
(2007) 12 AHC CK 0085

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 31225 of 2001

Sabhajit Mishra (Prof.) and others

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Uttar Pradesh State Universities Act, 1973 — Section 50

Citation : (2007) 12 AHC CK 0085

Hon'ble Judges : Anjani Kumar, J and Sudhir Agarwal, J

Final Decision : Partly Allowed

Judgement

1. The petitioners aggrieved by the Government Order dated 24.7.2001 providing for appointment of Head of Department in State Universities or rotation basis and for a fixed time, have filed this writ petition seeking a writ of certiorari for quashing the aforesaid Government Order. They have also sought a writ of mandamus, commanding the respondents neither to give effect to the said Government Order nor to make amendment in the First Statute of the University in the light of the aforesaid Government Order and not to interfere with the function of the petitioners as Head of Department.

2. The facts in brief, giving rise to the present dispute are, that, all the petitioners are seniormost Teachers/Professors in various departments of Deen Dayal Upadhyaya University, Gorakhpur (hereinafter referred to as "the University") as detailed below:

S. N.

Name

Head of Department of

1.

Prof. Sabhajit Mishra

Philosophy

2.

Prof. Rajendra Prasad

Defence Studies

3.

Prof. Smt. Aclesh Agarwal

Psychology

4.

Prof. Ganeshwar Rai

English

3. The petitioners were working as Head of Department in accordance with Statute 2.20 of the First Statutes of Gorakhpur University, 1977 (hereinafter referred to as the "Statutes") which provides, that seniormost teacher in each department of teaching in the University shall be Head of that Department. The State Government, however, issued an order dated 24.7.2001 (Annexure2 to the writ petition) providing that considering the demand of teachers of the University that Head of Department should be made on rotational basis, the Government has decided that Head of Department should be appointed on rotational basis for a period of three years and relevant Statute of the University in the light of the decision of the Government be accordingly amended. The Executive Council of the University considered the above Government Order in its meeting dated 23.8.2001 and decided to amend the Statute 2.20 and to implement the decision of the State Government contained in the said Government Order by inserting Statute 2.20 (8) in the First Statutes of the University and also to amend Statute 2.20 accordingly. It also decided to refer the matter to the State Government for approval of the amendment of the Statute. It is contended that though the amendment is sought in the Statute has not been assented to by the Chancellor till date, but since the aforesaid Government Order is arbitrary and illegal, therefore, the same is liable to be set aside and the respondents should not be permitted to amend the Statute in the light of the Government Order dated 24.7.2001.

4. Having heard learned Counsel for the parties, in our view the dispute raises the following issues which require adjudication in the present petition:

(i) Whether change in status of Head of Department is permissible pursuant to the Government Order dated 24.7.2001 unless Statute 2.20 is amended in accordance with the procedure prescribed under Section 50 of the U.P. State Universities Act, 1973?

(ii) Whether the petitioners have any legal or statutory right to restrain the

Chancellor from assenting the proposed amendment in the Statute?

(iii) Whether the Government Order dated 24.7.2001 is arbitrary, illegal and without jurisdiction?

5. Now coming to the first question, the answer is negative and it is to be held that so long the Statute, in fact, is not amended as per the procedure prescribed under Section 50 of the U.P. State Universities Act, 1973 (hereinafter referred to as the "Act"), the Government Order dated 24.7.2001 cannot be acted upon for the purposes of making appointment as Head of Department in the University ignoring the existing Statute 2.20.

6. The First Statutes of Gorakhpur University had been framed in 1977 in accordance with subsection (1) of Section 50 of the Act which provides that the First Statute of the University shall be made by the State Government by notification in the Gazette and in the case of my existing University, for so long as the First Statutes are not so made, the Statutes as in force immediately before the commencement of this Act, insofar as they are not inconsistent with the provisions of this Act, shall continue in force subject to such adaptations and modifications as may be necessary by the State Government by notification in the Gazette. Power of amendment of the said Statutes was conferred upon the State Government, upto 31st December, 1990, vide subsection (1A) of Section 50 and the said amendment was also to be made by notification in the Gazette. The procedure for making amendment, etc., in the Statutes for the period subsequent to 31st December, 1990 has been provided under subsections (2) to (7) of Section 50 of the Act. It would be appropriate to reproduce Section 50 as under:

"50. Statutes how made. The First Statutes of the University shall be made by the State Government by notification in the Gazette and in the case of any existing University, for so long as the First Statutes are not so made, the Statutes as in force immediately before the commencement of this Act, insofar as they are not inconsistent with the provisions of this Act, shall, subject to such adaptations and modifications whether by way of repeal, amendment or addition as may be necessary or expedient, as the State Government may, by notification in the Gazette provide, continue in force, and any such adaptation or modification shall not be called in question.

(1A) The State Government may by notification in the Gazette amend whether by way of addition, substitution omission, the First Statutes at any time up to December 31, 1990 and any such amendment may be retrospective to a date nor earlier than the date of such commencement.

(2) Until the First Statutes of the Purvanchal University are made under this Section, the Statutes of the University of Gorakhpur, as in force immediately before the establishment of the said University shall apply to it subject to such adaptations and modifications as the State Government may, by notification, provide.

(2A) The Executive Council may, at any time after December 31,1990 make new or additional Statutes or may amend or repeal the Statutes referred to in subsection (1) of subsection (1A).

(3) The Executive Council shall not propose the draft of any Statute affecting the status, power or constitution of any authority of the University until such authority has been given an opportunity of expressing its opinion upon the proposal and any opinion so expressed shall be in writing and shall be submitted to the Chancellor.

(4) Every new Statute or addition to a Statute or any amendment or repeal of Statute shall be submitted to the Chancellor who may assent to it or withhold his assent therefrom or remit it to the Executive Council for further consideration.

(5) A Statute passed by the Executive Council shall have effect from the date it is assented to by the Chancellor or from such later date as may be specified by him.

(6) Notwithstanding anything contained in the foregoing subsection, the State Government may in order to implement any decision taken by it in the interest of learning, teaching or research or for the benefit of teachers, students or other staff or on the basis of any suggestion or recommendation of the University Grants Commission or the State or National Education Policy with regard to the qualifications of the teachers, require the Executive Council to make new or Additional Statutes or amend or repeal the Statutes referred to in subsection (1) or subsection (1A) within a specified time and if the Executive Council fails to comply with such requirement the State Government may, with the assent of the Chancellor, make new or additional Statutes or amend or repeal the Statutes referred to in subsection (1) or subsection (1A).

(7) The Executive Council shall have no power to amend or repeal the Statutes made by the State Government under subsection (6) or make new or additional Statutes inconsistent with such Statutes."

7. A perusal of the aforesaid provision also shows that though the Statutes may be amended or repealed by the Executive Council with the assent of the Chancellor but subsection (6) of Section 50 empowers the Government to issue order to the Executive Council to make new or additional Statutes or amend or repeal a Statute within a specified time in order to implement any decision taken by it in the interest of learning, teaching or research or for the benefit of teachers, students or the other staff or on the basis of any suggestion or recommendation of University Grants Commission or the State or National Education Policy with regard to qualification of teachers. It also provides that if Executive Council fails to comply with such requirement, the State Government may with the assent of the Chancellor, make new or additional Statute referred to in subsection (1) or subsection (1A). It is not disputed that Statutes 2.20 of the Statutes of the University provides that the seniormost teacher in each department of teaching in the University shall be the Head of that Department. It would be appropriate to reproduce d the same as under:

"2.20. The seniormost teacher in each department of teaching in the University shall be the Head of that Department."

8. Now we come to the Government Order dated 24.7.2001 which as claimed by the respondents, is the order which has the effect of amendment of Statute 2.20. A perusal of Government Order dated 24.7.2001 shows that the same had been issued by the State Government to all ViceChancellors of the Universities providing roster of three years period for appointment of Head of Department. Para 2 of the said order directs various Universities to take action for appropriate amendment in the Statute treating the decision of the Government under Section 50(6) of the Act, and, paragraph No. 3 shows that the said amendment was to be made within thirty days failing which the State Government would proceed for amendment of the Statute at its own end with the assent of the Chancellor as provided under Section 50(6) of the Act. Therefore, a complete reading of the Government Order dated 24.7.2001 leaves no manner of doubt that it is not an act of State Government making amendment in Statutes of the University with respect to appointment of Head of Department and on the contrary, it only communicates its decision for a periodical appointment of Head of Department, and, directed the Executive Council of various Universities to take steps for making amendment in the relevant Statute within thirty days, failing which the State Government shall proceed as provided under Section 50(6) of the Act. The said Government Order, therefore, cannot be said to be an amendment in the Statute on its own and it is only a direction by the State Government to the Executive Council to take steps for amendment of the Statute. It is not disputed that pursuant to the Government Order dated 24.7.2001 the Executive Council of the University though convened its meeting on 23.8.2001, resolved to amend Statute 2.20 as per the directions of the Government, and a draft amendment of the Statutes was also referred to Chancellor for his approval vide University's letter dated 17.10.2001 but none of the parties has brought on record any material to show that either the Chancellor assented the proposed amendment of the Executive Council or it took any action otherwise, as provided under Section 50(4) of the Act. An amendment in the Statutes as resolved by the Executive Council can only be given effect to from the date it is assented by the Chancellor or from such later date as may be specified by him but unless it is assented by the Chancellor, it cannot be said that the resolution of the Executive Council or its proposal has attained the status of a Statute having the effect of modifying or amending the Statute or otherwise as resolved by Executive Council. We made repeated queries from the learned Counsel for the parties and we have been informed that except the fact that the matter was referred to the Chancellor, it appears, no further action was taken by the Chancellor at his end in this matter.

9. Coming to the action of the Government, except letter dated 24.7.2001 the State Government has not taken any further steps for amending the Statutes 2.20 as provided under Section 50(6) of the Act, in case the Executive Council has failed to comply with the directions of the State Government with respect to amendment, etc., of the Statutes. The Government Order dated 24.7.2001 was

the first step of the Government directing the Executive Council for amendment in the Statutes but in case of its failure to do so within 30 days as directed by the State Government, it appears that the State Government also took no further action in the matter. The counteraffidavit of the State Government is totally silent on this aspect and, therefore, this Court has no other option but to hold that except of issuance of letter dated 24.7.2001, the State Government did not take any further step for making amendment of the Statues in the manner as provided in the latter part of subsection (6) of Section 50 of the Act, i.e., by issuing order with the assent of the Chancellor to make new or additional Statute or amend or repeal, as the case may be. In the absence of any such action, in our view, it cannot be said that the Government Order dated 24.7.2001 can be read to have the effect of amending the Statute 2.20 in the manner, the Government suggested in the said order. Unless a Statute duly framed in exercise of statutory powers is altered in the manner and procedure prescribed in the Act, the Statute cannot be said to have changed, altered or amended and it will continue to operate without any alteration.

10. A Division Bench of this Court in *Ankur Yadav v. State of U.P. and others*, Reported in 2007 (10) ADJ 10 (DB) (LB), in which one of us (Hon"ble Sudhir Agarwal, J.) was a member, considered a similar kind of dispute regarding amendment in the Statutes and observed:

".....the Statutes of the University framed under the Act would govern the field and so long as the Statutes are not amended, no person can be appointed in the University governed by the Act and the Statutes framed thereunder by ignoring the qualification prescribed thereunder. No amount of proposal, acceptance, waiver, acquiescence etc. either by the University or the State Government would have the effect of amending the Statute unless the Statute as such is amended in accordance with the procedure prescribed under Section 50 of the Act....."

It is not disputed that the First Statute of the University was not amended in the manner provided under Section 50 of the Act till the date the petitioner was appointed and thus principle of estoppel, waiver or acquiescence would not apply against law....."

11. It is well settled that when law requires something to be done in a particular manner, anything otherwise is prohibited and would have no effect in the eyes of law. For amendment of the Statutes when a specific procedure is prescribed in the Act itself, the same is to be observed strictly and substantially. The First Statute of the University is a statutory provision and the same cannot be altered or modified, i.e., amended, etc., except in the manner prescribed in the Act. The mere fact that after 2001, a number of appointments were made as Head of Department on rotational basis, by itself, would not make any difference in the law, inasmuch as, no amount of estoppel and acquiescence would apply in such kind of cases where right of a person is governed by the specific provision of the Act and Statutes. The appointment to the post of Head of Department in the

University is governed by statutory provisions, namely, Statute 2.20 and unless the same is amended in accordance with the procedure prescribed in the Act, it has to be observed and complied with, and, any violation thereof shall vitiate the order which is in the teeth of the statutory provisions as existing.

12. Coming to the second issue, whether a proposed amendment should be assented to or not is within the exclusive domain of competent authority and the power, in our view is in the realm of legislation. No writ of mandamus would lie preventing a competent authority from exercising its legislative or statutory power in a particular manner. In our view, this issue has to be answered against the petitioners and no relief can be granted through a writ of mandamus to the Chancellor restraining him from assenting the proposed amendment in Statute 2.20. In our view, the writ petition to the extent, it seeks the aforesaid relief is thoroughly misconceived.

13. Coming to the last question, it is not disputed that as Head of Department, the seniormost teacher exercised administrative control over all other teachers and staff in the Department and is also a competent authority in respect to daytoday affairs of the Department. Though no higher pay scale is provided to a person appointed as Head of Department and by itself, it is not a sanctioned post as such, but it cannot be doubted that it confers a higher status on the incumbent with the authority and power to exercise administrative control over teachers and nonteaching staff of the Department concerned. He also exercises certain financial and other powers which are required to be looked after by the Head of Department. It would be against the normal hierarchical system in an establishment where a junior person would be allowed to exercise administrative control over seniors. It is not only derogatory to seniors but otherwise would also infuse a lot of heartburning, disgust and frustration amongst seniors. Conferment of a higher status on a person even on rotational basis, irrespective of seniority, especially when it carries conferment of higher administrative powers cannot be said to be innocuous and not affecting the rights and interests of other teachers. Technically speaking, conferment of headship of a Department by itself cannot be said to be a promotion but it has all traits and factors akin to promotion conferred upon a person who is given such an assignment of higher status. The Apex Court has rules that in the matter of comparison of the posts, equivalence in status is also matter of great importance and ignoring the person's seniority, a junior person cannot be placed on a higher status inasmuch as, much an act would be clearly arbitrary and discriminatory. The respondents have not shown any reason justifying the decision that headship of the Departments in the University should be conferred on rotational basis and that would not affect the senior teachers adversely in any manner. Importance of matter of status can be realized from the fact that when a Principal of a recognized institution was sought to be transferred as Reader of the University which is a post in the same pay scale, the Apex Court in *Vice Chancellor, Lalit Narain Mithila University v. Dayanand Jha*, AIR 1986 SC 1200, declared such order to be illegal, observing that "The true criterion for equivalence is the status and the nature and

responsibility of the duties attached to the two posts. Although the two posts of Principal and Reader are carried on the same scale of pay, the post of Principal undoubtedly has higher duties and responsibilities...."

14. We are, therefore, clearly of the view that the Government Order dated 24.7.2001 insofar as it provides for posting of the teachers of the University as Head of Department on rotational basis ignoring seniority is, ex facie, arbitrary, discriminatory and violative of Article 16 of the Constitution of India. The Government Order dated 24.7.2001, therefore, is liable to be quashed. Issues No. 3 is answered accordingly.

15. In the result, the writ petition is partly allowed. The Government Order dated 24.7.2001 (Annexure 1 to the writ petition) is hereby quashed. The respondents are restrained from interfering with the petitioners functioning as Head of Department of their respective disciplines in the University unless Statute 2.20 is amended in accordance with law.

16. The writ petition succeeds in part with costs which is quantified at Rs. 5000/ payable by the University.