector of Schools by means of his order/letter dated 17.08.1984 gave his permission to run the intermediate classes for agriculture group for the academic sessions 1984-85 i.e. with effect from July, 1984. It seems that the institution started classes for agriculture group and to run the classes, since teachers were required, institution appears to have made certain appointments including appointment of the petitioner. The petitioner was thus, appointed by means of letter dated 01.07.1992 on ad hoc basis as Lecturer Mathematics (agriculture) to impart education to the students of classes 11 and 12 studying in the institution.

The petitioner, though was appointed, was not being paid salary, which necessitated him to file Writ Petition No. 4475 (S/S) of 1994 before this Court. The said writ petition was disposed of finally by means of order dated 30.09.1999 with the direction to the State Government and Director of Education to consider and decide the representation of the petitioner in regard to payment of salary to him as well as the representation regarding creation of posts.

In compliance of the aforesaid order dated 30.09.1999, passed by this Court in Writ Petition No. 4475 (S/S) of 1994, Director of Education passed an order on 15.11.2000 whereby case for creation of posts was rejected on the ground that since in the year 1986 State Government had imposed a ban on creation of posts as such, posts cannot be created. While taking the decision contained in the order dated 15.11.2000, it has further been observed by the Director that since the management of institution has made appointment without creation of post as such, for payment of salary, the State exchequer cannot be saddled with any responsibility; rather it is the management of the institution which is to be held responsible for payment of salary to the petitioner.

The said order dated 15.11.2000 has been challenged by the petitioner in Writ Petition No. 1882 (S/S) of 2001 wherein an order was passed on 02.08.2002 by this Court to make payment of current salary to the petitioner in case he was working. In the said writ petition, yet another order was passed on 23.11.2002 whereby the District Inspector of Schools, Sultanpur was directed to sign pay bills of the petitioner and other teachers of the institution in question for payment of salary.

It has been admitted at bar that pursuant to the aforesaid orders dated 02.08.2002 and 23.11.2002, petitioner is being paid salary, though against another sanctioned post available in another institution.

Sri Ramesh Pandey, learned counsel for petitioner Ran Vijay Singh has stated that since the year 1992 i.e. ever since the appointment of petitioner, he has been working and discharging the functions of his post and has been imparting education of the subject for which he was appointed. He has further submitted that pursuant to the aforesaid two orders passed in Writ Petition No. 1882 (S/S) of 2001, the petitioner is also being paid his salary of the post of Lecturer in Mathematics (agriculture) continuously.

Claiming regularization of his services, petitioner, thereafter, filed a writ petition bearing Writ Petition No.4372 (S/S) of 2007. The claim made by the petitioner in the said writ petition was that he is covered by the cut off date as available under Section 33 (c) of Board Act, 1982, hence, appropriate direction be issued to consider his case for regularization of his services. The said writ petition was disposed of by this Court by means of the order dated 30.07.2007 whereby Joint Director of Education was directed to consider the case of petitioner for regularizing his services under Section 33 (c) of Board Act 1982 in accordance with law.

In compliance of the aforesaid direction issued by this Court vide its order dated 30.07.2007, the matter of regularization of the services of the petitioner was considered by a Committee and the same has been rejected. The decision so taken by the Committee rejecting the claim of petitioner for regularizing his services under Section 33 (c) of the Board Act 1982 as embodied in annexure no.1 appended to Writ Petition No. 579 (S/S) of 2008 has been communicated by the Joint Director of Education, Faizabad Division, Faizabad on 02.01.2008. It is this decision dated 02.01.2008 which is under challenge in Writ Petition No. 579 (S/S) of 2008.

In the said writ petition, apart from challenging the decision dated 02.01.2008 whereby claim of petitioner for regularization of his services has been rejected, petitioner has also prayed that State Government and Director of Education, U.P. be directed to consider the case for grant of sanction of post of Lecturer in Mathematics (agriculture) in the institution. Further prayer has been made that after sanction of the post, case of the petitioner be directed to be considered by the appropriate authority for regularizing his services as Lecturer in Mathematics (agriculture).

These are the details of prayers made in Writ Petition No. 579 (S/S) of 2008 and Writ Petition No. 1882 (S/S) of 2001 filed by the petitioner Ranvijay Singh.

As regards Writ Petition No. 7404 (S/S) of 2006, it is noted that the said writ petition has been filed by the Committee of Management of the institution challenging the order dated 15.11.2000, passed by the Director of Education, U.P. whereby claim of the petitioner Ranvijay Singh for payment of salary has

been rejected and further request for sanction of post has also been rejected (The order dated 15.11.2000 is also under challenge also in Writ Petition No. 1882 (S/S) of 2001 filed by petitioner Ranvijay Singh).

In Writ Petition No. 7404 (S/S) of 2006, besides throwing challenge to the order dated 15.11.2000, a prayer has been made to issue a writ in the nature of mandamus commanding the respondents to sanction nine teaching posts and four nonteaching posts in the institution and further to pay salary to the incumbents working in the institution.

In writ petition no. 7404 (S/S) of 2006, an order was passed on 05.10.2006 directing the Director of Education (Secondary), U.P. to create posts of teaching and nonteaching staff as required under the Rules. In compliance of the aforesaid order dated 05.10.2006, the matter relating to creation of posts appears to have been considered by the Director, who decided the representation made by the Committee of Management of the institution by means of order dated 18.05.2007 as contained in annexure 5 to the writ petition no. 579 (S/S) of 2008. The Director of Education (Secondary) U.P. further wrote a letter on 30.08.2007 to the State Government for sanction of certain posts in the institution in agriculture group. The said letter dated 30.08.2007 is also on record as annexure no.6 appended to the writ petition no. 579 (S/S) of 2008.

From the pleadings available on record in this bunch of writ petitions, the core issue which needs to be addressed is as to whether the stand taken by the State authorities throughout that on account of imposition of ban by the State Government on creation of posts, no posts in agriculture group of institution can be sanctioned, can be sustained legally or not.

First of all, the reason indicated in rejecting the case for creation of posts as contained in impugned order dated 15.11.2000 which is under challenge in Writ Petition No.740 (S/S) of 2006 and also in Writ Petition No. 1882 (S/S) of 2001 needs to be examined. The only reason indicated in the order dated 15.11.2000 for not sanctioning the posts is that there exists a ban on creation of posts imposed by the State Government since the year 1986.

In the counter affidavit filed in Writ Petition No. 579 (S/S) of 2008 again the stand taken by the State Government for not sanctioning the posts is the alleged ban imposed by the State Government on creation of posts.

This Court in Writ Petition No. 579 (S/S) of 2008 passed an order on 20.09.2012 requiring the learned Standing Counsel to seek instructions as to whether the ban imposed in the year 1986 in respect of creation of posts was lifted by any subsequent Government Order or not ?

In response to the aforesaid order dated 20.09.2012, a supplementary counter affidavit dated 27.11.2012 has been filed by the learned Standing Counsel which is sworn in by Sri Raj Shekhar Singh, District Inspector of Schools, Sultanpur wherein it has been submitted that by means of Government Order dated

09.12.1986, the State Government has imposed a ban on creation of any kind of posts in intermediate institution. Thus, consistently since the year 2000 till date the only stand taken by the State respondents is that on account of ban imposed by the State Government by means of order dated 09.12.1986, the post being sought to be created by the petitioner Ranvijay Singh and Committee of Management of the institution cannot be sanctioned.

Learned counsel for petitioner heavily relied upon the judgement of Hon'ble Apex Court in the case of Lal Bahadur Shastri Smarak Junior High School and another vs State of U.P. and others, reported in 2002 (2) UPLBEC, 1840 wherein appeal filed by the institution before the Hon'ble Apex Court challenging the judgement and orders passed by the Hon'ble Single Judge and by the Division Bench of this Court in Special Appeal was allowed and judgements of Hon'ble Single Judge and the Division Bench of High Court were set aside and appropriate directions were issued to the State authorities to consider the request of institution for sanction of additional posts of teacher in accordance with norms set out in the government orders and other executive instructions.

Paras 6 and 7 of the aforesaid judgement of Lal Bahadur Shastri Smarak Junior High School and another (supra)] are relevant to be quoted herein below.

"6. The High Court also did not considered the matter on merit but dismissed the writ petition and the special appeal merely on the ground that the writ petitioners had no right to get sanction of the additional posts of Teachers. The High Court failed to take note of the fact that the additional sections had been sanctioned by the departmental authority. Thereafter, to say that the management cannot claim extra posts is, in our view, contradictory and against maintenance of proper standard of teaching in educational institutions. Financial sanction of the Government may be an administrative precondition for the Director which he should have obtained but that cannot be accepted as the sole ground for rejecting the request of the management for the additional posts in the context of the sanction of additional sections.

7. At the cost of repetition it may be stated that all relevant aspects of the matter have not been considered by the Director while passing the order rejecting the appellants' request for additional posts of Teachers. The High Court also did not consider the matter on merits and dismissed the writ petition/special leave on the technical ground of want of enforceable right of the writ petitioner/appellants. The order passed by the Director as well as the judgements of the High Court are unsustainable. Therefore, the orders passed by the High Court dismissing the writ petition and special appeal are set aside, the writ petition is allowed and the order of the Director of Education (Basic), Uttar Pradesh dated 13.08.1998 is quashed. The Director will consider the request of the appellants' school for sanction of additional posts of Teachers for the extra sections sanctioned, in accordance with the norms set out in the Government Orders and executive instructions which were prevailing when the request of the management of the school was received in his office and pass a reasoned order

within three months from the date of the receipt of the intimation of this order. The director will give opportunity of hearing to the management of the school or its representative before passing the order."

In the said case, fact was that claim of the institution for creation/sanction of post was rejected by the Hon''ble Single Judge of this Court and also by the Division Bench of this Court in a Special Appeal merely on the ground that writ petitioner had no right to get additional posts of teachers sanctioned. However, Hon''ble Apex Court while striking down the judgements of this Court has further observed that High Court failed to take note of the fact that additional sections had been sanctioned by the departmental authorities. The Hon''ble Apex Court has further noted that financial sanction of the government may be an administrative precondition which needs to be obtained but absence of administrative financial sanction cannot be accepted as the sole ground for rejecting prayer of the institution to sanction additional post in the background of the fact of sanction of additional sections.

Learned Standing Counsel taking shelter in a Full Bench judgement of this Court in the case of Gopal Dubey vs District Inspector of Schools, Maharajganj and another, reported in 1999 (35) Allahabad Law Report, 191, has vehemently stated that in accordance with the law laid down by the full bench of this Court, no mandamus can be issued by this Court in exercise of its jurisdiction under Article 226 of Constitution of India for creation of posts for the reason that creation/sanction of posts is subject which lies exclusively in the domain of executive authorities.

Learned Standing Counsel appearing for State further submitted that in view of ban imposed by the State Government by means of Government order dated 09.12.1986, it is not open to any authority to create or sanction post irrespective of the fact that permission to run classes or sanction for additional sections in intermediate classes for agriculture group has been accorded in the present case.

Dealing with the arguments of learned Standing Counsel based on the aforesaid full bench judgement in the case of Gopal Dubey (supra), it may be noticed that issue engaging attention of the full bench in the case of Gopal Dubey (supra) appears to be different than the issue which engages attention of this Court in the present bunch of writ petitions.

The question which was answered by the full bench in the case of Gopal Dubey (supra) was as to whether on recognition being granted by the Board in respect of a subject in an institution under Section 7(A) of Education Act 1921, will it be presumed that the post of lecturer in such subject stands sanctioned by the Director of Education under Section 9 of Payment of Salaries of Act,1971 or not.

Learned counsel for petitioner replying to the arguments raised by learned Standing Counsel based on judgement in the case of Gopal Dubey (supra) states that he does not dispute the proposition of law laid down by the full bench in the aforesaid case. However, his submission is not based on the premise that on

account of recognition granted to the institution for agriculture group, post would be presumed to have been sanctioned under Section 9 of Payment of Salaries Act, 1971. His further submission is that Section 9 of Payment of Salaries Act, 1971 empowers the Director of Education to accord previous approval for creation of new post of teacher which exercise appears to have been under taken and completed by the Director as is reflected by the decision dated 18.05.2007 and the letter dated 30.08.2007 as contained in annexure nos.5 and 6, respectively to the writ petition no. 579 (S/S) of 2008. He further submitted that the decision dated 18.05.2007 has been arrived at by the Director after considering each and every relevant aspect of the matter and the Director, taking into account all the relevant factors, has sent the proposal to the State Government giving justification for creation of posts.

Taking into account the law laid down by the full bench in the case of Gopal Dubey (supra), the Court is of the opinion that the ratio declared by the full bench in the said case does not have any application to the facts of the instant case for the reason that it is not a case of the petitioner that merely because of recognition granted to agriculture section and because of previous sanction accorded for running the classes, the post shall stand created under Section 9 of Education Act, 1921 and thus, he is entitled for salary.

The petitioner's submission is based on the provisions of Section 9 of Payment of Salaries Act, 1971 and accordingly learned counsel for petitioner vehemently argues that in view of the proposal sent by the Director to State Government by means of decision dated 18.05.2007 and the letter dated 30.08.2007 as contained in annexure nos.5 and 6 respectively to the writ petition no. 579 (S/S) of 2008, it would be appropriate to direct the State Government to take a decision for the reason that the only ground being taken by the State authorities for not sanctioning the post is the alleged ban dated 09.12.1986.

The Court finds itself in agreement with the argument advanced by learned counsel for petitioner. Judgement of the full bench in the case of Gopal Dubey (supra) concerns itself with the question referred to full bench as to whether there will be presumption of sanction of post under Section 9 of Payment of Salaries Act, 1971 in case the recognition under Section 7 (A) of the Education Act, 1921 has been accorded coupled with the sanction for opening the new section.

In the instant case, justification for creation/sanction of post has already been considered by the appropriate authority i.e. Director of Education in terms of Section 9 of Payment of Salaries Act, 1971. The said consideration is embodied in the decisions dated 18.05.2007 and 30.08.2007 as contained in annexure nos. 5 and 6 respectively to the writ petition no. 579 (S/S) of 2008 and as such the judgement in the case of Gopal Dubey (supra) does not have any application to the facts of instant case.

In the case of Lal Bahadur Shastri Smarak Junior High School and another

(supra), absence of financial sanction of government as the sole ground for rejecting the prayer for sanction/creation of additional post was not accepted by the Hon''ble Apex Court. In the case of Gopal Dubey (supra), full bench has made it open to the Committee of Management to send proposal to the Director for grant of approval to the post in question in the said case.

A reference can also be made to another division bench judgement of this Court in the case of Rajesh Yadav and another vs Director of Education (Madhyamik) U.P.Allahabad and others, reported in 2009 (27) LCD 292, wherein while noticing the judgement of full bench in the case of Gopal Dubey (supra), the Division Bench in para 10 has observed as under.

"10. When the State is overseeing the education and clearing a post and making the payment, it is not a mechanical exercise. It is the duty of the officers of the State also to look into apart from the Committee of Management, to find out as to whether particular subject is really being taught or not. If the subject is being taught from 1969 to 1993, prima facie it appears that there was a need of teacher and surely, thereafter the appellant no.1 continued until the writ petition was disposed of."

The opposition or resistance on behalf of State for not considering creation of post even in the wake of proposal sent by the Director dated 18.05.2007 and 30.08.2007 is difficult to be approved for the reason that the recognition for running the agriculture group in the institution was accorded by the Board way back in the year 1984/1985 and permission to run the classes was given by the District Inspector of Schools in the same year.

Since 1984 till date several batches of students having been imparted education in agriculture group would have appeared in the examination and passed the same. It is true that as a matter of right neither an institution nor the teacher working in the institution can claim creation or sanction of the post. However, in case of intermediate institution in the State of U.P., area of sanction of post is covered by statutory provisions contained in section 9 of Payment of Salaries Act, 1971 which states that no institution shall create a new post of teacher or other employee except with the previous approval of the Director or such other officer as may be empowered in that behalf by the Director. Since creation of post saddles the State with statutory liability to make payment of salary under the scheme of Payment of Salaries Act, 1971, as such, administrative financial sanction of the State Government may be required. However, appropriate authority for judging the justification etc. for creation/sanction of post under the scheme of Payment of Salaries Act, 1971 is the Director of Secondary Education under Section 9 of the said Act.

In the instant case, the Director has already considered the matter and sent a proposal to the State Government not once but twice, vide his decision dated 18.05.2007 and the letter dated 30.08.2007. A perusal of the decision dated 18.05.2007 does not leave any room of doubt that Director on the basis of

material available before him has recorded his satisfaction as regards the justification of the post in question. The Director after considering the case has sent proposal to the State Government for according its concurrence/sanction.

On a conscious consideration of the facts of the instant case and looking into the statutory provisions contained in Section 9 of Payment of Salaries Act and also into the fact that the only reason indicated in the stand being taken by the State authorities for noncreation of post is the alleged ban imposed by the State Government on 09.12.1986, I am of the considered opinion that the matter needs to be considered and decided by the State Government in view of the observations made by the Hon''ble Apex Court in the case of Lal Bahadur Shastri Smarak Junior High School and another (supra) wherein the Hon''ble Apex Court has not accepted absence of financial sanction of the State Government as the sole ground for rejecting the request of management for sanction of additional posts in the institution in the background of sanction of additional sections.

As regards the claim of petitioner for being regularized, it is noticeable that in absence of any sanctioned post, his service could not be regularized even though he may be covered under the provision of 33 (c) of Board Act, 1982.

In view of the discussions made and the reasons given above, the instant bunch of writ petitions is disposed of with the following directions:

(1)State Government will take a decision for according the administrative financial sanction for creation/sanction of posts, as per decision of the Director of Education (Secondary) dated 18.05.2007 and the letter dated 30.08.2007 written by him to the State Government (annexures 5 and 6 appended to writ petition No. 579 (S/S) of 2008) in light of observations made above in the body of this judgement.

(2)Till final consideration of the matter of sanction/creation of posts, the petitioner shall be continued to be paid salary of the post as is being paid to him today in accordance with law.

(3)In case the State Government decides to create/sanction the post in question, case of the petitioner shall be considered for regularization of his services under Section 33 (c) of Board Act, 1982.

(4)The Committee of Management of the Institution shall be at liberty to make a representation to the appropriate authority relating to its grievance for creation of one post of Lab Assistant in Science group of high school section. If such a representation is made, the same shall be considered by the appropriate authority within a reasonable time.

There will be no order as to cost.