
(2014) 11 AHC CK 0156

In the Allahabad High Court

Case No : Writ Petition Nos. 885, 1807 and 5383 (S/S) of 2001

Shashi Kant Kanojia and Others

APPELLANT

Vs

D.I.O.S., Hardoi and Others

RESPONDENT

Date of Decision : 27-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 11 ADJ 681 : (2015) 1 ESC 479

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : R.N. Gupta and Rakesh Kumar Chaudhary, Advocates for the Appellant; R.B.S. Rathaur and Rajendra Singh Chauhan, Advocates for the Respondent

Judgement

Sudhir Agarwal, J.—All these writ petitions involve common questions of law and fact and, therefore, as requested and agreed by learned counsel for the parties, have been heard together and are being decided by this common judgment. In all these writ petitions the common relief sought by petitioners is writ of mandamus commanding the respondents to pay salary to them on the post of Assistant Teacher (L.T. Grade).

2. The dispute relates to appointment on the post of Assistant Teacher in Jang Bahadur Verma Gramin Uchchatar Madhyamik Vidyalaya, Balamau, Tehsil Sandila, District Hardoi (hereinafter referred to as the "College").

3. It is claimed that petitioners were appointed after due selection by Selection Committee constituted by Management of the College vide appointment letter dated 28.11.1996, 2.7.1994 and 30.6.1996, respectively, on the post of Assistant Teacher (L.T. Grade) in the pay scale of Rs. 1400-2300/-. It was mentioned in the appointment letters that appointment would be valid only after approval by District Inspector of Schools, Hardoi (hereinafter referred to as the "DIOS"). Pursuant to appointment letters, aforesaid three petitioners joined on 2.12.1996, 10.7.1994 and 12.7.1996 respectively. At the time of appointment,

College was not in grant-in-aid list and was brought to grant-in-aid w.e.f. 1.12.1998, vide State Government's letter dated 18.1.1999, wherein name of college was shown at Serial No. 61.

4. Upto November, 1998, petitioners' salary was paid by Management. There were total 13 sanctioned posts which included seven teaching, five Class-IV and one Class-III posts. It is also said that appointment of petitioners was approved by DIOS vide letter dated 15.7.1997, yet in an illegal manner, petitioners have not been paid salary, by respondents from State exchequer after the College has been brought in grant-in-aid.

5. Writ Petition No. 885 (SS) of 2001 (hereinafter referred to as the "first petition") has come up at the instance of three petitioners, namely, Shashi Kant Kanojia, Anita Devi and Chotey Lal, seeking a writ of mandamus, commanding respondents to pay salary to them on the post of Assistant Teacher (L.T. grade) alongwith interest on arrears.

6. Writ Petition No. 1807 (SS) of 2001 (hereinafter referred to as the "second petition") has been filed by one, Rakesh Kumar Singh, who has also sought a writ of mandamus, commanding respondents to pay salary to him on the post of Assistant Teacher in the College. He claims to have been appointed as Assistant Teacher (L.T. Grade) in the pay scale of Rs. 1400-2300/- vide appointment letter dated 2.7.1994. The aforesaid appointment was approved by DIOS vide letter dated 15.7.1997.

7. In the first writ petition, respondent No. 5 Jai Ram Singh (petitioner in the third writ petition) has filed a counter-affidavit, stating that petitioner No. 2 Anita Devi did not possess B.Ed., qualification, essential for appointment for the post of Assistant Teacher (L.T. Grade) in Secondary Educational institution, therefore, so called appointment of petitioner No. 2 is void ab initio. It is also said that the list sent by Management to the DIOS on 16.3.1998 showing names of the staff working in the College at that time contained following ten names as teaching and non-teaching staff:

8. Amongst the above ten persons, it was also mentioned, Shashi Kant Kanaujia, Anita Devi and Jai Ram Singh, Ram Prakash, Rakesh Kumar and Buddhi Prakash are not approved on the aforesaid list. DIOS passed the following order on 23.3.1998 which is also evident from the aforesaid document.

"Teachers and non-teaching staff mentioned at Serial Nos. 1, 2, 7 and 8 are working/appointed against created posts which are approved and recognized by the Department. Teachers/non-teaching staff mentioned at Serial No. 3, 4, 5, 6, 9 and 10 are unapproved and unrecognized which cannot be approved."

(English translation by Court)

9. The aforesaid document also shows that in the column of training, qualification against Smt. Anita Devi the following remark was mentioned.

(B.Ed., modular incomplete, Lucknow University, Lucknow)

10. It is thus pleaded that petitioner No. 2 had not completed B.Ed., therefore, not qualified for appointment and her appointment is patently illegal. The name of respondent No. 5 has been mentioned as unapproved just to cause serious prejudice to him vis-a-vis petitioner No. 1 which was in collusion with the Management.

11. Writ Petition No. 5383 (SS) of 2001 (hereinafter referred to as the "third petition") has been filed by Jai Ram Singh, who has also claimed payment of salary on the post of Assistant Teacher (L.T. Grade) claiming his appointment on the said post vide management's letter dated 30.6.1996.

12. No counter-affidavit has been filed by D.I.O.S. in the first writ petition. It has filed counter-affidavit in second and third petition. With respect to sanctioned strength, issuance of letter dated 22.7.1994 is not disputed, whereby the sanctioned strength of teaching and non-teaching staff of College has been shown as under:

13. The second and third petition has been opposed on the ground that petitioner, Rakesh Kumar Singh (second petition) was not qualified for appointment as Assistant Teacher (L.T. Grade) in 1994 since he obtained B.Ed., qualification in 1996 only. Moreover, in the list submitted by Management showing working staff in the year 1998 (Annexure-CA-1 to the counter-affidavit), name of petitioner, Rakesh Kumar Singh was not shown, meaning thereby it has been added subsequently otherwise. If he would have been appointed in 1994, he must have been shown in the list submitted in 1998. Annexure-CA-3 to the counter-affidavit is the certificate of Bachelor of Education examination of 1996 of University of Lucknow issued in the name of Rakesh Kumar Singh.

14. Similarly, the claim of petitioner in third petition has also been contested. It is said that the details of teaching and non teaching staff working in the unaided High School recognised prior to 14.10.1986 was called for by the State pursuant where to, the list, was submitted by the management vide letter dated 16.3.1998 (Annexure 1 to counter-affidavit of DIOS in the third petition). Therein petitioner Jairam Singh has been shown as unapproved Assistant Teacher appointed in 1996. Again after bringing the college in grand-in-aid, Additional Director, Education (Secondary) require further information of staff of college for the purpose of payment of salary from State Exchequer and in furtherance thereof vide management's letter dated 3.12.1999, a list of 13 persons was submitted, one Principal/Head Master 6 Assistant Teacher, one Clerk and 5 Class four Staff. Name of teaching staff given in the said list read as under:

15. Five teaching staff who are petitioners in this case, their qualification, year of acquiring qualification and date of appointment mentioned in the said chart reads as under:

16. Since the two list submitted by management one on 16.3.1998 and second

on 13.12.1999 where materially different, the DIOS on the list dated 3.12.1999 made the following remarks on 5.2.2000.

There is discrepancy between the staff statement submitted earlier and the staff statement presented now. Approval of teachers shown at serial Nos. 3, 4, 5, 6, and 7 are completely within realm of doubt. Names at serial No. 8, 11, 12 and 13 are unapproved and writ petition is pending in the Hon"ble High Court. Therefore, only the names at serial No. 01, 02, 9 and 10 stand countersigned."

(English translation by Court)

17. It is in these circumstances, for the purposes of payment of the salary, only four persons were approved namely Vijay Prakash, Ravindra Nath, Narsingh Bahadur and Shivraj Singh. Formar two constituted teaching staff and the remaining two non teaching staff. In 1997, the petitioner Jairam Singh (in third writ petition) was working as Assistant Teacher at Ranjit Singh Uchtar Madhyamik Vidyalaya, Kursath, Hardoi and his appointment was approved by the District Basic Education Officer vide letter dated 26.9.1997. He sought his transfer from Ranjit Singh Uchtar Madhyamik Vidyalaya, Kursath, Hardoi to the College, for which the proposal for accepting such transfer was passed by management of the College on 21.9.1997. The transfer proposal was also approved by management of Ranjit Singh Uchtar Madhyamik Vidyalaya, Kursath, Hardoi vide resolution dated 19.9.1997. While working at Ranjit Singh Uchtar Madhyamik Vidyalaya, Kursath, Hardoi, the petitioner, Jairam Singh of third writ petition, since he was Assistant Teacher in C.T. Grade, he was allowed L.T. Grade on completion of ten years of service vide letter dated 19.3.1998 passed by DIOS (Annexure CA 6 to counter-affidavit of DIOS in third writ petition). Since Ranjit Singh Uchtar Madhyamik Vidyalaya (supra) was non financed institution, therefore, petitioner Jai Ram could not have been allowed to transfer to the college. In the circumstances, inclusion of his name in the College by the management in the list dated 3.12.1999 was apparently illegal and mention of date of appointment of Jairam Singh as 1.7.96 was patently fallacious, forged and illegal as it could not have been done particularly when he was already working in Ranjit Singh Uchtar Madhyamik Vidyalaya, Kursath, Hardoi.

18. In the rejoinder-affidavit filed by petitioner in third petition, it is said that he proceeded on leave in Ranjit Singh Uchhtar Madhyamik Vidyalaya from 1.7.1996 onwards having been appointed at the College on the post of Assistant Teacher. His application dated 5.7.1996, seeking leave without pay, to the Principal Sri Ranjeet Singh Uchhtar Madhyamik Vidyalaya Kursath, Hardoi is annexed as Annexure RA-1 to the third writ petition.

19. I have heard Sri R.N. Gupta learned counsel for petitioners, learned Standing Counsel for respondent No. 1 to 3 and Sri Rajendra Singh Chauhan, Advocate for respondent No. 4.

20. During the course of arguments certain facts which have not been disputed by learned counsel for parties are that the College was upgraded as High School

prior to 1996 and its upgradation and recognition was granted by Board of High School. Thus, for the purpose of recruitment of teaching staff, it was within the purview of U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as "Act 1982").

21. All Secondary Schools recognized under the Intermediate Education Act, 1921 (hereinafter referred to as "Act 1921") are governed by Act 1982, except those which are not maintained by State Government. Definition of the word "institution" in Section 2(e) reads as under:

"(e) "Institution", means an Intermediate College or a Higher Secondary school or a High school recognised under the Intermediate Education Act, 1921, and includes institution maintained by a local authority but does not include an institution maintained by the State Government."

22. Whether an institution is in grant in aid or not is of no consequence, but once it is recognised under Act 1921, it is within the ambit of Act 1982 and recruitment of teaching staff, therefore, has to be made through Secondary Education Services Selection Board and not otherwise. Any appointment made otherwise, after enforcement of Act 1982, is void, in view of Section 16 of the Act. It is not the case of petitioners that in the present case, after enactment of Act 1982, at any point of time, vacancies of Assistant Teacher (L.T. Grade) were ever notified or requisitioned to the Board. An ad hoc appointment could have been made by Management, where the vacancy was substantive, after following the procedure laid down in U.P. Secondary Education Services Commission (Removal of Difficulties) Order, 1981 (hereinafter referred to as "First Order"). Appointment made in violation of First Order or the provisions contained in Act 1982 is void ab initio and would not entitle the incumbent(s) concerned, either to hold the post or to claim salary from State Exchequer.

23. The Apex Court in Prabhat Kumar Sharma and others Vs. State of U.P. and others, , held that procedure laid down by 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 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."

24. 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."

25. It is well-settled when law requires something to be done in particular manner anything otherwise is prohibited and illegal and would not confer any right upon the person appointed in a manner not provided under the statute. This Court in Special Appeal No. 331 of 1992, District Inspector of Schools v. Naresh Chandra, decided on 20.3.2006 held as under:

"Thus when the law requires some thing to be done in a particular manner no other way is permissible and any action not in accordance with such procedure would be void and illegal. The provision of statute and the rigor of statutory procedure cannot be diluted by holding the same to be mere irregularity, since it would be very difficult in such case to restrict or define the extent of such irregularity. For illustration, in one case, the management, who has made appointment after 58 days instead of 60 days may claim it to be a mere irregularity and in another matter the management after making appointment even within a week instead of waiting for 60 years may claim the similar protection. Such interpretation would result in making the period prescribed under Section 18 to be ununiform, illusory and virtually redundant. A statutory provision cannot be read in a manner, which will bring redundancy to any part of the statutory provision. In this view of the matter, we are clearly of the view that any infraction of the procedure prescribed under Section 18 of the Act would vitiate the appointment being void and illegal and such deviation cannot be said to be a mere irregularity."

26. The decision in Prabhat Kumar Sharma (supra) has been followed and reiterated recently by the Apex Court in Shesh Mani Shukla Vs. D.I.O.S. Deoria and Others, , wherein the Apex Court has 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."

27. An appointment made in violation of procedure prescribed in Removal of Difficulties Order read with Section 18 of Act, 1982 is void ab initio and nullity. It does not give any right to incumbent either to hold the post or to claim salary from State Exchequer. In these circumstances, granting mandamus in favour of petitioners to continue in service and pay salary is clearly amounts to directing the defendants to commit a blatant breach of statutory provisions. Such a mandamus is impermissible and could not have been granted by this Court in exercise of power under Article 226 of the Constitution of India.

28. The same view has been taken by this Court in a catena of decisions including State of U.P. and others v. Anil Kumar Singh Yadav (SECOND APPEAL

No. 421 of 2013) decided on 26.4.2013.

29. Appointments of petitioners being in the teeth of the aforesaid statutes i.e. the Act 1982 and First Order issued thereunder, are void ab initio.

30. Then it is also evident from the record that Anita Devi and Rakesh Kumar Singh did not possess requisite training qualification on the date they claim to have been appointed i.e. in 1994. B.Ed. qualification obtained by Rakesh Kumar is of 1996 and the qualification of Anita Devi shows that it was incomplete and no material has been placed on record to show that she was eligible on the date of alleged appointment i.e. 10.7.1994. Appointment of a person who lacks minimum or essential qualification is void ab initio.

31. It is well-settled that a person, who does not possess requisite qualification, prescribed in law for a particular post cannot be appointed to such a post and if an appointment in breach of such statute has been made, it would be a nullity and non est.

32. In Mohd. Sartaj and Another Vs. State of U.P. and Others, , the Apex Court held that a person lacking requisite qualification on the date of appointment, cannot derive any benefit out of such appointment since it is a nullity and void ab initio and, thus, does not confer any right upon the incumbent concerned to hold the post. Relevant observations contained in paras 19 and 21 are as under:

"In view of the basic lack of qualifications, they could not have been appointed nor their appointment could have been continued. Hence the appellants did not hold any right over the post.

It is settled law that the qualification should have been seen which the candidate possessed on the date of recruitment and not at a later stage unless rules to that regard permit it."

33. In Pramod Kumar Vs. U.P. Secondary Education Services Commission and Others, , has observed as under:

"If the essential educational qualification for requirement to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law."

34. Similarly, a Division Bench of this Court (in which I was also a member), in Special Appeal No. 1 (def.) of 1998 (Vijai Kumar Singh v. State of UP and others) decided on 23.2.2006, following the Apex Court's decision in Mohammad Sartaj (supra), has clearly held that any appointment made in violation of Rules is void ab initio.

35. Similar view has been taken by this Court in Doctor Prasad Yadav v. State of U.P. And Other (Writ-A No. - 5251 of 2011) decided on 30.7.2013.

36. In view of the above discussion, the petitioners are not entitled to a writ of

mandamus commanding the respondents to pay salary to them.

37. At this stage, learned counsel for the petitioners contended that during pendency of the petitions the petitioners on the strength of interim order passed by this Court were getting salary, therefore, after more than a decade, their interest may be protected.

38. It is well-settled, when writ petition is dismissed, it results as if no interim order was ever passed. This aspect has been clarified by several judgments of this Court and this view has been affirmed by the Apex Court in Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, . In Kanoria Chemicals and Industries Ltd. (supra) the Apex Court has observed:

"It is equally well-settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and it is the duty of the Court in such a case to put the parties in the same position they would have been put for the interim orders of the Court".

39. Instead of saddling this judgment with several other authorities on the same point it would be useful to refer a recent judgment of this Court in Dr. Avinash Mohan Vs. State of U.P. and Others, , where most of these cases are relied and referred.

40. A Division Bench of this Court (of which I was also a member) in Ajai Kumar Dubey Vs. Farrukhabad District Cooperative Bank Limited and Others, , while considering the effect of interim order on dismissal of the writ petition has said:

"There is another facet of the issue. An ex parte interim order is normally granted considering a prima facie case, balance of convenience and irreparable loss but the Court cannot simultaneously put other side in a situation where on account of interim order other side would suffer irreparable loss. "Actus curie neminem gravavit" is now well accepted doctrine applicable in these circumstances. The act of the Court shall prejudice none. No person can claim that he cause of the interim order of the Court he is entitled to retain certain benefit, for which he is otherwise not entitled. The respondents despite having won the case cannot be put to a disadvantageous position, which it would not have faced. If the said litigation would not have commenced. Mere filing of a case and obtain of an interim order can never result in a situation giving a permanent advantage to petitioner and permanent disadvantage to the respondents, though, ultimately, the writ petition is found to be frivolous or lacking merit and is dismissed. In order to claim benefit of certain statutory provisions, which require continuance of person's service on a particular date, if would mean that such continuance is based on his own rights of the incumbent and not on the clutches founded on interim order of Court of law. This aspect has also been dealt with in detail by this Court in Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-I and Others and we are in respectful

agreement of the exposition of law laid down thereunder, which is fully applicable in the case in hand also. We have no hesitation in observing that the appellant here also cannot take any advantage flowing from the interim order, which he has obtained in the writ petition, which has ultimately been dismissed."

41. A Division Bench of this Court (in which I was also a member) in Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-I and Others , held:

"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."

42. 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.

....."

43. Recently, the similar view has been taken by this Court in Ashwini Rai v. State of U.P. and 4 others (Writ-A 27802 of 2014 decided on 29.5.2014.

44. It is true that in some of the precedents without laying down any principle of law the Courts have shown a lenient view and have allowed the incumbent concerned to continue but in recent decade a strict approach has been shown by Apex Court which is more apt to adhere to rule of law. The kind of sympathy sought in this case has been termed as "misplaced sympathy". The view of the Court is that anything acquired illegally if allowed to remain with the person so acquired it would amount to confer a premium upon him of such illegality. This would encourage the people to go ahead with such kind of illegality with expectation in the context of similar precedence that if they are successful in continuing for a long time, judicial forum may not interfere and would allow them to continue with their illegally obtained benefits. This has been seriously castigated and held to benefit more the violators and cause a permanent deprivation to law abiders.

45. In State of Orissa and Another Vs. Mamata Mohanty, , the Apex Court says that an order, bad from inception, would not get sanctified at a later stage. No

subsequent action or development can validate an action which was not lawful at its inception for the reason that illegality strikes at the root of order. It goes on to say that it would be beyond the competence of any authority to validate such an order. Relying and referring to its earlier decisions in *Upen Chandra Gogoi Vs. State of Assam and Others*, ; *Mangal Prasad Tamoli (Dead) by Lrs. Vs. Narvedshwar Mishra (Dead) by Lrs. and Others*, ; and, *Ritesh Tewari and Another Vs. State of U.P. and Others*, , the Court in para 20 of the judgment said:

"It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin."

46. The writ petitions, therefore, lack merit and are accordingly dismissed. No order as to costs.