

(2007) 04 AHC CK 0037
In the Allahabad High Court
Case No : C.M.W.P. No. 50997 of 1999

Sheo Shanker Tripathi

APPELLANT

Vs

Director of Education (Sanskrit) U.P. and Others

RESPONDENT

Date of Decision : 17-04-2007

Acts Referred:

Constitution of India, 1950 — Article 16
Uttar Pradesh Higher Education Services Commission Act, 1980 — Section 12, 18, 31A, 31C
Uttar Pradesh Intermediate Education Regulations, 1921 — Regulation 2, 2(1)
Uttar Pradesh State Universities Act, 1973 — Section 16E, 16F, 16FF, 2(19), 31

Citation : (2007) 4 AWC 3636

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

Bench : Division Bench

Advocate : Lal Chandra Yadav, Birendra Pratap Singh, Sanjeev Kumar Pandey and Rajeev Kumar Pandey, for the Appellant; Anil Tiwari and S.C, for the Respondent

Final Decision : Dismissed

Judgement

Anjani Kumar and Sudhir Agarwal, JJ.—Heard learned Counsel for the parties and perused the record.

The Petitioner has sought a writ of mandamus commanding the Respondents to regularise him on the post of Principal in Sri Hanumant Sanskrit Mahavidyalaya, Hathi Barani, Varanasi (hereinafter referred to as the "College") and to pay salary of the said post w.e.f. 1.7.1994.

2. The facts in brief as borne out from the writ petition are that the aforesaid College is imparting education in Sanskrit upto Shastri and Acharya level and is affiliated to Sampurnanand Sanskrit University, Varanasi governed by the U. P. State Universities Act, 1973 (hereinafter referred to as "1973 Act") and U. P. Higher Education Services Commission Act, 1980 (hereinafter referred to as "1980 Act"). The Petitioner was appointed as Assistant Teacher on 1.11.1977 and

was confirmed on 15.8.1979. One Sri Devraj Pandey working on the post of Principal of the College retired on 30.6.1994 on attaining the age of superannuation, whereafter, the Petitioner being the senior most teacher was appointed as Principal on officiating basis by the management's letter dated 2.6.1994. Subsequently, the University also appointed the Petitioner as officiating Principal under Statute 12.22 and since then the Petitioner is continuously working as officiating Principal of the College and discharging duties. It is further said that the management passed a resolution on 15.7.1994 to appoint Petitioner as Principal on officiating basis and the Manager was directed to take all requisite steps for such appointment. The Petitioner took over charge on 9.7.1994 but has not been paid salary on the post of Principal despite his representation dated 18.2.1999.

3. Learned Counsel for the Petitioner submitted that for the last more than a decade he is working as officiating Principal and therefore, is entitled for salary of the said post and also to be regularised thereon. Reliance is placed on Section 31C of 1980 Act as inserted by U. P. Higher Education Service Commission (Amendment) Act, 1992 (U. P. Act No. 2 of 1992). It is contended that Section 31C in so far as it excludes Principal is arbitrary and therefore, benefit of the said provision must be applied to all the teachers which includes Principal.

4. The College being affiliated with Sampurnanand Sanskrit University, Varanasi, admittedly, is governed by the provisions of 1973 Act. Section 2 (19) thereof defines "teacher" and reads as under :

(19) "teacher" in relation to the provisions of this Act except Chapter XI-A, means a person employed in a University or in an institute or in a constituent or affiliated or associated college of a University for imparting instructions or guiding or conducting research in any subject or course approved by that University and includes a Principal or Director.

5. The procedure for appointment of teachers is prescribed u/s 31 of 1973 Act. However, the U. P. Legislature enacted 1980 Act in order to establish a service commission for selection of teachers for appointment to the Colleges affiliated or recognised by University and Section 12 thereof as substituted by U. P. Act No. 2 of 1992, w.e.f. 22.11.1992, reads as under :

12. Procedure for appointment of teachers.--

(1) Every appointment as a teacher of any college shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

(2) The management shall intimate the existing vacancies and the vacancies, likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation.--The expression "academic year" means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed subject-wise consolidated list vacancies intimated to him from all colleges.

(4) The manner of selection of persons for appointment to the posts of teachers of a college shall be such, as may be determined by regulations :

Provided that the Commission shall with a view to inviting talented persons give wide publicity in the State to the vacancies notified to it under Sub-section (3):

Provided further that the candidates shall be required to indicate their order of preference for the various, colleges vacancies wherein have been advertised.

6. In order to meet the contingencies arising due to a vacancy remain unfilled till the candidate selected by the Commission is available, the management has been conferred power to make ad hoc appointment. Under U. P. Secondary Education Services Commission (Removal of Difficulties) Order, 1983 (hereinafter referred to as "1983 Order"), in paras 2 and 3, the contingencies when ad hoc appointment shall be made and the manner of such appointment is provided as under :

(2) Vacancies in which ad hoc appointments can be made and eligibility for appointment.--The management of a College may appoint a teacher on purely ad hoc basis, in accordance with the provisions of this Order, in the vacancies occurring in any of the following manner, namely :

- (i) creation of new post ;
- (ii) suspension, removal or dismissal of teacher ;
- (iii) resignation or death of a teacher ;
- (iv) a teacher going on leave for a period of more than ten months ;
- (v) a teacher proceeding on "teachers fellowship" under any scheme of University Grants Commission or any other body ;
- (vi) the retirement of a teacher.

(3) Manner and duration of appointment.--Every appointment of a teacher under paragraph 2 shall be made in consultation with an expert, nominated by the Vice-Chancellor, and shall cease on the date when the Uttar Pradesh Higher Education Services Commission recommends a candidate for appointment in accordance with the provisions of the Uttar Pradesh Higher Education Services Commission Act, 1980.

7. Admittedly vacancy on the post of Principal occurred on 30.6.1994 but the management did not make any appointment on ad hoc basis as per the procedure prescribed under para 3 of 1983 Order. Unless the procedure prescribed under 1980 Act read with 1973 Act is followed, no appointment of teacher, which includes "Principal" also, could have been made by the

management.

8. Learned Counsel for the Petitioner at this stage placed reliance on Statute 12.22 of First Statute of Sampurnanand Sanskrit University, Varansi published in the gazette notification dated 20.12.1978 (hereinafter referred to as the "Statute") which reads as under :

12.22. In case the post of Principal of an affiliated college falls vacant, the senior-most teacher of the college shall act as Principal until a duly selected Principal assumes office.

9. It is contended that since the statute entitles seniormost teacher of the College to act as Principal until a duly selected Principal assumes office, the Petitioner was rightly appointed as officiating Principal and therefore, is entitled for payment of salary. Reliance is also placed on the Division Bench judgments in Narmedeshwar Misra v. District Inspector of Schools, Deoria and Ors., 1982 UPLBEC 171 and Pushkar Singh Verma Vs. District Inspector of Schools, Meerut and another,

10. We have considered the aforesaid submissions but find ourselves unable to agree with the same.

11. Before enactment of 1980 Act, the scheme for appointment of teachers of University and its affiliated, associated and constituent colleges was provided under the 1973 Act. Section 31 Sub-section (1) of 1973 Act provided that teachers of the University and all affiliated or associated college other than a college maintained exclusively by the State Government shall be appointed by the executive council or the management of the affiliated or associated college as the case may be on the recommendation of a Selection Committee in the manner provided thereunder. Sub-section (4) (c) of Section 31 provides constitution of Selection Committee for selection of the Principal and Sub-section (10) provides that no selection for appointment under the said section shall be made except after advertisement of the vacancy in at least two news papers having adequate circulation in Uttar Pradesh. Sub-section (11) provides for prior approval of Vice-Chancellor before appointment of teacher in an affiliated or associated college. Since regular selection u/s 31, would have taken some time, in order to meet the exigency arising due to occurrence of vacancy on the post of Principal, Statute 12.22 permitted senior most teacher to act as Principal till regular Principal assumes office. However, with the enactment of 1980 Act which has been given overriding effect, the procedure of selection and appointment has undergone a major change inasmuch as the Selection Committee is now substituted by the commission and the selection has to be made in accordance with the procedure prescribed under 1980 Act. Section 12 of the said Act prohibits appointment of a teacher not made in accordance with the provisions of 1980 Act and also declares such appointment, if it is in violation, void. Therefore, this Court is of the view that no appointment of teacher which includes Principal of the College can be made which is not in accordance with 1980 Act. That being so, Statute

12.22 would not help the Petitioner and would not apply in such a case. The Legislature after enacting 1980 Act realised that after occurrence of vacancy on the post of teacher selection may take time and some provisional arrangement would be necessary. To meet such contingency, exercising power u/s 31A of 1980 Act, the 1983 Order has been issued, which, as we have referred hereinabove, empowers management to make ad hoc appointment in the manner provided therein. Therefore, unless an appointment is made to the post of Principal under 1980 Act read with 1983 Order, no one can claim salary of the post of Principal. The judgment relied by learned Counsel for the Petitioner, in our view, in no way are applicable in this case. In Narmedeshwar Misra (supra), the matter pertain to appointment of a Principal on officiating basis under Regulation 2 (1), Chapter-II of the Regulations framed under Intermediate Education Act, 1921 (hereinafter referred to as "1921 Act"). Regulation 2, Chapter-II which came up for consideration before this Court reads as under :

2 (1) The posts of the Head of Institution shall, except as provided in Clause (2) be filled by direct recruitment after reference to the Selection Committee under Sub-section (1) of Section 16F or, as the case may be, under Sub-section (1) of Section 16FF.

Provided that in the case of any institution not being an institution referred to in Section 16FF a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months, or by death, retirement or suspension of any incumbent occurring during an educational session in the post of the Head of Institution shall be filled by the promotion of the senior most qualified teacher, if any, in the highest grade in institution.

12. On a plain reading of Regulation 2, and in view of the admitted fact that Narmedeshwar Misra was appointed to officiate as Principal of the College this Court held as under :

6. A perusal of the proviso to Regulation No. 2 (1) shows that the Petitioner's case was squarely covered by it. The Petitioner was appointed in the vacancy caused by the retirement of Banshidhar Dixit, to officiate as the Principal of the College. The Petitioner was the senior most teacher. He was, therefore, lawfully appointed as the officiating Principal contemplated by the proviso.

13. It is worthy to notice that under proviso to Regulation 2, Chapter-II the language used is that the post of Head of the Institution shall be filled by promotion of the senior most qualified teacher, if any, in the highest rank, in the institution meaning thereby the provision contemplates promotion on the post of Principal of the senior most teacher in the highest rank. When we compare the language of Regulation 2, Chapter-II with Statute 12.22, we find that in Statute 12.22 of the Statutes it does not talk of promotion or appointment on the post of Principal but says that the senior most teacher shall act as Principal. Therefore, in Narmedeshwar Misra (supra), this Court considered a different provision which is not applicable in the present case. Even otherwise it cannot be disputed that in

the case of Narmedeshwar Misra (supra), the Court found and observed in para 6 that the Petitioner was "lawfully appointed officiating Principal" and in that view of the matter it was held that he would be entitled for salary of the said post. A valid appointment to the post for the purpose of claiming salary, therefore, is a condition precedent and in the absence thereof salary of the higher post cannot be claimed.

14. Similarly, Pushkar Singh Verma (supra), also appears to be a case of secondary education governed by the provisions of 1921 Act and the regulations framed thereunder where provisions are different. In none of the cases it has been held that even if a teacher is not appointed or validly appointed to the post of Principal yet he would be entitled for salary.

15. At this stage, it is relevant to notice that Section 16E of Chapter-II A of 1973 Act makes State Government liable for payment of salary to the teachers and employees of every college which is in grant-in-aid list of the State Government. Under Statute 12.21 of the First Statute it is provided that the teachers shall be given such grade of pay and governed by such other conditions of service as may be laid down from time to time in the Ordinances or in the orders, special or general, issued by the Government concerned in that behalf. Statute 17.02 provides that except the case of appointment any vacancy caused by the grant of leave to a teacher for a period not exceeding 10 months, teachers of affiliated college shall be appointed on a written contract in the Form-1 or Form-2 set out in Appendix-D. Appendix-D Form-2 is meant for Principal of affiliated college, but the condition of service contained therein makes it clear that the same is referable to a substantive appointment made on probation. Therefore, under 1973 Act read with Statutes and 1980 Act, except of substantive appointment, the only other way permissible for appointment to the post of Principal is an ad hoc appointment in accordance with para 3 of 1983 Order and only thereafter one can claim salary for the post on which he is appointed and not otherwise. Thus, we are of the considered opinion that unless a Principal is appointed on the post of Principal in accordance with law, he cannot claim salary. In the case in hand it is not disputed that the Petitioner has not been appointed on the post of Principal in accordance with the procedure prescribed under para 3 of 1983 Order and therefore, he cannot be said to be a validly appointed Principal entitled for salary of the said post.

16. There is another angle of the matter. We find that the Petitioner was only directed to take over charge of the office of Principal on account of retirement of the incumbent but there is no order of appointment of the Petitioner as officiating or ad hoc Principal of the College. Even the copy of the resolution filed as Annexure-6 to the writ petition only shows that the Committee of Management authorised Manager to take steps for appointing Petitioner as Principal on officiating basis, but thereafter, whether such steps were actually taken and the Petitioner was actually appointed on ad hoc basis as Principal. There is nothing on record to show that such an exercise was undertaken by the Manager. The

only document available on record shows that the Petitioner was directed to take charge and discharge duties of Principal which he assumed on 9.7.1994. Appointment to a post on ad hoc or officiating basis is different than mere discharge of duties of a higher post. In other word, the Petitioner was only given current duty charge in addition to the substantive post he held. In our view, this arrangement did not result in promotion to the post of which the current duty charge was handed over to the Petitioner unless an order of promotion is issued by the management in favour of the Petitioner.

17. In *State of Haryana Vs. S.M. Sharma and others*, the Chief Administrator of the Board entrusted Sri S. M. Sharma, with the current duty charge of the post of Executive Engineer, which was subsequently withdrawn as a result of his transfer to other post. He challenged the said order stating that it amounts to reversion. The Apex Court held that Sri Sharma was only having current duty charge of the post of Executive Engineer and was never promoted or appointed to the aforesaid post. Therefore, on transfer to some other post, it did not result in reversion from the post of Executive Engineer.

18. A somewhat similar situation occurred in *Ramakant Shripad Sinai Advalpalkar v. Union of India and Ors.*, 1991 Supp (2) SCC 733 and the Apex Court observed as under :

The distinction between a situation where a Government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion.

19. It was further held that such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it sometimes. However, the person continues to hold substantive lower post and only discharges duties of the higher post essentially as a stop-gap arrangement. A further contention was raised that such an arrangement if continued for a very long period it would give some kind of right to continue on the post but negating such contention, it was held that an in-charge arrangement is neither recognition nor is necessarily based on seniority and therefore, no rights, equities and expectations can be built upon it.

20. A similar issue was considered by a Division Bench of this Court also in Special Appeal No. 935 of 1999, *Smt. Vijay Rani v. Regional Inspectress of Girls Schools Region-I, Meerut and Ors.*, decided on 27.11.2006 and this Court held as under:

In this view of the matter, the Petitioner-Appellant has miserably failed to show that the management ever appointed her as officiating Principal of the College and, therefore, we hold that she was only allowed to discharge duties of the office of officiating Principal, but was never appointed/promoted by the management as officiating Principal of the College. The question No. 1 is

answered and decided accordingly.

21. Since the Petitioner was never appointed on the post of Principal, therefore, the question of payment of salary of the said post would not arise. Even otherwise, as we have already noticed, the management did not make any ad hoc appointment in accordance with the procedure prescribed, i.e., 1980 Act read with 1983 Order and therefore, also, a mandamus for payment of salary to the Petitioner for the post of Principal cannot be issued. Even if it is assumed that the Petitioner was appointed by the management on officiating basis the said appointment being inconsistent to the procedure prescribed, it would not result in conferring any right upon him to claim salary on the basis of such illegal appointment, if any.

22. In *Prabhat Kumar Sharma and others Vs. State of U.P. and others*, considering appointment made in violation of the procedure prescribed under the Removal of Difficulties Order, the Apex Court held as under :

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

23. The Apex Court agreed and upheld the Full Bench decision of this Court in *Radha Raizada (supra)*. Similar view has been taken by this Court in a number of cases, some of which may be referred as under:

24. In *Dr. R. K. Pandey v. Sukh Ram Pal Singh Sahravat*, 1995 (1) ESC 74, this Court held :

As the appointment of Dr. Raman Kumar Pandey was made before two months from the date of vacancy could expire, it was wholly illegal, having been made in contravention of Section 18 of the Act.

25. In *Anilesh Pratap Singh Vs. State of U.P. and Others*, A Division Bench of this Court held :

15. Applying the principles laid down in the aforementioned cases we are of the considered opinion that the provisions of Section 18 of 1982 Act is mandatory and unless and until the period of two months expires from the date of notifying the vacancy to the Commission, the Committee of Management does not get any power to fill up the vacancy on ad hoc basis.

26. The aforesaid view has been followed recently in Special Appeal No. 32 of 2006, *Lalta Prasad Goswami v. State of U. P. and Ors.*, decided on 12th January, 2006.

27. Therefore, we are of the considered opinion that no mandamus in this can be issued for payment of salary to the Petitioner for the post of Principal.

28. Now coming to the second question, i.e., regularisation of the Petitioner, we find that the learned Counsel for the Petitioner could not place any provision for regularisation. So far as Section 31C of 1980 Act is concerned the same is

admittedly not applicable to the post of Principal. The Petitioner has not sought any relief challenging vires of Section 31C of 1980 Act and in the absence of any such relief we have to proceed treating Section 31C of 1980 Act a valid provision, and that being so, the same being inapplicable to the Petitioner, no direction can be issued to consider him for regularisation. It has been held by the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, where the appointment is illegal, or no appointment made consistent with the scheme of Article 16 of the Constitution, no mandamus can be issued for regularisation particularly in the absence of any provision. The writ petition, therefore, lacks merit and is accordingly dismissed. No order as to costs.