
(2010) 10 AHC CK 0024

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 40069 of 2007

Smt. Raj Prabha Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-10-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 21

Citation : (2011) 1 ADJ 540

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Dinesh Singh, D.R.S. Chauhan and J.P. Singh, for the Appellant; M.C. Chaturvedi (C.S.C.), Suresh Singh and B.P. Singh, for the Respondent

Judgement

Sudhir Agarwal, J.—Heard Sri Dinesh Singh, learned counsel for the petitioner and Sri M.C. Chaturvedi, learned Chief Standing Counsel assisted by Sri Suresh Singh and B.P. Singh, Advocates for the respondents. Sri Anil Sant, Secretary, Basic Education Government of U.P., Lucknow is present in this Court pursuant to this Court's order dated 4.10.2010 and has also filed an affidavit stating that he is personally looking into the matter, as a result thereof various payments have been made to the petitioner which were due to her since April, 1999 and onwards by the District Basic Education Officer, Azamgarh vide order dated 18.10.2010 (Annexure-1 to the affidavit).

2. Sri M.C. Chaturvedi, learned Chief Standing Counsel has submitted that in the present matter the Secretary himself has initiated inquiry against the officials who were responsible for such an extraordinary delay and laches and says that appropriate disciplinary action will be taken against the erring officials.

3. The facts in brief giving rise to the present dispute are that the petitioner was appointed as Assistant Teacher at Primary Pathshala Atraura, Block Phulpur, District Allahabad on 18.3.1998 by the District Basic Education Officer, Allahabad in the pay scale of Rs. 1100-1710 on probation for a period of one year. It was mentioned in the order of appointment that for the first five years the petitioner

shall not be transferred from the institution concerned to any other institution in the District. Thereafter it appears that pursuant to the Secretary, Board of Basic Education's order dated 30.8.1998 the petitioner was transferred to District Azamgarh so as to take charge in the rural area and the said order of transfer was conveyed to the petitioner by the District Basic Education Officer, Allahabad vide order dated 16.10.1998 and joined at Azamgarh on 30.11.1998. However her salary from November, 1998 till December, 2002 was not paid for want of verification of her date of appointment, transfer and relieving for which she made some correspondence with the authorities concerned. Ultimately the District Basic Education Officer, Azamgarh sent a letter dated 10.2.2004 (Annexure-4 to the writ petition) seeking verification in respect to the above matters from District Basic Education Officer, Allahabad but it appears that it remain unheeded, hence this writ petition.

4. The petitioner had sought a mandamus commanding the respondents to pay salary to the petitioner from 20.10.1998 to December, 2002, to fix her salary in the trained teachers grade and make payment of increment etc. from January, 2003 till date and also pay arrears of salary by adding annual increments etc.

5. A counter-affidavit has been filed initially on behalf of respondents No. 1 and 2 through Sri K.S. Shukla, Advocate. In para 8 thereof it is stated that the requisite information sent to the competent authority as long as back on 10.01.2002 by Lekhadhikari, Basic Shiksha, Allahabad. This affidavit is sworn by Sri Kamalakar Pandey, the then Basic Education Officer, Allahabad. Looking to these circumstances, this Court passed an order on 21.9.2010 as under:

The petitioner contends that her salary from 20th October, 1998 up to December 2002 has not been paid on account of the Last Pay Certificate and the Relieving Certificate, not being verified. A counter-affidavit has been filed on behalf of District Basic Education Officer, Allahabad, that the requisite information has been sent to District Basic Education Officer, Azamgarh, long back. An amendment application was filed on 5.2.2008 and a copy of the same has been served on learned Standing Counsel for the State. The said Affidavit categorically states that the information has been given to the District Basic Education Officer, Azamgarh, but unfortunately till date no action has been taken to ensure the payment of salary even though the certification has been made in this regard.

In the aforesaid circumstances, a show-cause is issued to the respondent No. 3 - District Basic Education Officer, Azamgarh, to inform the Court as to why the payment has not been made till today and further to issue necessary orders with regard to the payment of salary to the petitioner including arrears without any further delay by 4.10.2010. The said Officer shall file an Affidavit of Compliance in the light of the observations made herein above.

In the event the compliance is not made, the said Officer shall be personally present in Court on 4.10.2010. However, in case the order is issued, an Affidavit shall be filed in that regard.

List on 4.10.2010.

A certified copy of this order shall be issued to the learned Standing Counsel, free of charges, for its communication to the respondent No. 3.

6. Since neither anyone appears on 4.10.2010 nor any affidavit was filed, hence this Court was constrained to pass the following order on 4.10.2010:

This is a very surprising matter in which one of the District Basic Education Officer at Azamgarh is complaining that his counter part at Allahabad, though might have issued last pay certificate, but since it was not received by the office of respondent No. 3, therefore, for the last ten years pay fixation and payment of salary to the petitioner is adversely affected. This is really surprising and shocking. No other reason has been disclosed in the counter-affidavit.

Let all the respondents appear before this Court on 20.10.2010 and explain as to why and in what circumstances the fixation of salary and increment to the petitioner for the last ten years has not been made. They shall also file their affidavits by 20.10.2010.

List on 20.10.2010.

A copy of this order shall be supplied to learned Standing Counsel for information and compliance by respondents.

7. It is pursuant to this order Sri Anil Sant, Secretary, Basic Education U.P. Government as well as Sri Ram Murti Yadav, Assistant Basic Education Officer, Tahbarpur, District Azamgarh, Sri Shiv Chand Ram, District Basic Education officer, Azamgarh and Sri Brijesh Mishra, District Basic Education Officer, Allahabad are present. They have also filed their affidavits.

8. The affidavit of the respondent No. 2 which has been sworn by Dr. Brijesh Mishra, the present District Basic Education Officer, Allahabad states that after the transfer of the petitioner from Allahabad to Azamgarh, and after her relieving on 16.10.1998 at Allahabad, and joining on 20.10.1998 at Azamgarh, though she was entitled to get salary from District Azamgarh but due to the dispute of last pay certificate pending between Accounts officer, Basic Education Allahabad and Azamgarh, the salary could not be paid. This is evident from the correspondence of the two authorities. The record show that the relieving of petitioner on 16.10.1998 was verified by the then District Basic Education Officer, Allahabad on 4.12.2007 Annexure-1 to the affidavit). Dr. (Brijesh Mishra states that he joined as District Basic Education Officer, Allahabad in the month of June, 2008 and the present matter came to his notice only through the letter dated 6.10.2010 received in his office on 15.10.2010 which was sent by the District Basic Education Officer, Azamagarh, a copy whereof has been filed as Annexure-2 to this affidavit. This letter dated 6.10.2010 sent by the District Basic Education Officer, Azamgarh shows that after the petitioner's joining at Azamgarh she was posted as Assistant Teacher at Primary School Harraiya, Tahbarpur, District Azamgarh.

9. Letter dated 28.8.2001 sent by Assistant Basic Education Officer, Tahbarpur, Azamgarh for verification from the office of the Finance and Accounts Officer, Allahabad. He was informed by the letter dated 29.8.2001 by Finance and Accounts Officer, Allahabad that though the petitioner's salary was drawn at Allahabad and the amount shown in the last pay certificate is also correct, but the signature on the last pay certificate of Finance and Accounts Officer are forged. This really caused all the confusion. Later on by letter dated 10.1.2002 it is said that the earlier last pay certificate of the petitioner which was received in District Azamgarh was without any signature of Finance and Accounts Officer and the same is being counter signed and send. However, this shows that the signature on the letter dated 10.1.2002 and the last pay certificate were found to be different and, therefore, last pay certificate was treated to be doubtful hence salary was not paid to the petitioner. Thereafter the office of the District Basic Education Officer, Allahabad was contacted personally also but nothing could be verified by them. Ultimately the then District Basic Education Officer on 31.3.2003 directed for payment of minimum salary to the petitioner which accordingly commenced since January, 2003.

10. The District Basic Education Officer, Azamgarh vide letter dated 10.2.2004 again sought verification of last pay certificate, date of appointment and relieving and also sent reminder dated 27.3.2006. The office of the District Basic Education Officer, Allahabad vide letter dated 4.12.2007 sent verification with respect to the relieving of petitioner but did not clarify about last pay certificate of the petitioner hence payment could not be made. When the petitioner approached this Court, and order dated 21.9.2010 was passed, pursuant thereto, in order to avoid any contempt proceedings a request was made to the office of the District Basic Education Officer, Allahabad to make verification of last pay certificate etc. so that the petitioner's balance payment be made and the Court may be informed accordingly.

11. Thereafter only the District Basic Education Officer, Allahabad sent letter dated 15.10.2010 clarifying all these things but this also shows somewhat mutual shifting of responsibility. This is for the apparent reason of unexplained laches and negligence on the part of the two authorities who did not bother how a primary teacher would be surviving herself and maintaining her family for want of salary which she was entitled in law, not being paid for more than a decade. This is really extremely unfortunate and has to be condemned in the strongest words.

12. Sri M.C. Chaturvedi, learned Chief Standing Counsel informs that pursuant to this Court's order dated 4.10.2010 the Secretary, Basic Education himself has looked into this matter, as a result whereof the petitioner has been paid the following amounts by the District Basic Education Officer, Azamgarh vide letter dated 18.10.2010:

13. He also drew my attention to the Treasury Cheques of Rs. 78,188/- and Rs. 4,04,031/- dated 18.10.2010 issued in the name of the petitioner which the

counsel for petitioner has admitted to have received.

14. Sri Chaturvedi also says that an inquiry committee has been set up in this matter to find out the guilt of the persons concerned and appropriate disciplinary action would be taken by respondent No. 1 in this matter so as to avoid such kinds of lapses in future also.

15. Since the petitioner has been paid salary now, learned counsel for the respondents requested this Court to dispose of the writ petition having rendered infructuous, for the grievance of the petitioner has been met and satisfied.

16. In normal cases, this Court would have adopted this approach and could have passed appropriate order as requested above, but, here is a case where the lapses and unexplained negligence on the part of the respondent Nos. 2 and 3 is writ large. The petitioner admittedly has been made to suffer by not receiving the amount of salary for which she was entitled in law for more than a decade. Even this matter when remain pending before this Court for almost more than three years, the respondent Nos. 2 and 3 did not care at all whatsoever to look into the matter seriously and rectify their mistake by giving the rightful dues to the petitioner without any further delay. Even the order dated 21.9.2010 passed by Hon"ble A.P. Sahi, J. which specifically required the respondent-authorities to pass appropriate order and file affidavit went unheeded which compelled this Court to pass order dated 4.10.2010 summoning respondent No. 1 and it is only thereafter the payment due to petitioner has been made. It may be said technically that the justice ultimately had been done but in view of the Court this is a bit short of true and complete justice. It does not satisfy the petitioner for the trauma, harassment and helplessness she has faced all through besides the fact that her fundamental right under Article 21 has been infringed with impunity.

17. Having found myself satisfied that the respondent Nos. 3 and 4 have no valid and lawful justification for detaining salary of the petitioner, I am also satisfied that this Act was not only illegal and arbitrary but travels in the realm of malice in law, therefore, it deserves to be dealt with severely by this Court so that no Government officer in future may have the audacity of harassing a helpless poor employee, firstly, by torturing him/her by detaining his/her lawful dues and thereafter to escape from any liability so as to boast that nobody can touch him even if he commits an ex facie illegal or unjust act. Every Government officer, howsoever high, must always keep in mind that nobody is above law. The hands of justice are meant not to only catch out such person but it is also the constitutional duty of a Court of law to pass suitable order in such a matter so that such an illegal Act may not be repeated, not only by him/her but others also. This should be a lesson to everyone committing an Act which is ex facie unjust and having not been done for any just or lawful reason. Prima facie it must be treated to have been done for collateral purposes and covered by the term "malice in law".

18. The Apex Court has summarised "malice in law" in Smt. S.R. Venkataraman

Vs. Union of India (UOI) and Another, , as under:

It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another. (Para 8)

19. The Apex Court further in para 9 of the judgment in S.R. Venkatraman (supra) observed:

9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a Rule which makes a useful provision for the premature retirement of Government servants only in the "public interest", to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power.

20. In Mukesh Kumar Agrawal Vs. State of U.P. and Others, the Apex Court said:

We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved.

21. In Somesh Tiwari Vs. Union of India (UOI) and Others, , dealing with the question of validity of an order of transfer on the ground of malice in law, the Apex Court in para 16 of the judgment observed as under:

16. Mala fide is of two kinds--one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

22. In H.M.T. Ltd. rep. by its Deputy General Manager (HRM) and Another Vs. Mudappa and Others, , the Apex Court in paras 18 and 19 defined malice in law by referring to "Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under:

The legal meaning of malice is "ill-will or spite towards a party and any indirect

or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an Act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an Act done from ill feeling and spite". It is a deliberate Act in disregard of the rights of others.

19. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e. legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide.

23. In brief malice in law can be said when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-existent or for the purpose for which it is not meant though apparently it is shown that the same is being exercised for the purpose the power is supposed to be exercised. (See *The Manager, Government Branch Press and Another Vs. D.B. Belliappa*, ; *Punjab State Electricity Board Ltd. Vs. Zora Singh and Others*, ; *P. Mohanan Pillai Vs. State of Kerala and Others*, ; *M.P. State Co-op. Dairy Fedn. Ltd. and Another Vs. Rajnesh Kumar Jamindar and Others*, ; *Swaran Singh Chand Vs. Punjab State Electricity Board and Others*, and *Sri Yerneni Raja Ramchander @ Rajababu Vs. State of A.P. and Others*, .

24. In our system, the Constitution being supreme, yet the real power vests in the people of India since the Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to Act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee.

25. The respondents being the State Government, i.e., "State" under Article 12 of the Constitution of India, its officers are public functionaries. As observed under our Constitution, sovereignty vests in the people. Every limb of the constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind the respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees like the petitioner. The respondents have the support of the entire machinery and the various powers of the statute and an ordinary citizen or a common man is hardly equipped to match such might of the State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting

mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to Act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to the occasion otherwise the confidence of the common man would shake. It is the responsibility of the Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain the arbitrary and arrogant unlawful inaction or illegal exercise of power on the part of the public functionaries.

26. Regarding harassment of a Government employee, referring to observations of Lord Hailsham in *Casseli & Co. Ltd. v. Broome*, 1972 AC 1027 and Lord Devlin in *Rooks v. Bamard and others*, 1964 AC 1129, the Apex Court in *Lucknow Development Authority Vs. M.K. Gupta*, , held as under:

An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the Rule of law..... A public functionary if he Acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse, No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. (para 10)

27. The above observation as such has been reiterated in *Ghaziabad Development Authority Vs. Balbir Singh*, .

28. In the case of *Common Cause A Registered Society Vs. Union of India and others*, , the Apex Court said as under:

No public servant can say "you may set aside an order on the ground of Mala fide but you cannot hold me personally liable" No public servant can arrogate in himself the power to Act in a manner which is arbitrary.

29. In the case of *Shivsagar Tiwari Vs. Union of India (UOI) and Others*, , the Apex Court has held as follows:

An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he

had no end but his own profit.

30. In the case of Delhi Development Authority Vs. Skipper Construction and another, , has held as follows:

A democratic Government does not mean a tax Government. The Rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless.

31. In view of the above this writ petition is disposed of with the direction that the amount which the petitioner has been paid vide letter dated 18.10.2010 (Annexure-1 to the affidavit filed by Sri Anil Sant, Secretary, Basic Education, U.P. Government Lucknow on 20.10.2010, shall carry with it an interest at the rate of 6% per annum from the date the salary and arrears thereof etc. fell due and till it was actually paid. The said amount shall be calculated by the respondent No. 3 within two months from the date of production of the certified copy of this order and the same be paid to petitioner within one month thereafter. The petitioner shall also be entitled to costs which is quantified to Rs. 5000/- against the respondent Nos. 3 and 4. It is however made clear that the amount as directed above at the first instance though shall be liability of respondent No. 1 for payment to the petitioner but the respondent No. 1 shall be at liberty to recover the aforesaid amount of interest and costs from the officials concerned who are found guilty of such inaction, delay and negligence after holding inquiry in accordance with law.