
(2004) 07 AHC CK 0165
In the Allahabad High Court
Case No : C.M.W.P. No. 27711 of 2003

Smt. Manju Keshi Dixit

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Uttar Pradesh Intermediate Education Act, 1921 — Regulation 3

Citation : (2004) 4 AWC 3758 : (2004) 3 AWC 3758

Hon'ble Judges : R.K. Agrawal, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; P.C. Sharma, S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.K. Agrawal, J.—By means of the present petition filed under Article 226 of the Constitution of India, the petitioner, Smt. Manju Keshi Dixit, seeks a writ, order or direction in the nature of certiorari quashing the order dated 5th April, 2003 passed by the Regional Deputy Director of Education, Agra, respondent No. 1, filed as Annexure-1 to the writ petition, and other consequential reliefs.

2. Briefly stated, the facts giving rise to the present writ petition are as follows :

In the district of Hathras, there is an Intermediate College, known as Surjo Bai Inter College (hereinafter referred to as "the College"). It is recognised under the provisions of the U. P. Intermediate Education Act, 1921. However, It receives grants from the State Government upto High School only. According to the petitioner, she is working as Assistant Teacher L.T. grade to teach only in the High School classes in the aforesaid College. There was some dispute regarding the nature of her appointment which was ultimately decided by this Court in Civil Misc. Writ Petition No, 18266 of 1997, Smt. Manju Keshi Dixit v. Committee of Management, Surjo Bai Inter College, Hathras and Ors., and other connected writ petitions, decided on 13th September, 2002. This Court had held that the

petitioner had been appointed as L.T. grade teacher in the year 1974. However, the Deputy Director of Education, Agra was directed to re-decide the seniority in the light of the observations made in the judgment. Pursuant to the aforesaid directions, the Deputy Director of Education, Agra, by the impugned order dated 5th April, 2003, had determined the seniority by placing the petitioner at serial No. 2 and Smt. Raj Kumari, respondent No. 3, at serial No. 1. The order dated 5th April, 2003 is under challenge in the present writ petition.

3. I have heard Smt. Manju Keshi Dixit, the petitioner, who has appeared in person, Sri P. C. Sharma who represents the Committee of Management of the College and Sri S. S. Chauhan who represents Smt. Raj Kumari, respondent No. 3.

4. Smt. Dixit submitted that even though Smt. Raj Kumari, respondent No. 3, was appointed on 8th July, 1971, her appointment was invalid inasmuch as three of the members of the selection committee were her close relatives and, thus, they could not have made her selection. She further submitted that there has been a break in service of the respondent No. 3 from 25th April, 1992 to 27th April, 1992 as her leave was not sanctioned and, therefore, she cannot be made senior to her. According to the petitioner, the then Principal had given an entry of doubtful integrity on 23rd June, 1992 and, therefore, also she cannot be placed above her in the seniority list. She relied upon the order of the Regional Deputy Director of Education, Agra, dated 19th May, 1997 in which it was observed that the Committee of Management is authorised to take action in accordance with law against Smt. Raj Kumari regarding her illegal appointment. She, thus, submitted that if Smt. Raj Kumari, respondent No. 3, is treated as senior to the petitioner, she would become the officiating Principal, which is not warranted.

5. Sri P. C. Sharma, the learned counsel appearing for the Committee of Management, submitted that the Committee of Management had expunged the entry of doubtful integrity, treated the unauthorised leave as sanctioned leave and also had held that there was no illegality in the appointment of Smt. Rhj Kumari, which was made in the year 1971. He thus, submitted that the order passed by the Regional Deputy Director of Education is perfectly justified and in accordance with law.

6. Sri S. S. Chauhan, the learned counsel appearing for the respondent No. 3, while adopting the arguments of Sri P. C. Sharma submitted that even the petitioner had admitted that the respondent No. 3 had been appointed as an Assistant Teacher in the year 1971 whereas the petitioner has been appointed in the year 1974. Thus, on the own showing of the petitioner, the respondent No. 3 is much senior to her and, therefore, the seniority has been correctly determined. According to him, after a gap of more than 30 years, it is not open nor permissible to any person to question the validity of the appointment while determining the seniority.

7. Having heard the petitioner in person and the counsel for the respondents, I

find that it is not in dispute that the petitioner was appointed as Assistant Teacher in the year 1974 whereas the respondent No. 3 has been appointed as Assistant Teacher on 8th July, 1971. The appointment of the respondent No. 3 was under some cloud on the basis of audit reports for the years 1988-89 to 1997-98 but pursuant to the observations made by the Regional Deputy Director of Education in his order dated 19th May, 1997, the Committee of Management, vide order dated 25th April, 1999, had found the appointment of Smt. Raj Kumari, respondent No. 3, to be legal. Similarly, vide order dated 27th April, 1995 passed by Committee of Management, the unauthorised absence and break in service of the respondent No. 3 had been condoned. The Committee of Management vide resolution passed on 5th February, 1997, had also expunged the entry of doubtful integrity. The petitioner cannot be permitted to challenge these resolutions which had been passed in the years 1995, 1997 and 1999 at this stage, i.e., in the year 2003.

8. Seniority is to be determined in terms of Regulation 3 of Chapter II, of the Regulations framed under the U. P. Intermediate Education Act, 1921. Regulation 3 reads as follows :

"3. (1) The Committee of Management of every institution shall cause a seniority list of teacher to be prepared in accordance with the following provisions :

(a) The seniority list shall be prepared separately for each grade of teachers whether permanent or temporary, on any substantive post ;

(b) Seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. If two or more teachers were so appointed on the same date, seniority shall be determined on the basis of age ;

(bb) Where two or more teachers working in a grade are promoted to the next higher grade on the same date, their seniority inter se shall be determined on the basis of the length of their service to be reckoned from the date of their substantive appointment in the grade from which they are promoted :

Provided that if such length of service is equal, seniority shall be determined on the basis of age.

(c) A teacher in a higher grade shall be deemed to be senior to a teacher in the lower grade irrespective of the length of service ;

(d) If a teacher who is placed under suspension, is reinstated on his original post, his original seniority in the grade shall not be affected ;

(e) Every dispute about the seniority of the teacher shall be referred to the Committee of Management, which shall decide the same giving reasons for the decision ;

(2) The seniority list shall be revised every year and the provisions of clause (1) shall mutatis mutandis apply to such revision."

9. In the case of Vijay Narain Sharma v. District Inspector of Schools, Etawah and Ors. 1986 UPLBEC 44, this Court has held as under :

"23. It is, therefore, clear that even in the case of a promotion of a teacher to the lecturer's grade or to the L.T. grade, a teacher aggrieved by the decision of the Committee of Management has got a remedy to challenge the said decision before the District Inspector of Schools, From the above provisions, therefore, the Scheme of the Act is that at the time when the appointment is made or when the promotion is made, the said appointment or promotion made by the Managing Committee can be challenged to the higher authority prescribed under the Act and the regulations framed thereunder.

24. Regulation 3 of Chapter II lays down the principles on which the seniority list has to be prepared. I have already quoted Regulation 3 of Chapter II, which lays down the manner in which the seniority is to be determined. The relevant factors for determining the validity of the seniority list are the grade in which the teacher is working, whether he is appointed on the substantive post or not, whether the appointment is permanent or temporary, the date of the appointment or promotion and the age of the teachers.

25. On a reading of Regulation 3 of Chapter II, it is clear that it no where contemplated that the teacher who challenges the seniority list can again challenge the validity of the appointment or promotion of a teacher in the college. He can only be aggrieved by the factors, if wrongly decided, as mentioned in Regulation 3. The dispute can be taken in appeal under Clause (f) of Regulation 3, quoted above. In my opinion, it is clear that while disputing the validity of the seniority list, it is not open to a teacher to challenge the appointment and promotion which had already been done. The challenge to the appointment and promotion has been specifically provided. If no challenge is made at that stage then the appointment and promotion becomes final. If the Legislature intended that the appointment and promotion can be challenged at the time of determining seniority, the Legislature would have specifically provided in the Regulations. This has not been done.

26. There is another aspect of the matter that once the appointment or promotion becomes final, a vested right is created in favour of a teacher. A colleague of his in the institution having acquiesced to the appointment and promotion cannot be, subsequently, permitted to raise the dispute.

27. In this view of the matter, I am of the opinion that the contention raised by the learned counsel for the respondent is well founded. In proceedings for AWC 2361 determining the validity of the seniority list prepared by the college, it is not open to a teacher of the said college to challenge the appointment or promotion of any other teacher in the same college."

10. In the case of Smt. Rant Srivastava v. State Of U. P. and Ors. 1990 (1) Uplbec 425, this Court has held as under :

"5. Principal infirmity in appointment of petitioner, that could be pointed out, was that it was made without Issuing any advertisement and recommendation the Selection Committee. May be but could the management which appointed petitioner in 1984 and the Basic Shiksha Adhikari who did not raise any objection to payment of salary for five years raise this objection in 1989. The appointing authority under rules is the Committee of Management. And the approving authority is the Basic Shiksha Adhikari, who under U. P. Act No. 6 of 1979 is also to supervise the payment of salary and Is empowered to inspect and check. For five years no, objection was raised by him. And then suddenly when one of the members desired that a male principal, should be appointed, he also raised an objection. The petitioner had raised objection as far back as in 1985 against her being treated as temporary employee. No action was taken on it. Nor any decision was given. For procedural irregularity the petitioner should not be made to suffer. Normally it is to be presumed that Management must have sent papers for appointment of petitioner to Basic Shiksha Adhikari who must have granted approval unless it is rebutted either by placing any communication by Management from record of Basic Shiksha Adhikari to show that things did not proceed as they are provided in the Act. In absence of any material there is no reason to doubt that Committee of Management would have appointed without intimating Basic Shiksha Adhikari and would have even issued letter appointing petitioner permanently and Basic Shiksha Adhikari would not have raised any objection in respect of payment of salary etc. from 1984 to 1989. Change of Secretary or Basic Shiksha Adhikari should not be permitted to create any difference otherwise it shall result in creating arbitrariness and expose teachers of being thrown out of employment on one or the other pretext and shall never have security which Is necessary for efficient discharge of duty. Equity stands in her favour and prevents both the appointing and approving authority from taking recourse to their own mistakes, for causing prejudice to petitioner. Estoppel, the principle of equity, Is the shield for such unjust and unfair actions."

11. In the case of Asha Saxena Vs. S.K. Chaudhari and Others, , a Full Bench of this Court has held as follows :

"16.....In any view of the matter, the appointments which were existing for the last 17 years could not be set aside after a lapse of such a long period. Even the earlier Full Bench had quashed the order of the Regional Inspectress of Girls Schools referring the matter u/s 16E (1) of the Act and we are also of the opinion that the aforesaid order is liable to be quashed. It is true that there is power u/s 16E (10) of the Act to cancel the appointments but the power has to be exercised within a reasonable time. The appointment had been made in the year 1973 and by no stretch of imagination it can be said that the exercise of that power after the lapse of 17 years by the Director of Education u/s 16E (1), on the facts and circumstances of the case can be said to be exercise of a power within a reasonable time."

12. In the case of Smt. Zattoo Fattma v. Director of Education, U. P. Shiksha

Nideshalaya. Allahabad and Ors. 1999 (2) ESC 1271, this Court has held as under :

"4. The next question that begs consideration is whether the Regional Inspectress of Girls Schools was Justified In making reference u/s 16E (1) of the Act to the Director of Education for cancellation of the initial appointment of the appellant by promotion to C.T. grade and later, to L.T. grade after a lapse of about 23 years. The counsel for the appellant propounded with the vehemence that it would be unjust to allow the appointment to be cancelled after a lapse of nearly 23 years of the appointment of the appellant to L.T. grade. The submission made by the learned counsel is laded with substance. In Smt S. K. Chaudhary v. Manager, Committee of Management, Vidyawati Darbart Girls Inter College, Lookerganj, Allahabad and Ors. 1991 (1) UPLBEC 250, the validity of appointment of a teacher was sought to be challenged after lapse of 17 years. The Full Bench held as under :

"One fails to understand that after a lapse of nearly 17 years the Regional Inspectress of Girls Schools referred the matter to the Director of Education for adjudicating the question as to whether the appointments were valid or not. The exercise of power by the Regional Inspectress of Girls Schools on She facts and circumstances of the case Is wholly arbitrary as that powers could not be exercised after lapse of 17 years.....In any view of the matter the appointments which were existing for the last 17 years could not be set aside after lapse of such a longer period. It is true that there is power u/s 16E (1) of the Act to cancel the appointment but that power has to be exercised within a reasonable time. The appointments had been made in the year 1973 and by no stretch of imagination it can be said that the exercise of that power after the lapse of 17 years by the Director of Education u/s 16E (1), on the facts and circumstances of the case, can be said to be exercise of a power within a reasonable time."

5. The Court is no doubt conscious of the maxim "*Quod Ab Intio Non Valet in Tractu Temporis Non Convalescit*", which implies that which was originally void, does not by lapse of time become valid but rule contained in the said maxim is subject to certain exceptions and one such exception is illustrated by the maxim, *quod fieri non debet Factum valet* which means the fact cannot be altered though it should not have been done. *R. v. Lord Neborough*. 4 QB 585 will illustrate the doctrine of *factum valet*. There, the question as to the payment of salary to certain special constables whose appointments had not been made in accordance with the requirements of the Special Constable Act, 1831 nor was there any valid order for payment of their salaries. Relying upon the doctrine of *quod fieri non debet factum valet*. Lush, J. who decided that, as the order for payment had been acted upon, the account allowed, and the money paid, the proceedings should not be reopened. The appointment of the appellant herein to C.T. grade and later, to L.T. grade by promotion having been in fact acted upon, it would not be Just and proper to reopen the question of validity of her appointment by

promotion to C.T. grade and later, to L.T.grade after a lapse of about 23 years. In our opinion, the order of the Regional Inspectress of Girls Schools referring the matter to the Director of Education u/s 16E (1) is thus liable to be quashed."

13. Thus, the consistent view of this Court is that the appointment cannot be challenged while determining the seniority and if the appointment has been made and is continued for long period, it should not be disturbed or set aside on some technicalities or procedural irregularities.

14. The aforesaid decisions have been followed by this Court in the case of Rama Shanker Misra v. Joint Director of Education, Varanast Region. Varanast and Ors., Civil Misc. Writ Petition No. 23065 of 2000, decided on 20.3.2001.

15. Applying the principles laid down In the aforesaid decisions to the facts of the present case, the Court is of the considered opinion that the appointment of the respondent No. 3 as Assistant Teacher which was made in the year 1971, cannot be challenged while determining the seniority. Moreover, the Committee of Management, as far back as on 25th April, 1999, has held the appointment of the respondent No. 3 as valid. The break in service and doubtful integrity entered in the character roll of the respondent No. 3 has also been expunged by the Committee of Management vide resolutions passed on 27th April, 1995 and 5th February, 1997. Thus, there is no break in service of the respondent No. 3 and she has to be treated in continuous service since the date of her appointment as Assistant Teacher in the College. The petitioner could have challenged the decisions which were taken by the Committee of Management in the years 1995, 1997 and 1999 at that point of time. She having failed to challenge the said decisions within a reasonable period, cannot be allowed to challenge the same at this stage when the matter of seniority is being determined. Since the respondent No. 3 had been appointed as Assistant Teacher in the College on 12th August, 1971, which is admitted to the petitioner, and the petitioner had been appointed as Assistant Teacher in the College only in the year 1974, the respondent No. 3 is senior and has rightly been declared so.

16. In view of the foregoing discussions, there is no merit in this petition. The writ petition fails and is dismissed. However, the parties shall bear their own costs.