
(2010) 10 AHC CK 0396

In the Allahabad High Court

Case No : Cr Civil Miscellaneous Writ Petition No. 25187 of 2007

Smt. Zahida Khatoon and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Uttar Pradesh Recognized Basic Schools (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 — Rule 14, 14(1)

Citation : (2011) 1 UPLBEC 510

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri J.J. Munir, learned Counsel for the Petitioners and learned Standing Counsel for the Respondents.

2. The Petitioners have sought a writ of mandamus commanding the Respondents to pay salary to Petitioners from August, 2005 to July, 2006 with all consequential benefits treating them as to have retired at the end of Session 2005-06, i.e., 30.6.2006 from the post of Assistant Teacher in Primary Section of Hamidia Girls High School, Khair Nagar, Meerut. It is said that under the relevant rules the age of retirement of the teachers was 60 years but by the Government Order dated 4.2.2004 it was conveyed that the age of retirement is being extended to 60 where it is 58 years and to 62 where it is 60 years. The said Government order applicable to all teachers employed in Primary and Junior High Schools of Basic Shiksha Parishad as also Government aided Junior High Schools, i.e., Senior Primary Schools. He submitted that since the Petitioners were going to attain the age of superannuation of 60 years on 4.5.2004 and 4.4.2004 respectively they continued taking advantage of the aforesaid Government order and ultimately retired on 30.6.2006. It is also said that the Petitioners have paid salary up to July, 2005 and thereafter were not paid salary and, therefore, entitled for the same.

3. However, I find no force in the submission. The Government Order dated 4.2.2004 which convey the decision of the Governor for increase of age of retirement, in the last but one Daraeraph says as under:

4. Learned Counsel for the Petitioners admits that in the case of Petitioners the matter is governed by the U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as "1978 Rules") wherein the age of retirement under Rule 14 was 60 years. It is not in dispute that Rule 14 was substituted and amended by notification dated 25.10.2005 published in U.P. Gazette, Extra., Part 4, Section (Kha), dated 25.10.2005 and after its amendment by substitution it reads as under:

2. Amendment of Rule 14.-In Uttar Pradesh Recognised Basic Schools (Junior High Schools Recruitment and Conditions of Service of Teachers) Rules, 1978 for the existing Sub-rule (1) of Rule 14, the following rules shall be substituted:

Superannuation.-Every Headmaster or Assistant teacher of a recognised school shall retire in the afternoon of the last day of the month in which he attains the age of sixty-two years, provided that a Headmaster or Assistant teacher who retires during an academic session, not being Headmaster and Assistant teacher retiring on June 30, shall continue to work till June 30, following next after the date of retirement and such period of service shall be deemed as extended period of employment.

5. A perusal of the notification also shows that operation of the said rule has been made prospective and the teachers already retired have not given any benefit under the said rules. The Government order cannot be enforced which is otherwise contrary to the rules unless the rule is amended. The amendment of rule is prospective having been made on 25.10.2005, obviously the Petitioners were not entitled to continue beyond 60 years contrary to the statutory rules. It is well settled that an executive order cannot prevail over statutory rules. In *Indra Sawhney and Ors. v. Union of India and Ors.* 1992 (Supp) 3 SCC 217, the Apex Court held that though the executive orders can be issued to fill up the gaps in the rules if the rules are silent on the subject but the executive orders cannot be issued which are inconsistent with the statutory rules already framed. In *Laxman Dundappa Dhamanekar and Another Vs. Management of Vishwa Bharata Seva Samiti and Another*, also the same view was taken. In *K. Kuppusamy and Another Vs. State of T.N. and Others*, the Court said that statutory rules cannot be overridden by executive orders or executive practice and merely because the Government has taken a decision to amend the rules does not mean that the rule stood obligated. So long as the rules are not amended in accordance with the procedure prescribed under law the same would continue to apply and would have to be observed in words and spirit. In *Chandraprakash Madhavrao Dadwa and Others Vs. Union of India and Others*, also the Apex Court expressed the same view holding that the executive orders cannot be conflicted and override the statutory rules of 1977.

6. Further a mere direction issued by executive order which is otherwise not in conformity of the rules will not give any benefit to any person. Therefore, the Petitioners were not entitled for such benefit.

7. Learned Counsel for the Petitioners submitted that the salary which the Petitioners already received for about one year is not on account of any fraud or misrepresentation on the part of the Petitioners, therefore, such amount cannot be recovered from the Petitioners. Reliance is placed on a decision of this Court in *Suresh Chandra Srivastava v. State of U.P. and Ors.* 2008 (3) UPLBEC 2352, where this Court has said:

3. It transpires that the Petitioner was initially appointed in the year 1967 in the Civil Supply Department at Allahabad and retired on 31st July, 2006 from the post of Supply Inspector. The impugned order has been passed for the recovery of the amount from his gratuity on the ground that the Department had erroneously fixed his salary at Rs. 560/- instead of Rs. 545/- in the year 1979, and therefore, the excess amount paid to the Petitioner was to be recovered from his gratuity. The Petitioner, being aggrieved by the said order, has filed the present writ petition.

4. In *Ram Briksh Ram v. State of U.P. and Ors.* (2007) 2 UPLBEC 1544, a Division Bench of this Court held that if certain benefits, like pay-scale and grade was given to an employee incorrectly during his service period, and that there was no misrepresentation or fraud played on his part, in that case, the excess amount paid to the employee could not be recovered, especially, when there was no fault on the part of the employee.

5. In *Ratnesh Chand Tyagi v. Director, Agriculture Marketing, Lucknow and Anr.* (2007) 2 UPLBEC 1593, a similar relief was again granted by the Court. Similar view was again reiterated in *Ram Murti Singh v. State of U.P. and Ors.* (2006) 3 UPLBEC 2415 and in *Awadh Nath Tripathi Vs. Chief Development Officer and Others*,

6. In the present case, the Court finds that the Department itself had voluntarily fixed the salary to the Petitioner and that there was no fraud or misrepresentation committed by the Petitioner. Consequently, in view of the aforesaid judgments, the employer could not recover any excess payment made to the Petitioner during his service period or after his retirement. Further, this Court finds that no opportunity or show cause notice was given to the Petitioner before issuing the order for the recovery of the amount, and consequently, the said recovery order was violative of the principles of natural justice.

8. The principle of law stated in the aforesaid judgment has no exception. However, it is not applicable to all the matter. Here is not a case where incumbent by any mistake of the employer has been given any extra salary by any wrong fixation etc. The statutory Rule 14 provides that every Headmaster of Assistant Teacher of a recognised school shall retire in the afternoon of the last day of the month in which he attains the age of sixty two years, but where the

incumbent retire during an academic session, it could have continued till the end of the session, i.e., 30th June of the following next year and to that extent the service shall be deemed to be extended. The Petitioners having attained the age of superannuation on 4.5.2004 and 4.4.2004 respectively were liable to retire on 30.6.2004 under Rule 14. The effect of the aforesaid rule was that the Petitioners by operative of law had to cease to continue after 30.6.2004. The law did not permit that their services will be deemed to continue ever thereafter. If the Petitioners work thereafter and claim for received salary for the period subsequent to 30.6.2006 it is contrary to the rules. The Petitioners are also beneficiaries of an illegality. Addressing the case in similar circumstances the Apex Court in the case of Radha Kishun Vs. Union of India (UOI) and Others, has held that the excess amount paid to the person concerned on account of his continuance beyond the age of superannuation is liable to be recovered.

9. In view thereof, I find no merit in the writ petition. Dismissed. No costs.