
(2012) 03 AHC CK 0098

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 11703 of 2012

Smt. Nidhi Jain

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-03-2012

Acts Referred:

Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 — Rule 10, 8

Citation : (2012) 4 ADJ 255 : (2012) 3 AWC 2997

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Indra Mani Tripathi, for the Appellant;

Final Decision : Dismissed

Judgement

Hon'ble Sudhir Agarwal, J.—Heard Sri Indra Mani Tripathi, learned counsel for the petitioner at great length, learned Standing Counsel for respondent Nos. 1 and 2 and have perused the record. The writ petition is directed against the order dated 26.12.2011 (Annexure 12 to the writ petition) which is show-cause notice issued by District Basic Education Officer Mahamayanagar (Hathras) (hereinafter referred to as "DBEO") requiring petitioner to show-cause as to why her services be not terminated since her very appointment on compassionate basis was illegal and contrary to the rules. The order dated 10.2.2012 (Annexure 14 to the writ petition) whereby the petitioner's appointment on the post of Assistant Teacher has been declared illegal as a consequence whereof petitioner has been terminated by order passed by DBEO is the consequential order impugned herein.

2. Certain facts which are not in dispute may be stated in brief as under.

3. The petitioner's mother Smt. Usha Jaiswal was working as Assistant Teacher and posted at Gigraili Primary School Hathras. It is also not in dispute that petitioner's father Sri Narendra Kumar Jain was also employed as Station Master in Indian Railway. The petitioner possessed educational qualification in M.Sc.

(Mathematics) in 2006 when her mother Smt. Usha Jaiswal died due to an accident on 29.8.2006. At the time of her death, she had four children including the petitioner in her family besides husband. The petitioner's one elder sister was already married.

4. The petitioner submitted an application for compassionate appointment which was supported by affidavits of various family members of the petitioner that they had no objection if appointment is provided to the petitioner. The copy of an affidavit filed by the petitioner is on record at page 54/55 dated 25.11.2006 which states that petitioner's mother was an Assistant Teacher, died in an accident on 29.8.2006 and petitioner as her legal heir has submitted application for compassionate appointment, she is neither employed in State Government nor Central Government nor any other instrumentality of the two departments nor has submitted any application for appointment earlier, she is an unemployed girl, and, therefore need be appointed on compassionate basis. There is no reference of employment of petitioner's father therein.

5. Learned counsel for the petitioner has drawn my attention to a copy of the application said to have been submitted by petitioner, placed on record as Annexure 3 at page 44, wherein factum about employment of petitioner's father is mentioned and it also contains endorsement dated 17.11.2006 addressed to BSA recommending compassionate appointment of petitioner in order to fortify his submission that there was no misrepresentation on the part of petitioner.

6. It is worthy to notice that this photocopy of application does not contain any date of submission of the said application form though endorsement dated 17.11.2006 is there, but who has made this endorsement is also not very clear.

7. Be that as it may, the fact remains that Dr. Indra Pratap Singh Solanki, the then District Basic Education Officer, Hathras appointed petitioner treating her entitled for compassionate appointment as an untrained Assistant Teacher on the fixed salary of Rs. 2750/-. The petitioner was appointed and posted by order dated 7.12.2006 in Primary School Nagal Dhan Singh, Block Mursan Hathras. The petitioner joined on 11.12.2006 and while serving as Assistant Teacher also went for training meant for untrained teachers appointed on compassionate basis and completed the same. After completion of such training petitioner was placed in regular trained teacher pay scale by DBEO by order order dated 27.1.2011.

8. Later on some complaint was made that in a fraudulent manner petitioner had obtained appointment on compassionate basis though she was not entitled for such appointment since her father was alive and already in Government employment. An enquiry was initiated and show-cause notice was issued to the petitioner by Deputy Basic Education Officer on 8.12.2011. The petitioner submitted all her testimonials for perusal of DBEO who after scrutiny of the document found that when petitioner applied for compassionate appointment, her father was already an employee of Central Government working in railway department and therefore as per Government Order dated 4.9.2000, making

provision for compassionate appointment to the Assistant Teachers of primary schools, it could not have been offered to the petitioner and appointment of petitioner therefore was clearly illegal. The DBEO accordingly issued a show-cause notice dated 26.12.2011 to the petitioner and thereafter has passed the impugned order.

9. Learned counsel for the petitioner referring to the petitioner's reply dated 14.1.2012 contended that petitioner did not play any fraud in the matter, inasmuch as, she has clearly stated in her application that her father was employed as Railway Master in Indian Railways. The fault, if any, committed was on the part of respondents for which petitioner after more than five years cannot be made to suffer, particularly when she has also successfully completed BTC training meant for untrained Assistant Teachers and in the meantime her father has also retired from service on 30.10.2011.

10. Learned counsel for the petitioner further submitted that it is only when petitioner has played fraud or misrepresentation, her service could have been terminated but not otherwise. He also contended that impugned order amounts to terminating service of petitioner but without holding any departmental enquiry hence it is wholly illegal and liable to be set aside.

11. Having given my anxious consideration to all the above submissions, I find no substance therein. This fact is not disputed by petitioner that her father was working as Station Master in Indian Railway at the time when petitioner's mother met with an accident and died and petitioner applied for compassionate appointment and also when she was so appointed. It is also true that copy of application which petitioner has placed before this Court i.e. at page 44 of the writ petition, in para 3, clearly mention that petitioner's father is serving as Station Master in Railway Department and the aforesaid document also contain an endorsement dated 17.11.2006 recommending for compassionate appointment of the petitioner and the said endorsement is addressed to BSA but the aforesaid application itself is undated. Besides the said application, in all other documents namely various affidavits etc. as also affidavit of petitioner's father himself there is no reference or mention of the fact which may demonstrate that petitioner's father was in employment. No other affidavit except affidavit of petitioner's father in which he has mentioned about his employment as Railway Master in Railway Department.

12. Be that as it may, apparently it cannot be disputed that petitioner herself cannot be said to be guilty of concealment of any fact or misrepresentation or fraud. The error or blunder is on the part of the then DBEO who made appointment of petitioner on compassionate basis without carefully looking into the contents of application submitted by petitioner stating that her father being in Government service at that time, she did not qualify for compassionate appointment under the provisions applicable at the relevant time. The mistake on the part of the then DBEO, whether deliberate or intentional would be a matter of investigation but the fact remains that the petitioner ex facie may not be held

guilty of any fraud or misrepresentation.

13. However, that itself would not solve the problem. A public employment commences initially as a matter of contract and thereafter governs by statute and becomes a matter of status. Here appointment of petitioner was admittedly governed by statutory rules. The petitioner claimed to be entitled for compassionate appointment under relevant provisions though she was not and a mistake of fact and law was committed by DBEO in giving appointment to the petitioner treating her eligible for compassionate appointment though neither she was nor could be under relevant provisions and therefore, it was an action, void ab initio. The DBEO made an appointment which was patently illegal and could not have been done. The petitioner could not have been appointed on compassionate basis without possessing training qualification. No such untrained incumbent could have been appointed unless possess essential qualification prescribed in Rule 8 of U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "1981 Rules"). The petitioner was appointed despite being untrained apparently giving her benefit of Rule 10 of 1981 Rules. It is only because of the fact that petitioner claim benefit of compassionate appointment and DBEO also intended to treat petitioner's claim as compassionate appointment that exception/exemption with respect to training under Rule 10 of 1981 Rules was resorted to and Rule 8 was ignored by taking shield under compassionate appointment.

14. It is well settled that an appointment lacking basic qualification is void ab initio. The training qualification under Rule 8 of 1981 Rules is an essential qualification and no person lacking requisite qualification could have been appointed unless governed by Rule 10. The mere fact that petitioner did not play any fraud or misrepresentation may not result in penalizing the petitioner by directing her to repay the salary which has been paid to her, founded on a wholly illegal appointment but that by itself will not validate her appointment entitling her to continue in service.

15. The appointment being void ab initio since beginning, the impugned order only declare the aforesaid status having the effect of termination of services of the petitioner otherwise here it is not a case of termination for something she has done during the course of employment but declaration of appointment as illegal. Here is a case of very illegality in the appointment and not to a transaction of a later stage. This Court has already differentiated and expressed the view when the very selection/appointment of incumbent is found to be nullity, cancellation thereof does not amount to dismissal or removal of service. In Civil Misc. Writ Petition No. 51300 of 2007 (Devendra Kumar v. State of U.P. and others) decided on 2.11.2010; the Court said:

Here this is not a case of dismissal. It is a case of cancellation of selection and appointment on account of false information furnished by petitioner before his appointment by filing an affidavit which contained wrong information and therefore, cancellation of selection and appointment... has been made

16. It is thus evident and also admitted by petitioner that her father was in Government service at the time when she claimed compassionate appointment, the petitioner could not have been given compassionate appointment as she did not fulfill requisite conditions entitling her for compassionate appointment.

17. The statutory position which is clear has not been disputed by learned counsel for the petitioner but what he claims is that once appointment has been made and she has been permitted to continue thereafter for five years and more, she could not have been terminated without holding a departmental enquiry consistent with disciplinary rules applicable to assistant teachers of primary schools.

18. The submission, in view of the above discussion, is wholly misconceived and untenable in law. Having said so, this Court finds that here the real guilt comes from the then DBEO who passed the order of appointment of petitioner without caring to look into even the bare contents of petitioner's application which ex facie would have shown that petitioner was not eligible for compassionate appointment since one of her parents namely father was employed at the relevant time. The family therefore could not be said to suffer penury due to death of mother who was not the sole bread earner.

19. It is negligence on the part of DBEO which has resulted in this situation and has also caused payment of salary to petitioner from public exchequer though she was not entitled for the same. The application submitted by petitioner is short. The factum of employment of petitioner's father having been written very clearly, this Court has no reason but to infer that lapse/negligence or illegality in discharge of duties on the part of DBEO was deliberate and intentional. He, in a wholly illegal manner, has conferred a benefit upon the petitioner to which she was not entitled at all. Therefore, loss occurred to Public exchequer due to payment of huge amount to petitioner in the form of salary pursuant to a wholly illegal appointment is attributable to the then DBEO and he must be held accountable therefore.

20. In the circumstances this Court direct that entire amount of salary, which has been paid to petitioner pursuant to appointment order dated 7.12.2006, which was ex facie illegal and void ab initio, be recovered from the then DBEO. Learned Standing Counsel submits that for the above illegality, DBEO solely may not be responsible, inasmuch as, subordinate staff who recommended for such an appointment may also have contributed for it.

21. I do not find any substance therein for the reason that ultimate responsibility of appointment lay upon DBEO concerned and since he has issued order of appointment which was patently illegal since inception, the accountability for such illegal act must rest upon such authority and not subordinate authorities.

22. The Secretary, Basic Education, U.P. Lucknow therefore is directed to initiate a departmental enquiry against the then DBEO in accordance with relevant rules, in respect to above illegal act. Besides above, amount of salary paid to petitioner

pursuant to illegal order of appointment shall also be recovered from the person found responsible in making appointment of petitioner after giving due opportunity of hearing as per procedure prescribed in law. The observations made above only to this extent shall not be taken to be conclusive against the then DBEO and the competent authority shall proceed in the matter independently but shall finalize the proceedings within four months from the date of receipt of copy of the judgment and submit a copy of the final order to this Court through Registrar General.

23. In view of the above I do not find any merit in the writ petition. It is accordingly dismissed subject to above directions and observations. The Registrar General is directed to send a copy of this order to Secretary, Basic Education, U.P. Lucknow forthwith with for information and compliance of the directions as above.