

(2009) 07 AHC CK 0082
In the Allahabad High Court

Ravindra Nath Kushwaha

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 14-07-2009

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 33C

Citation : (2009) 4 AWC 4045

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Arun Tandon, J.—Heard learned Counsel for the petitioner and learned standing counsel for the State-respondents.

2. Petitioner before this Court claims to have been appointed on ad hoc basis against a vacancy caused in L.T. grade on account of retirement of one Harish Chandra Srivastava on 30th June, 1991. According to the petitioner an advertisement was published by the Committee of Management of the Institution, D.A.V. Intermediate College, Meerapur, Allahabad for ad hoc appointment against said vacancy. The petitioner, who was possessed of the prescribed qualification applied in response thereto. He was placed at serial No. 1 in the merit list prepared by Selection Committee. The Management of the institution passed a resolution dated 15th March, 1992 offering ad hoc appointment to the petitioner. The petitioner was infact issued an appointment letter by the Management on 17th March, 1992. Papers qua appointment of the petitioner were forwarded to the District Inspector of Schools, Allahabad for grant of financial approval. The District Inspector of Schools vide order dated 1st June, 1992 refused to accord financial approval to the appointment of the petitioner and directed as follows:

mDr ifjizs{; esa vki }kjk izLrkfor mDr rnFkZ fu;qfDr vLohdkj dh tkrh gS A ;fn
blds foijhr vH;FkhZ vH;FkhZ dks dk;Zjr dj;k tkrk gS rks mlds osrukfn ds fy, izcU/

k ra= mRrjnk;h gksxk A

3. This order of the District Inspector of Schools dated 1st June, 1992 was subjected to challenge before this Court by the petitioner vide Civil Misc. Writ Petition No. 24533 of 1992, Ravindra Nath Kushwaha v. District Inspector of Schools and two Ors. In the said writ petition petitioner was granted an interim order dated 14th July, 1992, which provided that the District Inspector of Schools may pass suitable orders qua claim of the petitioner for salary, inasmuch as in the meantime ban imposed on ad hoc appointment had been removed. The District Inspector of Schools is stated to have passed an order dated 20th January, 1993, which provided for payment of salary to the petitioner with reference to the interim order of this Court dated 14th July, 1992. In the last two lines of the order the District inspector of Schools, it is specifically recorded as follows:

;g Hkqxrku ekuuh; mPp U;k;y; ds ;kfpdk la0 24533@92 eas ikfjr vxzslj vkns"k@fu.kZ; ds v/khu gksxk A

4. Petitioner was however, advised to get the writ . petition dismissed as not pressed, The writ petition was so dismissed under order of this Court dated 23rd January, 2009 (A copy whereof is enclosed as Annexure-16 to the writ petition).

5. Petitioner has now approached this Court by this petition for a writ of mandamus commanding the respondents to consider the claim of the petitioner for regularization in view of Section 33C of the U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as the "Act, 1982").

6. On behalf of the petitioner it is contended that petitioner got the writ petition dismissed as not pressed only because of an assurance held out by the Regional Joint Director of Education, Allahabad Region, Allahabad that his claim for regularisation shall be considered, if he withdraws the writ petition. Reference in that regard is made to paragraph-3 of the withdrawal application alongwith an affidavit enclosed as Annexure-15 to the writ petition, which reads as follows:

3. That now the respondent authorities have assured the petitioner that in case the petitioner withdraw the instant writ petition he will be regularised as per Section 33C (1) of U.P. Act No. 5 of 1982 as inserted vide U.P. No. 25 of 1998.

7. The authorities are not considering the claim of the writ petitioner for regularization. Hence, this petition.

8. I have considered the submissions made by the learned Counsel for the petitioner and have gone through the records of the present writ petition.

9. The Hon"ble Supreme Court of India in the case of Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur through its Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another, has specifically held that if a teacher is working under an interim order of the Court,

there can be no change of status because of such working under interim order. For ready reference paragraph-6 reads as follows:

6 ... But the crucial question is whether the respondent was continuously serving the institution under Clause (c) of Section 33B (i)? Admittedly, the service of the respondent came to be terminated w.e.f. 30.6.1988 though he had obtained the stay order and continued to be in service, it was not by virtue of his own right under an order of appointment, he continued in the office with permission of the management...

10. It is settled that if a writ petition is dismissed, it is to be presumed that the interim order was never granted, inasmuch as interim order merges in the final order Reference *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras*, It therefore, logically leads to the position, as was prevailing on the date the interim order was passed, being restored back in the eyes of law.

11. In view of the law laid down by the Hon"ble Supreme Court of India what results with the dismissal of the first writ petition filed by the petitioner is that order of the District Inspector of Schools refusing to accord financial approval to the appointment of petitioner, dated 1st June, 1992 with a further condition that if the Committee of Management takes work from the petitioner, responsibility of payment of salary shall be upon the Management is restored. The order stands on record, as it has not been set aside by any court of law or any higher authority.

12. A Division Bench of this Court in the case of *Smt. Vijay Rani v. Regional Inspectress of Girls Schools, Region I, Meerut Division, Meerut and Ors.* 2007 (2) ADJ 473 , has dealt with more or less identical situation and it would be worthwhile to reproduce question 3 as framed in paragraph 13 of the judgment and the answer given thereto by the Division Bench in paragraph Nos. 39 to 42, read as follows:

Question No. 3.-Whether the petitioner-appellant can claim any benefit for any purpose whatsoever on account of her continuance as Principal of the College pursuant to the interim order passed by this Court in the writ petition, though the same has ultimately been dismissed.

39. Coming to the 3rd question, we find that the R.I.G.S. issued order as long as back on 29th March, 1989 directing management to allow respondent No. 3 to officiate as Principal of the College. She also issued letter dated 17th April, 1989 directing Manager to promote respondent No. 3 as officiating Principal and send salary bills under her signature. A reminder letter was also sent on 28th April, 1989. The petitioner-appellant at no point of time was ever appointed as officiating Principal of the College and in any case, since 12th May, 1989, she has worked continuously as officiating Principal under the interim order passed by this Court and not pursuant to her own rights. In the circumstances, she cannot claim any benefit out of her continuance as officiating Principal on the basis of

the interim order of this Court, when the writ petition ultimately stands dismissed. There are two principles which have to be followed in such a case. Firstly, act of the Court shall prejudice none. If a person has enjoyed certain benefits under the interim order, he/she would not be allowed to claim any further benefit due to change in law pursuant to enjoyment of certain benefit under an interim order of the Court. A benefit under the interim order is tentative and subject to final decision in the matter and cannot go beyond the final decision. In Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another, the services of the respondent came to be terminated on 30th June, 1988, whereafter he obtained interim order and continued thereunder. Thus, he continued in service not by virtue of his own right under an order of appointment, but on account of an interim order of the Court, thus, held that no benefit of such continuance can be allowed. In South Eastern Coalfields Ltd. Vs. State of M.P. and Others, the Court recognised the principle that wrong order should not be perpetuated by keeping it alive. Recognizing the maxim *auctus curiae neminem gravabit*, it was held that no one shall suffer by an act of the Court and such a rule is not confined to an erroneous act of the Court but act of the Court embraces within its purview all such acts as to which the Court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and law. It is duty of the Court to apply the restitution putting the parties in the same position as they would have been, had the order, subsequently found to be erroneous by the Court, would not have been passed. In para 28 of the judgment, it was held:

The injury, if any, caused by the act of the Court shall be undone and the gain which the parties would have earned unless it was interdicted by the order of the Court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the Court to pass interlocutory orders favourable to them by making out a *prima facie* case when the issue are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced.

(Emphasis added)

40. Considering from another angle, where an Interim order is passed and the writ petition is ultimately dismissed, the effect would be as if no order was ever passed. That being so, the incumbent does not gain on the basis of mere continuance since he has no legal or valid right to continue. An interim order passed by the Court merges with the final order and, therefore, the result

brought by dismissal of the writ petition is that the interim order becomes non est. A Division Bench of this Court in *Shyam Lal Vs. State of Uttar Pradesh, Lucknow and Others*, while considering the effect of dismissal of writ petition on interim order passed by the Court has laid down as under:

It is well-settled that an interim order merges in the final order and does not exist by itself. So the result brought about by an interim order would be non est in the eye of law if the final order grants no relief. The grant of interim relief when the petition was ultimately dismissed could not have the effect to postponing implementation of the order of compulsory retirement. It must in the circumstances take effect as if there was no interim order.

41. The same principle has been reiterated in the following cases:

(A) *Sri Ram Charan Das Vs. Pyare Lal*,

In *Shyam Lal Vs. State of Uttar Pradesh, Lucknow and Others*, a Bench of this Court has held that orders of stay of injunction are interim orders that merge in final orders passed in the proceedings. The result brought about by the interim order becomes non est in the eye of law in final order grants no relief. In this view of the matter it seems to us that the interim stay became non est and lost all the efficacy, the Commissioner having upheld the permission which became effective from the date it was passed.

(B) *Shyam Manohar Shukla v. State of U.P.* 1986 (4) LCD 196.

It is settled law that an interim order passed in a case which is ultimately dismissed is to be treated as not having been passed at all [see *Shaym Lal v. Shyam Lal Vs. State of Uttar Pradesh, Lucknow and Others*, and *Sri Ram Charan Das Vs. Pyare Lal*,

(C) *M/s. Kanoria Chemicals and Industries Ltd. Vs. U.P. State Electricity Board and other*,

After the dismissal of the writ petitions wherein notification dated 21.4.1990 was stayed, the result brought about by the interim orders staying the notification became non est in the eye of law and lost all its efficacy and the notification became effective from the beginning.

42. Therefore, we hold that mere continuance of the petitioner-appellant pursuant to the interim order dated 12th May, 1989, passed in the writ petition would not entitle her to claim any benefit of Section 33A (1A) of the Act, since the aforesaid benefit is available only where the incumbent has continued on the basis of appointment made under para 2 of the first order and not where one has continued on the basis of the interim order of the Court. Further, the continuance must be pursuant to an order of appointment, meaning thereby the appointment must have been made and the appointment letter should continue to operate, i.e., the service must not have come to an end or terminated. Only then Section 33A (1A) of the Act, would apply and not otherwise. The question No. 3 is

accordingly answered against the petitioner-appellant and we hold that she is not entitled for any benefit on account of her continuance pursuant to the interim order passed by this Court in the writ petition.

13. Learned Counsel for the petitioner has vehemently argued that the writ petition had become infructuous, as the ban imposed under the Government order dated 12th July, 1991 had since been declared illegal by this Court in the case of *Km. Prabhawati Dikshit v. Uttar Pradesh Madhyamik Shiksha Sewa Ayog and Anr.* 1992 (1) UPLBEC 682, therefore, the ground mentioned for refusing financial approval became non est.

14. The averments so made on behalf of the petitioner has only been stated to be rejected. The correctness or otherwise of the judgment of this Court in the case of *Km. Prabhawati Dikshit (supra)* was subject-matter of reference under order of the Hon'ble the Chief Justice dated 19th May, 1992 to a Division Bench in the case of *Durgesh Kumari v. State of U.P. and Ors.* (1995) 3 UPBEC 1387. The Division Bench has held that ban imposed by the State Government was legally justified and the Committee of Management after imposition of the ban had no authority of law to make any appointment (Reference paragraph 7 of the said judgment). It is, therefore, clear that the plea that the first writ petition was rendered infructuous as the ban had been quashed, is based on complete non-consideration of the Division Bench judgment in the case of *Durgesh Kumari (supra)*, wherein the law laid down in the case of *Km. Prabhawati Dikshit (supra)* has been held as not the correct law.

15. In view of the aforesaid, this Court has no hesitation to record that the order of the District Inspector of Schools refusing to accord approval to the petitioner dated 1st June, 1992 stood affirmed with the dismissal of the first writ petition filed by the petitioner. As a result whereof, the petitioner (if permitted to continue in the institution) becomes entitled to salary from the Committee of Management only and in no case he can claim regularisation on the strength of working under interim order, which has been merged into final order of dismissal of the writ petition.

16. This Court may record that irrespective of the ban imposed, ad hoc appointment against a substantive vacancy has necessarily to be in accordance with the law laid down by the Full Bench of this Court in the case of *Kumari Radha Raizada and Ors. v. Committee of Management, Vidyawati Darbari Girls Inter College and Ors.* 1994 ALJ 1077, the Division Bench judgment in the case of *Brajesh Chandra Yadav v. District Inspector of Schools, Etawah and Ors.* (1990) 2 UPLBEC 1215, as has been explained by the Division Bench of this Court in the case of *Smt. Vijay Rani (supra)*. It has been held that for determination of the legality of such ad hoc appointment following issues have to be satisfied:

(a) Whether the vacancy exists in the eyes of law or not?

(b) Whether the ad hoc appointment had been made u/s 18 of Act, 1982 after

following the procedure prescribed under the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) First Order, 1981 or not?

(c) Whether the candidate was possessed of the prescribed qualifications, if any.

17. Such exercise has not been undertaken by any of the education authorities in the facts of the case.

18. Learned Counsel for the petitioner has made an attempt to suggest to the Court that the letter of the District Inspector of Schools dated 7th November, 2005 infact examines the legality of the appointment offered to the petitioner and therefore, he is entitled for regularization u/s 33C of Act, 1982.

19. The contention so raised on behalf of the petitioner is misconceived. Once the petitioner was refused financial approval under order dated 1st June, 1992 on the ground that ban being imposed, there was no occasion for any enquiry being made any further qua claim of the petitioner for regularisation, so long as the writ petition was not decided. Even otherwise, the letter of the District Inspector of Schools dated 7th November, 2005 does not take into consideration the issue as to whether procedure prescribed for making ad hoc appointment of the petitioner was in accordance with the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) First Order, 1981, as has been explained by the Full Bench of this Court in the case of Kumari Radha Raizada (supra) and the Division Bench in the case of Brajesh Chandra Yadav and Smt. Vijay Rani (supras) or not. The letter dated 7th November, 2005 does not help the petitioner in any manner, even otherwise is of no legal consequence in view of the dismissal of the first writ petition.

20. If the contention of the petitioner is accepted, it would mean that although his writ petition against the order of the District Inspector of Schools disapproving his appointment dated 1st June, 1992 has been dismissed, yet he is held to be validly appointed and his continuance under the interim order of the writ court would entail to his benefit. Such can never be outcome of an order dismissing the writ petition.

21. In view of the above, I am of the opinion that the petitioner is not entitled to the relief prayed for. However, this order will not prejudice the rights of the petitioner to make an application in his earlier writ petition for recall of the order dismissing the same as withdrawn. A writ petition is accordingly dismissed.