
(2002) 07 AHC CK 0035
In the Allahabad High Court
Case No : C.M.W.P. No. 7109 of 1996

Sudhir Kumar Rai and Another	Vs	APPELLANT
District Inspector of Schools and Others		RESPONDENT

Date of Decision : 18-07-2002

Acts Referred:

Citation : (2002) 4 AWC 3114 : (2003) 1 UPLBEC 219

Hon'ble Judges : A.K. Yog, J

Bench : Single Bench

Advocate : R.B. Pradhan and S.P. Pandey, for the Appellant; S.K. Chaubey, for the Respondent

Final Decision : Allowed

Judgement

A.K. Yog, J.—Heard Sri S. P. Pandey, advocate on behalf of the petitioners, Sri S. K. Chaubey on behalf of respondent No. 3/Committee of Management, Sarvodaya Kisan Intermediate College, Kauri Ram, Gorakhpur, called the college, Sri Abhinav Upadhyay, learned standing counsel on behalf of respondent Nos. 1 and 2, District Inspector of Schools and another and perused the record.

2. The college is a recognised Government aided educational Institution governed by the provisions of U. P. Intermediate Education Act, U. P. Secondary Education Services Commission and Selection Board Act, 1982 and Payment of Salaries of Teachers and other Employees Act. 1971. Narsingh Rai, Lecturer (Civics) and Ram Niwas Rai, Lecturer (Economics) of the college attained the age of superannuation and retired on 30.6.1995. As a consequence thereof, two posts of Lecturer, under promotional quota, fell substantively vacant. Consequently, two Assistant Teachers in L. T. grade, namely, Devi Dutt Singh and Ram Kinkar Rai, were given ad hoc promotion on the aforesaid posts of Lecturers (held by Narsingh Rai and Ram Niwas Rai). The two posts of Assistant Teachers in L.T. grade (held by Devi Dutt Singh and Ram Kinkar Rai) treating the vacancies on short term basis, were notified on the notice board of the college and also advertised in local newspaper (paragraph 6 of the writ petition). The Committee

of Management in its meeting held on 19.11.1995 considered the question of filling up aforesaid vacancies and constituted a selection committee.

3. According to petitioners, they were selected and directly appointed on the two posts of Assistant Teachers L.T. grade which had fallen vacant due to ad hoc promotion of Devi Dutt Singh and Ram Kinkar Rai. Requisite papers and proforma, according to the petitioners, were sent to the District Inspector of Schools, Gorakhpur, for approval. The D.I.O.S., however, refused to accord approval/financial sanction, vide Impugned order dated 29.12.1995/Annexure-7 to the petition passed on Manager's letter, on the ground that department has imposed ban w.e.f. 9.6.1995 on appointment and hence, it was not possible for the said authority to extend financial sanction.

4. Aggrieved by the aforesaid order dated 29.12.1995/Annexure-7 to the petition (passed on the letter of the Manager of the college), the petitioners have approached this Court by filing instant writ petition.

5. It may be noted that this Court passed an interim order in favour of the petitioners at the time of initial filing of the writ petition which reads thus :

"In the meantime, the operation of the impugned order dated 29.12.1995 shall remain stayed. The respondents are further directed to make the payment of salary to the petitioners and continue to pay the same as and when it falls due or to show cause within a period of three weeks from the date a certified copy of this order is produced before the District Inspector of Schools, Gorakhpur."

6. No counter-affidavit has been filed by the Committee of Management as yet and a statement is made that the management is supporting the petitioners. Learned counsel appearing on behalf of the management also made a statement that petitioners have been discharging their duties in the college on the basis of the interim order dated 27.2.1996.

7. It is also stated at the Bar that contempt petition was filed which is sub-judice on the ground that stay Vacate application, filed on behalf of contesting respondent Nos. 1 and 2 in the present petition, is pending.

8. In view of the categorical direction in the Interim order passed by this Court, respondents (including D.I.O.S.) were required to make payment of salary and continue to pay the same as and when it fell due or to show cause within specified period. The learned single Judge clearly intended that the petitioners ought to be paid their salary for the period they discharge their duties in the college.

9. The record shows that stay vacate application along with counter-affidavit on behalf of respondent No. 1 D.I.O.S., Gorakhpur, was filed in this Court on 9.2.1999. There has been no application, praying for condoning delay in filing counter-affidavit and to treat it in time. In this view of the matter, it is not open to the respondent No. 1 to argue that the respondent Nos. 1 and 2 having shown cause by filing counter- affidavit (beyond the period of three weeks granted by

this Court vide interim order dated 27.2.1996} could ignore the Court order/direction. In case the petitioners were working and discharging their duties in the college under interim order dated 27.2.1996, the concerned respondents (including D.I.O.S. and Accounts Officer) were duty bound to comply with the direction and consequently, ensure payment of salary. There is no valid excuse for not having complied with the interim order passed by this Court. This is clearly an arbitrary conduct and amounts to illegal harassment of the petitioners. The Government and its officials are not expected to act arbitrarily and multiply litigation. Petitioners are entitled to salary, if they worked under interim order dated 27.2.1996.

10. Record shows that petitioners have been working in the college since July, 1995. Keeping the above in mind and also that the ban, imposed by the department, if any, having been lifted later, the said ban lost its relevance in view of the interim order passed by this Court.

11. In view of the arguments of the petitioners and the respondents, a factual aspect of the matter, (viz., whether the posts of Assistant Teacher L.T. grade, had fallen vacant substantively or on short term basis) requires to be decided. The documents, filed along with writ petition as Annexure-1 (notification on notice board of the college), Annexures-2 and 3 (Advertisement in local daily newspapers), Annexure-5 (minutes recorded in the management meeting dated 19.11.1995) and Annexure-7 (impugned order dated 29.12.1995, passed on the letter of Manager) go to show that the petitioners and management treated the aforesaid vacancies as "short term vacancy" and made appointment on that basis. The D.I.O.S. did not withheld financial sanction on that ground or any other ground.

12. It is also appropriate to deal with the contention of the learned counsel for the petitioners that an appointee on a short term vacancy becoming substantive in future, would not automatically cease. In support of his contention, he referred to the case of Smt. Shashi Saxena Vs. Deputy Director of Education and others,

13. In rebuttal, the learned standing counsel referred to the decision in the case of Ran Vijay Singh Chauhan Vs. Joint Director of Education, Jhansi and others, . wherein the learned single Judge took notice of the above Division Bench decision and in para 23, made following observations :

"The direction in and Smt. Shashi Saxena (supra) with great respect and profound humility is contrary to the judicial discipline as explained by the Apex Court in Sub-Inspector Roop Lal (supra). It being contrary to the ratio of the Full Bench in Smt. Pramiia Mishra (supra) cannot be relied by the learned counsel for the petitioner to claim that the petitioner would continue even when the vacancy stood converted into substantive till a regularly selected candidate joined. The directions in the circumstances has neither any binding force nor any legal effect. Therefore, the argument of the learned counsel for the petitioner is devoid of any

merit."

14. The aforesaid observation made in paragraph 23 is preceded by some of the passages extracted from some of the judgments of the Apex Court dwelling upon the issue of Judicial discipline.

15. The learned single Judge, I am constrained to observe with humility, should have shown constraints following the parameters of judicial discipline exactly on the line on which he sought to draw support from the judgments of the Apex Court.

16. In case the learned single Judge was of the opinion that Division Bench has erred and hence unable to follow, he should have referred the matter to larger Bench. The learned single Judge with respect, acted against settled norms of judicial propriety on the ground of binding precedent by resorting to the theory of per incuriam.

17. The Apex Court has, time and again cautioned against such a tendency, namely to wriggle out of binding judgments by resorting to the theory of per incuriam. Reference be made to the case of S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others,

18. I clarify that the judgment rendered in Division Bench case in the case of Smt. Shashi Saxena (supra), which has been rendered after considering Full Bench decision in the case of Smt. Pramila Mishra v. Deputy Director of Education, Jhansi Division, Jhansi and Ors. (1997) 2 UPLBEC 1329, is a precedent required to be followed by single as well as Division Bench of this Court unless a larger Bench re-considers and takes a view other than the one taken in the cases of Smt. Shashi Saxena and Smt. Pramila Mishra (supra).

19. With deep regard at my command, I am unable to persuade myself to follow the judgment in the case of Ran Vijay Singh Chauhan (supra) and, as per rule of judicial discipline, I feel bound by the Division Bench judgment in the case of Smt. Shashi Saxena (supra). This is clarified so that the concerned D.I.O.S. does not find himself in a fix as far the legal position on the issue is concerned.

20. However, there is controversy on certain relevant facts, i.e., nature of vacancy, whether it was "short term" and whether it has been subsequently converted into "substantive vacancy", and the same cannot be decided efficaciously in the present writ proceeding on the basis of affidavits alone. Original record shall be required to adjudicate on this issue.

21. I direct the petitioners to file a certified copy of this judgment before concerned District Inspector of Schools along with a comprehensive representation, complete copy of writ petition, counter-affidavit, supplementary counter-affidavit and rejoinder-affidavit to the said counter and supplementary counter-affidavit (together with annexures) within eight weeks from today and if such a representation is filed, the respondent No. 1 D.I.O.S. shall decide the case of the petitioners by passing a reasoned order in accordance with law, including

opportunity of hearing being given to petitioners, exercising unfettered discretion without being prejudiced by any of the observations made above, on the basis of record before it and also keeping in view the decision of Apex Court and the High Courts, as may be relied upon by the petitioners in support of their case.

22. As a result thereof, a writ in the nature ,of certiorari is issued and the impugned order dated 29.12.1995 (passed on Manager's letter dated 8.12.1995)/Annexure-7 to the writ petition (whereby financial sanction was refused on the ground that there was departmental ban w.e.f. 9.6.1995), is quashed ; the D.I.O.S. is further directed to decide the representation, if it is filed by the petitioners within the time stipulated above along with certified copy of this judgment, subject to observations made above, within three months of receipt of representation. It is made clear that in case the petitioners fail to make representation, as indicated above, the petitioners will not be entitled to continue in the college on expiry of eight weeks from today.

23. In case the representation is filed, as indicated above, the petitioners will be allowed to continue till D.I.O.S. passes a reasoned order, as contemplated above. The petitioners shall be entitled to their salary for the period they have actually worked and shall be paid future salary along with other staff month by month in accordance with law and relevant Government orders and petitioners shall also be entitled to arrears of salary along with 10% simple interest per annum for the period petitioners have worked in the college and D.I.O.S. shall satisfy himself on this score before making payment of arrears of salary, which may be paid within two months of receipt of certified copy of this order.

24. It is made clear that in case the petitioners are not found to have legitimate claim, their continuance and payment of their salary under this judgment, shall confer no advantage upon them.

25. The writ petition stands allowed, subject to directions and observations made above.

26. No order as to costs.