
(2011) 05 AHC CK 0395
In the Allahabad High Court
Case No : Special Appeal No. 80 of 2011

Rishi Kant Sharma

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 26-05-2011

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 5
Constitution of India, 1950 — Article 226
Uttar Pradesh Intermediate Education Act, 1921 — Section 16E(1)
Uttar Pradesh Recognized Basic Schools (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 — Rule 4(2), 7

Citation : (2011) 6 ADJ 1 : (2011) 3 UPLBEC 1957

Hon'ble Judges : Sanjay Misra, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Amitava Lala, J.—This special appeal is arising out of the judgment and order dated 22nd December, 2010 passed by the learned Single Judge in Civil Misc. Writ Petition No. 46303 of 2003 (Asha Ram Chauhan v. State of U.P. and Ors.) whereby the writ petition has been allowed and the orders impugned in the writ petition dated 23rd October, 2002 and 24th October, 2002 have been quashed.

2. The facts remain that on 30th June, 1997 the post of Head Master of the institution in question had fallen vacant. On 17th June, 2002 necessary advertisement was made. On 06th September, 2002 selection was made in favour of the Appellant, the Respondent No. 4 in the writ petition. On 23rd October, 2002 approval to the appointment of the Appellant was made. On 24th October, 2002 appointment order was issued to the Appellant. On 01st November, 2002 Appellant joined in the respective post of Headmaster of the institution. Thus, the Appellant, Respondent No. 4 in the writ petition, was appointed as regular Headmaster of the institution in question following the process of law. The writ petition was filed by the Respondent No. 5, writ Petitioner in the writ petition, on 14th October, 2003 i.e. after about one year

from the date of joining of the Appellant, wherein no interim order of stay was granted by the Court at the time of entertaining such writ petition. However, after a period of seven years from the date of making the writ petition and about eight years from the date of joining of the Appellant on the post of Headmaster, the approval to the appointment of the Appellant and the appointment letter of the Appellant were cancelled and the writ petition was allowed by the impugned order of the learned Single Judge. Being aggrieved and/or dissatisfied with such order of learned Single Judge, this appeal has been filed.

3. Before the learned Single Judge the Appellant, Respondent No. 4 in the writ petition, raised various preliminary objections, one of which is that the Respondent No. 5- writ Petitioner has no locus to maintain the writ petition in view of the fact that he was not a candidate for selection for the post, therefore, the writ petition is not maintainable. In support of such contention, he had relied upon a Division Bench judgment of this Court dated 9th November, 2009 passed in Special Appeal (Defective) No. 1172 of 2009 (Km. Vijeta Tripathi v. State of U.P. and Ors.). The relevant portion of such judgment is quoted hereunder:

Respondent No. 7-Appellant, aggrieved by order dated 18.9.2009 passed by learned Single Judge in Civil Misc. Writ Petition No. 50482 of 2009, has preferred this appeal under Rule 5 Chapter VIII of the Allahabad High Court Rules, 1952.

The order impugned looks innocuous as the writ petition has been disposed of with a direction to the Director of Education to examine the matter u/s 16-E (1) of the Intermediate Education Act.

Mr. Ashok Khare, Senior Advocate, appearing on behalf of the Appellant, submits that as the writ Petitioner- Respondent No. 7 (hereinafter referred to as the "writ Petitioner"), was not a claimant to the posts held by the Appellant as also Respondent Nos. 4, 5 and 6, the grievance raised by him about their illegal appointments does not give him a personal cause so as to file a writ petition cognizable by a Single Judge. He submits that in case the writ Petitioner attempted to question their appointments, he should have filed a public interest litigation and that too was not fit to be entertained, as the issue relates to service matter.

Be that as it may, as the writ Petitioner was not a candidate for appointment, the writ petition filed by him ought not to have been entertained by the learned Single Judge on this ground alone.

Accordingly, we set aside the order dated 18.9.2009 passed by the learned Single Judge, giving liberty to the writ Petitioner to take recourse to any other proceeding permissible in law.

In the result, appeal is allowed with the observation aforesaid.

4. Learned Single Judge while dealing with such judgment held that the Division Bench judgment was delivered when the Petitioner therein was not a claimant for the post, whereas in this case it has been amply demonstrated that the writ

Petitioner herein was a claimant. According to the Respondent No. 5-writ Petitioner, the vacancy was not advertised in accordance with Rule 7 of the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter in short called as the "Rules, 1978") but when the Appellant-Respondent No. 4 himself contended that the Respondent No. 5-writ Petitioner had filed an application in response to the advertisement published, it does not show that the Respondent No. 5-writ Petitioner was not a claimant. If he had made an application but not participated in the selection, it will have same effect.

5. So far as second preliminary objection as raised by the Appellant-Respondent No. 4 before the learned Single Judge is concerned, it was to the effect that the Respondent No. 5-writ Petitioner has not approached the Court with clean hands, inasmuch as he had made an application for the post by his own handwriting but stated that he was not aware of the advertisement. In this regard, an objection was raised by the Respondent No. 5-writ Petitioner by saying that the application was not made in his own handwriting but it is prepared document only for the purpose of frustrating the present proceedings. The application is stated to be dated 15th July, 2002 when the last date for making the application as per the advertisement was 25th June, 2002. However, learned Single Judge did not want to enter into the disputed question of fact and recorded that the Court is satisfied that the Respondent No. 5-writ Petitioner is not guilty of deliberately filing a false affidavit or of not approaching the Court with clean hands.

6. According to us, normally the writ Court does not enter into the disputed question of fact. But there is no prohibition to the writ Court not to enter into it, if situation calls upon. In the instant case, learned Single Judge has adjudicated the first preliminary objection on the submission of the writ Petitioner ignoring the Division Bench judgment but such Respondent No. 5-writ Petitioner when categorically objected his participation in the process of selection, learned Single Judge withdrew himself taking plea of disputed question of fact. Thereby, the learned Single Judge erred in holding in favour of the Respondent No. 5-writ Petitioner. Assuming that the Appellant-Respondent No. 4 said that the Respondent No. 5-writ Petitioner has made the application pursuant to the advertisement, therefore, one preliminary objection of the Appellant-Respondent No. 4 will go but another preliminary objection will stand. Learned Single Judge only considered the statement of the Appellant-Respondent No. 4 with regard to the response to the advertisement but has not considered statement of the Respondent No. 5-writ Petitioner that he has not made any application pursuant to the advertisement with its proper prospective. Therefore, learned Single Judge erred in distinguishing the Division Bench judgment, as aforesaid. If the Respondent No. 5-writ Petitioner is not a claimant pursuant to the advertisement, the writ petition was liable to be dismissed particularly when at the time of entertaining the writ petition no interim order was passed by the Court upon verification of facts.

7. Third preliminary objection as raised by the Appellant-Respondent No. 4 before the learned Single Judge is regarding long lapse of time in making writ petition. The Appellant-Respondent No. 4 joined the institution on 01st November, 2002 when the writ petition was presented on 14th October, 2003 with the allegation that the Respondent No. 5-writ Petitioner was earlier given to understand that the Appellant-Respondent No. 4 has been appointed by way of transfer and it is only when that he was informed that such appointment has been made by direct recruitment, the writ petition has been filed. In this regard, learned Single Judge held that the Respondent No. 5-writ Petitioner can not be said to have slept over his rights nor can it be said that the writ petition suffers from unexplained laches so as to defeat his right under Article 226 of the Constitution of India. Learned Single Judge further distinguished the order of the learned Single Judge dated 22nd November, 2010 passed in Civil Misc. Writ Petition No. 38703 of 2006 (Guru Narain Singh v. State of U.P. and Ors.), as was relied upon by the Appellant-Respondent No. 4, by saying in that case there was undue delay and laches of more than two and half years and, therefore, such writ petition was not entertained on merits.

8. On an approach being made, it is required to be seen at first why there was delay in filing the writ petition or what prevented the Respondent No. 5-writ Petitioner in pursuing the writ petition for its early disposal. We should not be forgetful that writ Petitioner had the carriage of proceeding to do the needful following the CPC principally. The writ Petitioner can not be allowed to develop his case from any objection of the Respondents or by filing affidavits. He is required to stand on his own footing at first. There is no doubt that selection of the Appellant-Respondent No. 4 was made following the process of law and his appointment was approved by the appropriate authority and he has joined on the post on 01st November, 2002. Therefore, it can not be said to be back-door appointment. The writ petition was filed after a period of about one year of joining in service of the Appellant-Respondent No. 4 and no order of stay was passed at the initial stage. The writ petition was pending for a further period of seven years of filing and eight years from the date of joining of the Appellant-Respondent No. 4. Hence, it is to be construed that the Respondent No. 5- writ Petitioner is insincere in pursuing his case having carriage of proceedings. Moreover, when there are laches, it would not have been proper to say that there was laches of two and half years and in this case it is one year only to distinguish own judgment. Therefore, drawing of inference only on period of delay in filing writ petition is flimsy and unsustainable in nature.

9. Without prejudice to the observations as made by this Court, let us now deal with the merit of the case. So far as merit is concerned, Rule 4 (2) of the Rules, 1978 is purportedly applicable in this case. Rule 4(2) speaks about the minimum qualifications for appointment to the post of Headmaster of a recognised school. Rule 4(2) is quoted below:

4. Minimum qualifications.--(1).....

(2) The minimum qualifications for the appointment to the post of Headmaster of a recognised school shall be as follows:

(a) A degree from a recognised University or an equivalent examination recognised as such;

(b) A teacher's training course recognised by the State Government or the Board, such as Hindustani Teaching Certificate, Junior Teaching Certificate, Certificate of Training or Basic Teaching Certificate; and

(c) Three years' teaching experience in a recognised school.

10. Out of Clauses (a), (b) and (c) of Sub-rule (2) as above, there is no dispute with regard to Clause (a). Controversy, if any, appears to be in connection with Clauses (b) and (c). Clause (b) speaks about teacher's training course recognised by the State Government etc. Appointment of the Appellant-Respondent No. 4 was made following the due process of law. Necessary advertisement was made. Selection was processed. After selection, approval to the selection was made by the Basic Shiksha Adhikari. Appointment of the Appellant-Respondent No. 4 was accordingly made. The Appellant-Respondent No. 4 joined in the service. There is no objection on the part of any of the authorities with regard to rendering of service by the Appellant-Respondent No. 4 excepting the writ Petitioner-complainant, who happened to be either an applicant for selection or he had not applied at all. But the learned Single Judge has considered the merit of the Appellant-Respondent No. 4 from the point of view of the complainant in an old writ petition. Under Clause (b) of Sub-rule (2), the qualification of the Appellant-Respondent No. 4 was B. Ed. degree but, according to the learned Single Judge, B.T.C. is the appropriate degree and not B. Ed.. There was a long standing dispute whether B. Ed. course can be taken as a superior course of B.T.C. for giving an accommodation to the teachers in service or not. It was happened when sufficient teachers having B.T.C. qualification were not available. However, the State Government has issued a Government Order incorporating the B. Ed. degree to satisfy the test of Clause (b). Therefore, if any candidate was accepted by the appointing or approving authority on the ground that B. Ed. degree is the appropriate degree for the purpose of service and in the course of such service the degree is recognised as one of the minimum qualifications, such appointment should not be interfered. Such Government Order, was issued as clarificatory or declaratory in nature, which always effects retrospectively. Therefore, even the Appellant-Respondent No. 4 can not be said to not having appropriate qualification. So far as three years' teaching experience in a recognised school is concerned, learned Single Judge only held that the Appellant-Respondent No. 4 worked in one institution between 01st July, 1998 till May, 2002 and he was on leave without pay between November, 2000 to July, 2001 and the Appellant-Respondent No. 4 is not in a position to show that his appointment on the post of teacher in such recognised Junior High School was made with the approval of the Basic Shiksha Adhikari. In the instant case, the selection of the Appellant-Respondent No. 4 as Headmaster

is approved by the Basic Shiksha Adhikari, therefore, it will be presupposed that all the necessities were made prior to his appointment. Moreover, there is no dispute under the order of the learned Single Judge that the Appellant-Respondent No. 4 had the teaching experience in the recognised school but only requirement is with regard to approval of the Basic Shiksha Adhikari or not. It is hardly believable that when entire process starting from advertisement till the approval of appointment was rooted following the due process inclusive of the Act of the Basic Shiksha Adhikari, he has ignored the qualifications of Appellant-Respondent No. 4 and made the appointment. Had it been so, his appointment would have been cancelled by now by the appropriate authority. Yet if one wants to get satisfaction of the test, the matter can be referred to the Director, Basic Education, Government of U.P., Lucknow for its disposal within the appropriate time, but the Court can not direct to terminate the service of one at the instance of the complainant, whose credential has been discussed by this Division Bench in the earlier paragraphs. It is a matter between the employer and the employee and if the tests are not satisfied, it is duty of the employer to point out to the appropriate authority that employee is lacking qualification.

11. On merit, two judgments were relied upon by the learned Single Judge i.e. Mohd. Sartaj and Another Vs. State of U.P. and Others, and Pramod Kumar v. U.P. Secondary Education Services Commission and Ors., 2008 (4) ALJ 207. So far as the first judgment is concerned, the distinguishing feature has been overlooked by the learned Single Judge. We have carefully gone through the ratio of the first judgment in re: Mohd. Sartaj (supra). In that case, cancellation order of appointment was issued within a very short span of time giving no probability for any legitimate expectation to the Appellants regarding continuation of their service. No separate appointment order was issued in favour of those Appellants but the memorandum, wherein the list of selected candidates was published, provided that all the selected candidates must join their respective schools/ colleges within fifteen days and from this the nature of appointment made cannot be ascertained. Moreover, the cancellation order itself gives an opportunity that if they do hold and possess the B.T.C. qualification alongwith intermediate qualification, they may contact and get the same verified on a particular date by the appointing authority and they may bring this to the notice of the concerned authorities. Therefore, the Supreme Court was pleased to deliver the judgment at that juncture. In the present case, long span of time has expired. Since last eight years the Appellant-Respondent No. 4 is working as "Headmaster". The Respondent No. 5- writ Petitioner invoked the jurisdiction of the writ Court after a period of about one year from the date of appointment of the Appellant. No interim order was passed in the writ petition at the stage of filing. Belatedly after seven or eight years from the date of appointment of the Appellant the writ petition was allowed. The appointment of the Appellant-Respondent No. 4 was cancelled on the ratio of Mohd. Sartaj (supra), when long span of time gives rise to the legitimate expectation. Therefore, learned Single Judge has wrongly assessed the ratio. At least the appropriate authority could have been directed to

consider the cause. So far as second judgment i.e. Pramod Kumar (supra) is concerned, the Petitioner therein was appointed in short term vacancy as ad hoc Assistant Teacher in C.T. Grade and the objection was raised by the appointing authority itself about his qualification. Against this background, the Court was pleased to hold that if the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same can not be condoned. According to us, the word "ordinarily" varies from case to case. Striking features have to be looked whether illegality is persisted or irregularly. Is it believable state of affairs that from the advertisement till approval of the service by the Basic Shiksha Adhikari, all the authorities have acted shutting their eyes? Is it a case to pass a favourable order on the statements of a complainant, whose locus is doubtful? Whether preliminary issues are at all ignorable? No answer is available from the judgment of the learned Single Judge to that extent.

12. Having so, the impugned order dated 22nd December, 2010 passed by the learned Single Judge cannot be sustained, therefore, the same is liable to be set aside. Accordingly, it is set aside.

13. In any event, balance of convenience will be sub-served, if the case of the Appellant is referred to the Director, Basic Education, Government of U.P., Lucknow, being the authority under the State Government, to come to an appropriate conclusion in this regard within a period of one month from the date of communication of the order passed hereunder. Accordingly, the case of the Appellant is referred to such authority.

14. Thus, the special appeal is disposed of.

15. No order is passed as to costs.