
(2011) 12 AHC CK 0025

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2913 of 1992

Satya Prakash Singh

APPELLANT

Vs

District Inspector of Schools, Fatehpur and Others

RESPONDENT

Date of Decision : 01-12-2011

Acts Referred:

Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 18

Citation : (2012) 6 ADJ 7

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Pradeep Verma, D. Verma, R. Jain and R.K. Jain, for the Appellant;
L.A. Suffian, Liaquat Ali Siddiqui and C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Sudhir Agarwal, J.—Heard Sri Rahul Jain, learned counsel for the petitioner, learned Standing Counsel for respondent Nos. 1 and 3 and perused the record. The petitioner has sought a writ of certiorari for quashing the order dated 27.12.1991, Annexure 6 to the writ petition, whereby District Inspector of Schools has revoked approval granted to the petitioner's ad hoc appointment as Assistant Teacher, (L.T. Grade), on 2.12.1991 with effect from the date of issuance of revocation order dated 27.12.1991.

2. The facts in brief giving rise to the present dispute are as under:

3. Sri Bans Gopal Intermediate College, Rasulpur, P.O. Ladigawan, District Fatehpur (hereinafter referred to as "College") is recognized by the Board of High School and Intermediate and is governed by the provision of U.P. Intermediate Education Act, 1921 (hereinafter referred to as "Act 1921"). In respect to the payment of salary, the College is governed by U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (hereinafter referred to as "Act 1971") and for recruitment of teaching staff it is also not disputed that U.P. Secondary Education Services Selection

Board Act, 1982 (hereinafter referred to as "Act 1982") is applicable to the College.

4. It is claimed that a substantive vacancy on the post of Assistant Teacher (L.T. Grade) occurred pursuant to Director of Education's letter dated 12.3.1991 whereby it notified creation of certain posts in the College. The management of the institution sought to appoint the petitioner on ad hoc basis as Assistant Teacher (L.T. Grade) (Science & Maths) and by letter dated 29.11.1991 information was given to District Inspector of Schools, Fatehpur (hereinafter referred to as "DIOS") who granted approval u/s 18 of 1982 Act with a clarification that the said approval shall automatically stand revoked on a candidate recommended by the Commission joins the post. Consequently the Manager of the College issued letter of appointment on 3.12.1991, a copy whereof has been filed as Annexure 3 to the writ petition. The petitioner claimed to have joined on 3.12.1991 itself and started functioning. Thereafter vide impugned order dated 27.12.1991 the DIOS has withdrawn approval. It is said that the impugned order is wholly illegal and also in violation of principles of natural justice hence is liable to be set aside.

5. The respondents, State of U.P., has filed a counter-affidavit sworn by Sri Anup Kumar Maheshwari, Associate DIOS, Fatehpur stating that approval was obtained by Management, of the College by illusion and wrong representation hence it was revoked. It is said that at the time when the petitioner's appointment was sought to be made by the management, there was a ban imposed by the Government hence no direct appointment could have been made even on ad hoc basis.

6. By way of amendment of the writ petition, petitioner has sought a further relief for considering his matter for regularization as Assistant Teacher (L.T. Grade) u/s 33-C (a) (i) of Act 1982. He in fact contended that the petitioner stood regularized w.e.f. 20.4.1998 with all consequential benefits and therefore should be treated as such.

7. It is evident from record, when the writ petition was entertained by Court on 28.1.1992, on the very first date while granting time to respondents to file counter-affidavit, an ex parte interim order was passed to the following effect:

In the meanwhile the operation of the order dated 27.12.1991 shall remain stayed and till a regularly selected candidate by the Commission offers to join, the services of the petitioner shall not be dispensed with and he shall be paid his salary.

8. The petitioner infact has continued pursuant to the aforesaid interim order passed by this Court.

9. So far as imposition of ban is concerned, learned counsel for the petitioner though faintly contended that Government Order imposing ban was struck down by this Court (Single Judge) in *Km. Prabhawati Dikshit v. U.P. Madhyamik*

Shiksha Sewa Ayog and another, 1992 (1) UPLBEC 582 but subsequently could not dispute that the said decision of Hon"ble Single Judge was reversed by Division Bench in intra Court appeal in Durgesh Kumari v. State of U.P. and others, 1995 (3) UPLBEC 1387 and the ban order was upheld by the Division Bench. In view thereof it cannot be said that despite ban having been imposed by the Government, the petitioner could have been appointed.

10. Be that as it may, I do not want to leave the matter here at since the petitioner had continued for almost 20 years pursuant to the interim order passed. I propose to examine whether his initial appointment was in accordance with law i.e. the procedure prescribed in statute. If I find this venture in favour of the petitioner, the benefit under subsequent amended provision, whether can be extended to him or not shall also be examined so that the entire matter may be thrashed out at this very stage and there may not be any multiplication of litigation. The counsel for parties agreed to this course.

11. In the entire writ petition, petitioner has not disclosed, what procedure was followed for his appointment on ad hoc basis as Assistant Teacher. Non observance of statute, on the contrary, is evident. The order of creation of post was issued by Director of Education, relied by the petitioner, on 12.3.1991. It is nowhere stated that vacancy was ever advertised or any further procedure was followed except that a letter was issued by Manager of the College on 29.11.1991 to DIOS communicating that petitioner has been selected by Committee of Management for ad hoc appointment as Assistant Teacher (L.T. Grade) whereupon DIOS passed order of approval.

12. The College being Intermediate, recruitment on the post of teacher could have been made only in accordance with procedure prescribed in Act 1982 and the Rules and Regulation framed thereunder. An appointment not made in accordance with procedure prescribed thereunder is non-est. Even if it is assumed that the post existed, the vacancy being substantive, it was incumbent upon respondent No. 2 to follow the procedure prescribed in para 5 of U.P. Secondary Education Services Commission (Removal of Difficulties) Order, 1981, which reads as under:

5. Ad hoc appointment by direct recruitment.--(1) Where any vacancy cannot be filled by promotion under Paragraph 4, the same may be filled by direct recruitment in accordance with clauses (2) to (5).

(2) The Management shall as soon as may be, inform the District Inspector of Schools about the details of the vacancy and such Inspector shall invite applications from the local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh.

(3) Every application referred to in clause (2) shall, be address to the District Inspector of Schools and shall be accompanied;

- (a) by a crossed postal order worth ten rupees payable to such Inspector;
- (b) by a self-addressed envelope bearing postal stamp for purposes of registration.

(4) The District Inspector of Schools shall cause the best candidates selected on the basis of quality point specified in Appendix. The compilation of quality points may be done on remunerative basis by the retired Gazetted Government servants under the personal supervision of such Inspector.

(5) If more than one teacher of the same subject or category is to be recruited for more than one institution, the names of the selected teachers and names of the institutions shall be arranged in Hindi alphabetical order. The candidate whose name appears on the top of the list shall be allotted to the institution the name whereof appears on the top of the list of the institution. This process shall be repeated till both the lists are exhausted.

Explanation.--In relation to an institution imparting instruction to women the expression "District Inspector of Schools" shall mean the "Regional Inspectress of Girl's Schools.

13. This procedure whether obligatory or not, and consequence of non observance has been considered in a catena of decisions of this Court as well as the Apex Court. A detailed judgment was rendered by a Full Bench of this Court in Radha Raizada v. Committee of Management, 1994 (2) ESC 345 (FB) and confirming the above Full Bench judgment, Apex Court in Prabhat Kumar Sharma and others Vs. State of U.P. and others, , held that procedure laid down in Removal of Difficulties Order is mandatory and has to be observed in words and spirit. An appointment made inconsistent with the said procedure is void ab-initio and will not confer either any right upon the incumbent to hold the post or to continue in service or to claim salary from State exchequer. The relevant observations made by the Apex Court in Prabhat Kumar Sharma (supra) is as under:

Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees.

14. Again in para 11 of the judgment the Court held as under:

Any appointment in violation thereof is void. As seen prior to the Amendment Act of 1982 the First 1981 Order envisages recruitment as per the procedure prescribed in para 5 thereof. It is an in-built procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any posts in aided institution.

15. This decision has been followed and reiterated recently by the Apex Court in Shesh Mani Shukla v. District Inspector of Schools Deoria and others, JT 2009 (10) SC 309, wherein the Apex Court has also held as under:

It is true that the appellant has worked for a long time. His appointment,

however, being in contravention of the statutory provision was illegal, and, thus, void ab-initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State.

16. In the circumstances this Court has no doubt in its mind that the petitioner was never appointed on the post in question in accordance with the procedure prescribed in Removal of Difficulties Orders. In view of the decision of the Apex Court in Prabhat Kumar Sharma (supra), Shesh Mani Shukla (shukla) and Full Bench decision of this Court in Radha Raizada (supra), the alleged appointment of the petitioner would confer no right upon him either to hold the post or to continue in service or to claim salary from State exchequer.

17. In the present case since the petitioner has received salary pursuant to an ex parte interim order passed by this Court on 28.1.1992 which has caused substantial loss to the Government revenue, respondent No. 1 is entitled to be restored back to the loss it has suffered due to interim order passed by this Court.

18. It is well-settled that the act of Court shall prejudice none. The State-respondents also cannot be made to suffer only on account of an ex parte interim order passed by this Court when ultimately writ petition fails. The prejudice, if any, it has sustained, is liable to be mitigated by restoring the position, if it is permissible in terms of money or otherwise. This aspect has been considered in a catena of decisions. The service rendered pursuant to an interim order would not give any benefit to petitioner. This issue has been considered by a Division Bench of this Court (in which 1 was also a member) in Smt. Vijay Rani v. Regional Inspectress of Girls Schools, Region-1, Meerut and others, 2007(2) ESC 987 and the Court held as under:

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.

19. The same principal 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 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.

20. It is lastly contended that since the petitioner has continued and worked for more than the last two decades, therefore, he should be allowed to continue and be deemed to have been absorbed.

21. I am afraid. This would be diversion of justice and would amount to compel the respondents to commit a flagrant breach of law. It will also amount to clothing validity to something which is inherently illegal and void. This Court is a Court of law and has taken the oath of upholding rule of law. The prayer made is clearly against rule of law and, therefore, this Court shall be failing its constitutional obligations of holding majesty of rule of law if accept this request. A similar contention was raised before the Apex Court for invoking power under Article 142 in Alka Ojha v. Rajasthan Public Service Commission and another, (2011) 9 SCC 438, but it was rejected by the Court observing that such power cannot be exercised for conferring legitimacy to the appointment which were otherwise illegal and contrary to statute.

22. Recently also in Raghavendra Rao Etc. Vs. State of Karnataka and Others Etc., , the Apex Court has observed:

It is now a well-settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service.

23. In view of the above discussion the writ petition deserve to be dismissed. But with regard to refund of salary received by the petitioner pursuant to his

continuance on the post in question founded on the ex parte interim order passed by this Court, in my view, ends of justice would meet if only one third of the salary received by the petitioner is directed to be refunded by him.

24. In the result, writ petition is dismissed. However, the amount of salary received by the petitioner for the period he has continued pursuant to interim order passed by this Court on 28.1.1992, he shall refund one-third of the total amount within four months from today and deposit with DIOS failing which it shall be open to the respondent No. 1 to recover the said amount from petitioner, if necessary, as arrears of land revenue, on a certificate issued by DIOS in this regard. The petitioner shall also liable to pay cost which is quantified to Rs. 5,000/-.