

(1997) 10 AHC CK 0095

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 26119 of 1997

Vishwamitra Yadav

APPELLANT

Vs

U.P. State Public Service Tribunal and Others

RESPONDENT

Date of Decision : 29-10-1997

Acts Referred:

Citation : (1997) AWC 598 : (1998) 1 UPLBEC 23

Hon'ble Judges : R.A. Sharma, J;Kundan Singh, J

Bench : Division Bench

Advocate : K.K. Singh, for the Appellant;

Final Decision : Allowed

Judgement

R.A. Sharma, J.—The petitioner, who was working as play organiser in observation Home at Basti, was promoted vide order dated June 28, 1994 by the District Magistrate to the post of Assistant Superintendent observation Home (hereinafter referred to as Assistant Superintendent) at Basti on temporary/ad hoc basis till a candidate duly selected by the Director Women Welfare, U.P. Lucknow (hereinafter referred to as the Director) is appointed. By an order dated May 15, 1996 the petitioner's promotion was cancelled by the Director. Against the said order the petitioner filed writ petition which was dismissed by this Court on the ground of alternative remedy of a claim petition before U.P. Public Service Tribunal, Lucknow (hereinafter referred to as the Tribunal). The petitioner thereafter filed claim petition before the Tribunal which has been dismissed vide order dated May 29, 1997. Being aggrieved, he has filed this writ petition.

2. On August 8, 1997 learned Standing Counsel, who represents respondents, was granted four weeks' time to file counter-affidavit. As no counter-affidavit was filed by the respondents, on 19.9.1997 the learned Standing Counsel was granted a month and no more time to file counter-affidavit. In spite of stop order the counter-affidavit has not been filed till date. The result is that the averments made in the writ petition are liable to be taken as correct.

3. We have heard the learned Counsel for the petitioner and the learned Standing Counsel.

4. The learned Counsel for the petitioner has challenged the impugned order on three grounds, viz. (i) No opportunity of being heard was given to the petitioner by the Director before cancelling the order of his promotion, (ii) The District Magistrate is fully empowered to make temporary/ad hoc promotion to the post of Assistant Superintendent, and (iii) The petitioner has been discriminated against in as much as Sri S.S. Husain, who was also promoted on temporary basis to the post of Assistant Superintendent by the District Magistrate, has been allowed to continue whereas the petitioner's promotion has been cancelled.

5. The petitioner's promotion dated June 28, 1994 was cancelled by the Director vide order dated May 15, 1996 on two grounds, namely, (1) The post in question is within the purview of Subordinate Service Commission and (2) the petitioner is not eligible for promotion to the said post. The Tribunal without considering the grounds on which the Director cancelled the order of promotion, has dismissed the claim petition on three grounds, viz. (i) As the petitioner's promotion was purely on temporary/adhoc basis he was not entitled to any opportunity of being heard before reversion to the lower post, (ii) As the petitioner's promotion was purely temporary till such time a person is appointed on the basis of regular selection he is left with no claim to the said post after appointment of another person, and (iii) The District Magistrate has no authority to promote the petitioner to the post in question. The Tribunal did not record any finding about eligibility of the petitioner for promotion to the post of Assistant Superintendent. It also did not hold that temporary/ad hoc promotion could not have been made to the post in question by appropriate authority without consultation with the Commission. Thus the grounds on which the Director-cancelled the order of promotion of the petitioner were not the grounds on which the Tribunal rejected the claim petition.

6. A temporary government servant has no right to the post to which he is appointed temporarily and his service can be terminated without giving him any opportunity of being heard. Similarly a temporary promote has no right to the post to which he is promoted on temporary/adhoc basis and he can be reverted to the lower post without giving him any opportunity of being heard. In such cases principles of natural justice are not attracted. But the order cancelling the order of appointment/promotion is different from the order terminating service of a temporary government servant/reverting such an employee to the lower post. In the case of termination of service or reversion from the higher post the order of appointment promotion is not cancelled. The only effect of such an order is that the right of the employee for continuance on the post to which he was appointed/promoted comes to an end, but the order of appointment/promotion is not declared invalid. However, if the order of appointment/promotion is cancelled the very appointment/promotion is rendered illegal causing adverse effect on the employee concerned. In such a case if the order of cancellation of appointment/

promotion is on a ground which is capable of being explained it is mandatory that the employee concerned is given an opportunity of being heard before cancelling his appointment/promotion. In the present case the petitioner's promotion was cancelled by the Director on the ground of his ineligibility for promotion. In such a case the petitioner was entitled to an opportunity of being heard. But that was not done. This is clear from paragraph 11 of the writ petition in which it has been stated that no opportunity of being heard was given to the petitioner before cancellation of his promotion. The said allegations have not been denied by the respondents by filing counter-affidavit. It is apparent that the impugned order has been passed in violation of principles of natural Justice. The Tribunal has, however, treated the order of the Director as an order of reversion simpliciter of a temporary employee. It did not notice the difference between the order canceling an order of promotion and the order reverting a temporary employee to a lower post, on account of which it has upheld the order of the Director even though it was passed in violation of the principles of natural justice. The order of the Tribunal, therefore, cannot be sustained.

7. When this case was taken up we asked Sri Kushwaha learned Standing Counsel, to seek instructions about the power of the District Magistrate to make promotion to the post in question on temporary/ad hoc basis. Sri Kushwaha has stated that although no rules have been framed for regulating the promotion to the post in question, but the District Magistrate has the power to make adhoc/temporary promotion to the said post by way of local arrangement. In view of the statement of the learned Standing Counsel it is difficult to sustain the finding of the Tribunal to the effect that the District Magistrate has no authority to promote the petitioner. But as we are relegating the matter to the Director we are expressing no final opinion on this question and it is for the Director to decide the same.

8. The findings recorded by the Tribunal to the effect that the post in question was advertised after the impugned order and another person was selected and has already been appointed, have been disputed and denied by the petitioner in paragraph 23 of the writ petition. It has further been stated therein that no such averment was made in the counter-affidavit filed by the State in the Tribunal. It has also been stated that the post is lying vacant and no one has been appointed to the said post so far. These averments have not been denied by the respondents by filing counter-affidavit.

9. The petitioner, has however, not stated in the writ petition that he is eligible for promotion to the post of Assistant Superintendent, although it was one of the grounds on which his promotion was cancelled by the Director. But as the Tribunal has not rejected the claim petition of the petitioner on this ground, it is not proper to decide the writ petition on such a ground. Proper course appears to be to permit the Director to go into the matter and pass appropriate order.

10. The writ petition is accordingly allowed. The orders dated 15.5.1996 and 29.5.1997 passed by the Director and the Tribunal respectively are quashed. This

matter is remanded to the Director to decide the same afresh in accordance with law by speaking order, after giving an opportunity of being heard to the petitioner within three months from the date of presentation of certified copy of this judgment. While deciding afresh the Director will also decide the questions about eligibility of the petitioner for promotion to the post of Assistant Superintendent, as well as the power of the District Magistrate to make such promotion. It will be open to the petitioner to make a representation in this regard alongwith certified copy of this judgment before the Director and if such a representation is made the same shall be considered by the Director when passing fresh order.

11. Although the writ petition is being allowed and the matter is being relegated to the Director the petitioner is not entitled to be reinstated in service for two reasons, viz. (i) his promotion was purely ad hoc/temporary, made by way of local arrangement and there is nothing on record to indicate that service of ad hoc/temporary Assistant Superintendent is still required, and (ii) in the absence of any finding about eligibility of the petitioner for promotion to the post of Assistant Superintendent as well as the power of the District Magistrate to make such promotion, it will be improper to permit the petitioner to work as Assistant Superintendent. The question of reinstatement of the petitioner as Assistant Superintendent and his continuance in the said post will depend on the order which may be passed by the Director pursuant to this judgment.