

(2011) 01 AHC CK 0328

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 42851 of 2007

Yogesh Kumar and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2011) 10 ADJ 893

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Sudhir Agarwal, J.—Heard Sri Adarsh Bhushan, holding brief of Sri Ashok Khare, learned Senior Advocate, for petitioner and learned Standing Counsel for respondent Nos. 1 to 3.

2. Petitioners have sought a writ of mandamus commanding respondent No. 4, i.e.. Principal, Gandhi Shiksha Niketan Inter College, Karanpur, Anoopshahar, District Bulandshhar, not to interfere in the functioning of petitioners as Guest Subject Expert in Vocational Subjects in the said College and pay salary to petitioners for the academic year 2006-07 and continue to pay the same as and when it falls due.

3. Petitioners have averred in the writ petition that the Kothari Commission was of the view that for a majority of occupations, University degree was not necessary and this object could be achieved by training higher secondary students. The Commission felt that it should be possible to divert at least 50 percent of students completing ten years of education in vocational stream reducing pressure on Universities and also preparing students for gainful employment. It is also said that scheme provided for selection of Teachers, and, that vocational courses would be conducted with the help of fulltime as well as part time teachers. Fulltime Teachers will be appointed to teach as well as to

coordinate general organization of the instruction and also the work of part-time staff. Qualification of fulltime teachers will vary with reference to each group of vocation courses and availability of qualified persons at the salaries prevalent in the schools.

4. Certain institutions in order to give effect to the said scheme of vocational education, were recognized under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as "1921 Act"). State Government issued certain Government Orders from time to time in this regard. Respondent No. 2 on 30.3.1991 issued letter to all the Deputy Director of Educations of every Region laying down certain guidelines for payment of salary to Subject Specialists. It is said that vocational courses in the recognized institution in State of U.P. are being sponsored but managed substantially with financial aid extended by Central and State Government. These courses are being run under control and supervision of State and Central Government.

5. Petitioners claim to be appointed as "Guest Subject Experts" in vocational subjects in Gandhi Shiksha Niketan Inter College, Karanpur, Anoopshahar, Bulandshahar (hereinafter referred to as "College") in the year 1994 and were imparting education to students of intermediate classes for the last 14 years. Petitioner No. 1 was teaching Nursery Teacher Training and petitioner No. 2 was imparting education in Library Science. Their signatures were attested by Principal for payment of salary as also by District Inspector of Schools (hereinafter referred to as "DIOS"). However, the Principal of College started interference in functioning of petitioners and in the year 2006-07 virtually stopped classes of vocational education in respect where to various representations were made by petitioners and DIOS also made certain queries but of no avail. Hence, this writ petition.

6. A counter-affidavit has been filed on behalf of respondents 1 to 3 sworn by Ragho Ram, Finance and Accounts Officer, Bulandshahar. It is said that the College is a recognized non Government institution. In the year 1994-95, vocational teaching courses were introduced in the College in furtherance of employment oriented education scheme and the two petitioners were appointed by Principal temporarily as "Guest Subject Experts" for teaching vocational subjects in the College. As per terms of their appointment they were paid honorarium of Rs. 50/- per lecture, It is said that in the month of June 2007, petitioners' educational qualifications were verified by Principal. It was found that petitioners did not possess minimum prescribed eligibility for "Guest Subject Experts", in view thereof they were discontinued, and, since then petitioners are not working.

7. Petitioners, in the rejoinder-affidavit, while replying para 3 of counter-affidavit of respondents 1 to 3, have not said anything about the nature of their appointment which has been described by respondents 1 to 3 as "Part-time temporary" made by Principal.

8. A supplement counter-affidavit has been filed by respondent No. 4 denying very factum of appointment of petitioners stating that they were never issued any letter of appointment appointing them as "Guest Subject Expert" in College. They were merely asked by Principal to take classes of vocational subjects in the College on payment of honorarium as fixed from time to time. Their job was casual. The power of appointment is not otherwise vested in Principal and that is how the question of appointment by Principal would not arise. Payment of honorarium to petitioners for the period they took classes is not disputed but their actual appointment as "Guest Subject Expert" has been disputed.

9. In the rejoinder-affidavit filed by petitioners, they have not placed on record any letter of appointment but their claim is that the said letter of appointment is in possession of the Principal.

10. From the facts narrated above, as pleaded by parties, it is evident that so far as functioning of petitioners as "Guest Subject Expert" in the College is concerned, the same is not in dispute. For the period they have performed their job, payment of honorarium is also not in dispute. But that is not the end of matter.

11. Petitioners have sought a writ of mandamus commanding respondent No. 4 not to interfere in their functions as "Guest Subject Expert". A writ of mandamus can be issued only if a legal right vests in the claimant and also corresponding obligation exists in the authority to act or not to act in a particular manner. Therefore, petitioners have to demonstrate their right to hold the post of "Guest Subject Expert".

12. The first question, therefore, needs be adjudicated in this matter is, what is the nature of appointment/engagement of petitioners.

13. The second would be, whether petitioners have any right to continue to work in the College.

14. Though no document throwing light on the alleged scheme propounded by State Government or Central Government has been placed on record, but for the time being this Court proceed on the assumption that there was a scheme in this regard permitting Intermediate Colleges to run vocational courses by engaging "Guest Subject Experts" in such Courses. The first thing is whether such a scheme can make vocational courses an integral part of the College imparting education in various subjects duly recognized and approved by Board of High School and Intermediate, U.P., Allahabad under provisions of 1921 Act and whether in such matters appointment of Teachers would be controlled and governed by 1921 Act, which would take us to U.P. Secondary Education Service Selection Board Act, 1982 (hereinafter referred to as "1982 Act") and U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (hereinafter referred to as "1971 Act").

15. It is not the case of petitioners that any post was created by educational

authorities in the College for "Guest Subject Expert". In absence of creation of any post by Director of Education, 1971 Act obviously would have no application. Further, in absence of any recognition of vocational courses by the Board of High School and Intermediate Education, U.P. Allahabad so as to constitute an integral part of various other courses recognized by it in respect where to these Intermediate Colleges are imparting education in regular side, the vocational training course would become part and parcel, integrally, of the College. This fact along with the fact that no sanctioned post has been created by educational authorities for the purpose of 1971 Act, 1982 Act also cannot be applied.

16. Further, under 1921 Act, power of appointment of a Teacher is vested in Committee of Management. Here the petitioners themselves admit that they were appointed by Principal of College, who has no power of such appointment under 1921 Act and the Rules and Regulations framed there under. Meaning thereby, engagement of petitioners as "Guest Subject Expert" cannot be attributed to 1921 Act.

17. It may be a kind of additional function discharged by educational institutions in order to give effect to some kind of scheme, but so far as statutory provisions as referred to above, applicable to secondary educational institutions are concerned, the same have no application to such course and engagement of persons for running such course. No other statute has been referred to by learned counsel for petitioners in order to give a statutory colour to their claim making their engagement governed by some statute so as to vest a right enforceable in a Court of law.

18. If an engagement is made under some scheme, the matter is to be governed by such scheme and in absence of any such scheme being placed on record, this Court is not in position to make any comment thereon. But one thing is certain. The petitioners have no legal right whatsoever in the matter in question.

19. Assuming that petitioners were engaged by Principal, no letter of appointment has been placed on record. Though in normal course of transaction, a letter of appointment must be in possession of the person who is appointed under such letter. The petitioners have failed to place any such letter of appointment on record. Even though petitioners' engagement as "Guest Subject Expert" and payment of honorarium is not disputed, the Respondent Nos. 1 to 3, against whom no allegation has been made by petitioners, have specifically said that such engagement was a part time engagement and in furtherance of a non statutory scheme. A part time engagement not governed by statute does not give any right to the incumbent concerned to hold a post or to claim continuance on such engagement. At the best, engagement can be said to be contractual in nature and if there is any breach of contract, it is always open to petitioners to seek common law remedy available in cases of breach of contract complaining alleged breach of contract and for damages. In the case of breach of contract of employment, remedy of specific performance would not lie unless it is shown that the employee is entitled to reinstatement under some statutory provision

etc, as laid down by the Apex Court in Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, ; Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, ; Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others, and Pearlite Liners Pvt. Ltd. Vs. Manorama Sirsi, . Therefore, considering from any angle, the remedy of the petitioners would lie in common law and not under Article 226 of the Constitution of India.

20. There is another aspect of the matter. Petitioners' alleged engagement is not consistent with the provisions of Article 16 of Constitution. It is not their case that any advertisement was made by respondent No. 4 before engaging petitioners giving equal opportunity of appointment to all eligible persons, and, thereafter the petitioners were engaged. Engagement of petitioner, as has been narrated in writ petition, appears to be a back door entry, i.e. direct entry with the favour shown by the Principal of the College at that time. A person entering from back door is bound to exit in the same manner.

21. There are more wider issues in the matter, which I find necessary to refer.

22. Petitioner No. 1 claims to have been working as "Guest Subject Expert" imparting education in Nursery Teaching Training. Such a course cannot be allowed to run by an educational institution unless it is approved for running such course under the provisions of National Council for Teacher Education Act, 1993 (hereinafter referred to as "1993 Act"). It is nowhere stated that such course in the College was ever approved by National Council for Teacher Education (hereinafter referred to as "NCTE"). Running a "Teacher Training Course" without approval of NCTE is an offence under 1993 Act.

23. Similarly, it is also not the case of petitioners that these two vocational courses were recognized or approved by any other competent authority under the relevant statute. Mere formation of a scheme by State or Central Government would not entitle an educational institution to embark upon itself the task of running that course unless other statutory requirements for recognition of such course are observed and completed. "Nursery Teachers Training Course" means a course for imparting education in Nursery classes, i.e., to small children who join the institution at the very first inception. Nothing has been placed on record to show that the petitioner No. 1 was qualified to impart education for such a course. Record shows that petitioner no 1 hold Post Graduate Degree, i.e., M.A. and B.Ed. The B.Ed, is a Teachers Training Course for higher classes and not Nursery classes. Apex Court, time and again has held that the degree of B.Ed, cannot be equated with the training course specialized and applicable for small children, i.e., of primary schools. In P.M. Latha and Another Vs. State of Kerala and Others, , the Apex Court has held as under:

We find absolutely no force in the argument advanced by the respondents that B.Ed. qualification is a higher qualification than TTC and therefore, the B.Ed. candidates should be held to be eligible to compete for the post. On behalf of

appellants, it is pointed out before us that trained teachers certificate is given to teachers specially trained to teach small children in primary classes whereas for B.Ed. degree, the training imparted is to teach students of classes above primary. B.Ed. degree holders, therefore, cannot necessarily be held to be holding qualification suitable for appointment as teachers in primary schools. Whether for a particular post, the source of recruitment should be from the candidates with TTC qualification or B.Ed. qualification, is a matter of recruitment policy. We find sufficient logic and justification in the State prescribing qualification for post of primary teachers as only TTC and not B.Ed. Whether B.Ed. qualification can also be prescribed for primary teachers is a question to be considered by the authorities concerned but we cannot consider B.Ed. candidates, for the present vacancies advertised, as eligible.

24. In *Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others*, , the Apex Court has held;

In our considered opinion it has rightly come to the conclusion that B.Ed. qualification, although a well recognized qualification in the field of teaching and education - being not prescribed in the advertisement, only some of the B.Ed. candidate who took a chance to apply for the post cannot be given entry in the field of selection. We also find that the High Court right came to the conclusion that teacher training imparted to teachers for B.Ed. course equips them for teaching higher classes. A specialized training given to teachers for teaching small children at primary level cannot be compared with training given for awarding B.Ed. degree. Merely because primary teachers can also earn promotion to the post of teachers to teach higher classes and for which B.Ed. is the prescribed qualification, it cannot be held that B.Ed. is a higher qualification than TTC. Looking to the different nature of TTC qualification the High Court rightly held that it is not comparable with B.Ed. degree qualification and latter cannot be created as higher qualification to the former."

25. Following the aforesaid authorities of Apex Court, this Court has also taken the same view in Writ Petition No. 39747 of 2009 (*Vimlesh Kumar Yadav v. State of U.P. and others*) decided on 8.1.2010.

26. So far as petitioner No. 2 is concerned, only this much has been said that he Is imparting education in Library Science. Therefore, this Court refrain itself from making further comments but ex facie is satisfied that petitioners have not shown their eligibility also for imparting education in the subjects for which they claim to have been engaged. To my mind, even the Government cannot allow to run a scheme which would be contradictory to various statutory provisions operating the field.

27. An executive order cannot provide something which is inconsistent to statute.

28. Moreover, status of "Guest Subject Expert" has been considered by this Court in Civil Misc. Writ Petition No. 38035 of 2003 (*Ram Daur Prasad v. State of U.P. and others*) decided on 28.3.2007 and this Court has observed as under:

It is not disputed that engagement of Guest Subject Specialist is under scheme of the Board of Secondary Education permitting one part time Teacher in each trade. They are engaged by the College depending upon the requirement in every session and are paid honorarium. Thus the Guest Subject Specialist has no right to continue but the engagement is totally is the discretion of the management depending upon its requirement and availability of funds. Moreover, it is also not disputed that before making engagement under the said scheme, no selection is made consistent with Article 16 of the Constitution and neither vacancy was advertised nor persons eligible for such engagement were considered and engagement has been made by the concerned college on mere asking of application from individual. Since no person has a right to continue to work as Guest Subject Specialist, a writ of mandamus cannot be issued."

29. Further, considering legality of such kind of engagement without complying with the provisions of Article 16 of the Constitution, this Court has further said in Ram Daur Prasad (supra) as under:

However, since it is not disputed that the engagement of Guest Subject Specialist has not been made by the competent authority consistent with the scheme and Article 16 of the Constitution, it can not be said that engagement made contrary thereto is legal and liable to continue. In the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , the Apex Court held as under

Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules.

"While directing that appointments, temporary or casual, be regularized or made permanent, the Courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in

nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain-nor at arm's length- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the Court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the Court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment.

It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

30. In view of above discussion, in my view, petitioners have no right to seek a writ of mandamus, as sought in the writ petition. No relief can be granted since they have failed to demonstrate any legal right vested in them to continue in the position of Guest Subject Expert in the College.

31. The writ petition is devoid of merit. Dismissed. No costs.