

Amit Kumar Vs. District Inspector of Schools, Jaunpur and Janother

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Court : Allahabad

Decided On : Nov-21-2000

Reported in : 2001(1)AWC242; (2001)1UPLBEC481

Judge : V. M. Sahai, J.

Acts : U. P. Intermediate Education Act, 1921; Dying-in-Harness Rules

Appeal No. : C. M. W. P. No. 50286 of 2000

Appellant : Amit Kumar

Respondent : District Inspector of Schools, Jaunpur and Janother

Advocate for Def. : S. C. and ;Smt. Sunita Agrawal

Advocate for Pet/Ap. : Indra Raj Singh

Judgement :

V. M. Sahai, J.

1. The Short question that arises for consideration in this petition is whether the provisions of Regulation 101 of Chapter III of the Regulations framed under U. P. Intermediate Education Act, 1921, requiring the appointing authority not to fill a vacancy of a non-teaching post in an aided and recognised institution except with the prior approval of District Inspector of Schools is mandatory or directory.

2. One Ram Lala Singh was working as Junior Clerk [in brief clerk] in an aided and recognised institution Balika Inter College, Shahganj, Jaunpur (in brief institution). In the institution, there was only one sanctioned post of clerk. Ram Lala Singh was due to retire on 31.7.2000. He took medical leave from 19.6.2000 to 31.7.2000. The Committee of Management (in brief Management) sent a letter on 8.1.2000 to District Inspector of Schools (in brief D.I.O.S.) that since Ram Lala Singh was due to retire on 31.7.2000, permission be granted to fill the post of clerk. An advertisement was issued on 20.6.2000 by the management inviting applications to fill short-term vacancy of clerk, which was available till 30.7.2000. The petitioner, who is son of Ram Lala Singh, applied. The selection committee selected him on 25.6.2000. He was issued appointment letter on 30.6.2000 in the leave vacancy of his father. He joined on 8.7.2000. On 10.7.2000 the manager wrote a letter to D.I.O.S. for granting financial approval to the appointment of the petitioner. No approval was granted. Meanwhile Ram Lala Singh retired on 31.7.2000 and a substantive vacancy of clerk became available. On 24.8.2000 the manager wrote a letter to D.I.O.S., intimating him that he had already written letters on 8.1.2000, 2.2.2000, 22.3.2000, 19.4.2000, 26.5.2000, 20.6.2000 and 31.7.2000, for grant of permission to fill the post of clerk. But no prior approval has been granted by D.I.O.S. In the leave vacancy of Ram Lala Singh the petitioner had been appointed and it was prayed that appointment of the petitioner be approved on the substantive vacancy of clerk and financial approval be granted. It was also prayed, in the alternative, that for making regular appointment on substantive vacancy of clerk, which occurred on 31.7.2000, permission be granted to the management to fill the post. The D.I.O.S. did not pass any order. The management on 4.9.2000 issued an advertisement in local newspaper 'Tarun Mitra' published from Jaunpur inviting applications for appointment on the substantive post of clerk. The petitioner applied and was selected by the respondents on 20.9.2000. The management issued appointment letter to him on 6.10.2000. He joined on 11.10.2000. The manager sent a letter to D.I.O.S. on 12.10.2000 for granting financial approval to the appointment. The D.I.O.S. on 6.11.2000 refused to grant financial approval on the ground that his prior approval was not taken before making the appointment. It is this order dated 6.11.2000 which has been challenged by the petitioner in this writ petition.

3. I have heard at length Sri Indra Raj Singh, learned counsel for the petitioner and Smt. Sunita Agrawal, learned standing counsel appearing for the respondent No. 1.

4. The learned counsel for the petitioner has vehemently urged that once the management wrote a letter to D.I.O.S. for obtaining prior approval before making the appointment of clerk, D.I.O.S. could not withhold permission. And the permission was to be granted within reasonable time. He placed reliance on the decision of this Court in *Rajendra Yadav u. Deputy Director of Education, Gorakhpur and others*, 1999 AWC (3) 2123, and has urged that in case prior approval is not granted by D.I.O.S. within two weeks, it would be deemed that approval has been granted for making appointment and the management was well within its right to make appointment on the post of clerk. The learned counsel urged that the impugned order has been passed by D.I.O.S, without affording any opportunity of hearing to the petitioner or the management. He further urged that it is not disclosed in the impugned order if any application for appointment under the Dying-in-Harness Rules was pending. Therefore, there was no justification to refuse approval of petitioner's appointment. The learned counsel further urged that in view of the decision of the Apex Court in *Post Graduate Institution of Medical Education and Research, Chandigarh v. Faculty Association and others*, AIR 1998 SC 1767, that single post cannot be reserved and it could only be filled by direct recruitment the D.I.O.S. could not refuse approval on the ground that candidate under Dying-in-Harness Rules was to be appointed. Learned counsel then urged that even if the appointment of petitioner was irregular, once approval is granted to the appointment by D.I.O.S. it will be deemed to be a valid appointment with effect from the date of approval and in this regard he has placed reliance on the decision of this Court in *Ashika Prasad Shukla v. District Inspector of Schools. Allahabad and another*, 1998 (3) ESC 2006, *Rajesh Kumar Dwivedi v. State of U. P.*, 1998 (4) AWC 531 and *Atul Bhatnagar v. District Inspector of Schools Saharanpur and others*, 1997 ALR (30) 627. Learned counsel for the petitioner lastly urged that since he worked as clerk he is entitled for salary, it should be paid either by D.I.O.S. or the management of the institution.

5. Smt, Sunita Agrawal, learned standing counsel has urged that Regulation 101 provides that prior approval of D.I.O.S. has to be obtained by the appointing authority before making any appointment on a non-teaching post of class-III or IV, therefore. Regulation 101 is mandatory and it has not been complied with by the appointing authority. She urged that two weeks period for grant of prior approval under Regulation 101 could not be treated to be reasonable as held by this Court in Rajendra Yadav (supra). She further urged that under Regulations 101 to 107 of the Regulations framed under U. P. Intermediate Education Act. 1921 (in brief Regulation), appointment under the Dying-in-Harness Rules have to be provided to the dependant of the deceased. If two weeks' period were treated, in law, to be sufficient period, then the interest of the dependant of the deceased who is claiming appointment would seriously be jeopardised. She further urged that decision of Apex Court in Post Graduate Institute of Medical Education (supra) was not applicable to the facts of the instant case as the single post of clerk is to be filled by direct recruitment. And appointments under the Dying-in-Harness Rules are also made by direct recruitment. Learned standing counsel urged that the petitioner being the son of the retired clerk Ram Lala Singh the management appears to be interested in appointing him as the advertisement issued to fill the post of clerk was published only in one local newspaper 'Tarun Mitra' published from Jaunpur. It is not a newspaper having wide circulation. Further the advertisement is required to be issued in two newspapers, therefore, the management did not follow the procedure and the appointment was illegal and contrary to the provisions of Regulations, therefore, the petitioner is not entitled to any salary.

6. The question is whether the provisions of Regulation 101 of Chapter III of the Regulations framed under U. P. Intermediate Education Act, 1921, requiring the appointing authority not to fill a vacancy of a non-teaching post in an aided and recognised institution except with the prior approval of District Inspector of Schools is mandatory or directory. Regulations 101 to 107 was inserted in Chapter III of the Regulations framed under U. P. Intermediate Education Act. 1921, by State Government notification dated 30.7.1992. Regulation 101 and Regulations 103 to 107 were subsequently substituted by notification dated 2.2.1995. The relevant Regulation 101 in Hindi and its translated version in English as quoted by Apex

Court in Director of Education (Secondary) and another v. Pushpendra Kumar and others, 1998 (2) UPLBEC 1310, are extracted below :

'101. The appointing authority shall not fill any vacancy in the non-teaching staff of a recognised aided Institution except with the prior approval of the Inspector.'(Images come ???)

7. Regulation 100 provides that appointing authority for the post of class-III employee is Committee of Management and for the class-IV post is Principal of the institution. Regulation 101 provides that vacancy of a non-teaching post in a recognised aided institution shall not be filled by the appointing authority without obtaining prior approval of the D.I.O.S. Regulation 102 provides that the appointing authority would intimate within three months before the occurrence of vacancy due to the retirement, to the D.I.O.S. Regulation 103 provides that dependant of teaching or non-teaching staff who has died in-harness be given appointment on a non-teaching post. Regulation 106 provides that such appointment has to be given to candidate under the Dying-in-Harness Rules as far as possible in the same organization. And if there is no vacancy available in the organization, he could be appointed in any other organization of the district. The reason for obtaining prior approval of the D.I.O.S. is that he shall look into the records and find out whether appointment has to be given on class-III or class-IV post as per qualification to any candidate in the district under Dying-in-harness Rules. If not, he may grant prior approval to the appointing authority. Thereafter, the appointing authority makes appointment on the non-teaching post, in accordance with the procedure prescribed by law and forwards the papers to the D.I.O.S. for grant of financial approval.

8. The language of the regulation is clear that appointing authority shall not fill any vacancy in non-teaching staff of a recognised aided Institution except with the prior approval of the Inspector. Two words in Regulation 101 are important. The use of word 'shall' makes it obligatory for the appointing authority, before filling the vacancy of non-teaching post to obtain prior approval of the Inspector. The use of word 'except' mandates the appointing authority not to fill the vacancy without obtaining prior approval of the Inspector. The question which arises is that what is

the import of word 'shall' and 'except' used in Regulation 101. When the Legislature or the rule-making authority uses the word 'shall', normally it is used in imperative or mandatory sense- After reading the provision, it has to be culled out as to whether word 'shall' has been used in mandatory or directory sense.

9. The word 'except' has been defined in Webster's Third New International Dictionary to mean,

'unless' or 'only'.

The word 'except' has been defined in Black's Law Dictionary revised fourth edition as the expression 'except for' is synonymous in many cases with.

'but for' and 'only for'.

'In Black's Law Dictionary sixth edition the word 'except' has been defined as.

but for; only for ; not including ; other than; otherwise than; to leave out of account or consideration.'

'In Grolier New Webster's Dictionary the word 'except' has been defined as.

apart from, excluding, only, but'.

'In Black's Law Dictionary sixth edition the word 'shall' expressed as used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion.....It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favour of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.

But it may be construed as merely permissive or directory (as equivalent to 'may'), to carry out the legislative Intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.'

10. From the aforesaid meaning of the word 'except', it is clear that the expression 'except' has been used in Regulation 101 to mean 'only'. Therefore, the appointing authority before making appointment on a non-teaching post could make any appointment only after obtaining prior approval of D.I.O.S. In my opinion, use of these two words 'shall' and 'except' have been used in imperative terms. And clearly express that prior approval of D.I.O.S. is a condition precedent for making any appointment on a non-teaching post. Use of word 'except' with the prior approval of D.I.O.S. does not leave any discretion to the appointing authority to make any appointment without obtaining his prior approval. If Regulation 101 is treated to be directory, then the appointing authority could make appointment on non-teaching post even without prior approval of the D.I.O.S. It would result in giving power to the appointing authority to make appointment first, and thereafter obtain financial approval. This was not the intention of Legislature or the rule-making authority. And it clearly intended that before making any appointment, the appointing authority must obtain prior approval of the D.I.O.S. The legislative intent has to be given effect to while interpreting regulatory provisions of Regulation 101. Regulations 103 to 106 to regulations further make it clear that the Regulation 101 cannot be construed as permissive or directory. Further, the procedural safeguard contained in Regulation 101, making it obligatory for the appointing authority in matters of making appointment on non-teaching posts, not to fill the vacancy except with the prior approval of the D.I.O.S., has an element of public interest. Regulation 103 providing for appointments under the Dying-in-Service Rules makes it obligatory on the D.I.O.S. to provide appointment to dependants not only in the institution where the deceased was working but any other institution, therefore, the only reasonable interpretation which can be given to the two words 'shall' and 'except' used in Regulation 101 is that these expressions are imperative and the regulatory provision contained in Regulation 101 is mandatory and cannot be treated to be directory. The requirement of obtaining prior approval of D.I.O.S. is not an empty formality. It is in public interest. The appointment of petitioner

being contrary to Regulation 101 did not vest any right in him either to claim his appointment as regular or any salary.

11. The next question is whether the Court could fix any time limit for exercise of power by the D.I.O.S. under Regulation 101. The Legislature or the rule making authority while amending Regulation 101 did not fix any time limit for D.I.O.S. within which he has to grant or refuse prior approval to the appointing authority for filling the non-teaching post. Learned counsel for the petitioner has strongly relied on a decision of this Court in *Rajendra Yadav (supra)*. It has been urged that in view of this decision, once appointing authority sends a request to D.I.O.S. for obtaining prior approval before making any appointment and such approval is not granted within two weeks after papers are received by D.I.O.S., then it would be deemed that the D.I.O.S. has granted approval to the appointment sought to be made by the appointing authority. The learned Judge has relied on the decision of Apex Court in *Regional Provident Fund Commissioner v. M/s. K.T. Rolling Mills Private Limited*, JT 1995 (1) SC 138. The Apex Court held that where a power is conferred on an authority under the Statute. It has to be exercised within a reasonable period. True but what is reasonable period would depend on the facts of each case. It cannot be fixed by the Court. It can only determine whether the power exercised by the authority was within reasonable time or not, in the facts of a particular case. The authority while framing Regulations 101 to 107 did not fix any time limit within which the D.I.O.S. could grant prior approval to the recommendation made by the appointing authority for filling the non-teaching post. The reason is obvious. The D.I.O.S. has to verify from the records as to whether any candidate in the district is to be appointed under the Dying-in-Harness Rules and vacancies for making appointments are available or not in the institutions of the district. Therefore, the authority in its wisdom did not think it reasonable to fix any time limit for the D.I.O.S. under Regulation 101 for exercising power of granting prior approval. Wherever, either in the U. P. Intermediate Education Act, 1921, or the regulations framed thereunder. Legislature or the rule-making authority, thought it proper to fix a time limit, it clearly provided the time within which the power is to be exercised and if the power is not exercised within fixed time limit, it provided that it would be deemed that prior approval has been granted by the educational authority. In Regulation 6 of Chapter II of the regulations,

deemed approval has been provided if on the proposal for promotion of a teacher, the D.I.O.S. does not communicate his decision within three weeks to the management. The provision for deemed approval, therefore, was a conscious omission. It is settled rule of interpretation that where Legislature or the rule-making authority enacts different provisions for similar situation, then it should be interpreted in the manner it has been provided for. On the construction of the Regulation 101 and in absence of any provision for deemed approval, the learned standing counsel rightly argued that the decision in Rajendra Yadav (supra) is not helpful.

12. The appointing authority had applied to the D.I.O.S. for grant of prior approval before making any appointment on the class-III post. No. communication was sent by the D.I.O.S. to the appointing authority either refusing or granting the permission. Without obtaining prior approval of the D.I.O.S., the appointing authority proceeded to make appointment of the petitioner on the non-teaching post. If the D.I.O.S. failed to perform his statutory duty under Regulation 101 and did not grant prior approval, then it was open to the management to approach this Court for issuance of a writ of mandamus for direction to the D.I.O.S. for deciding the application of the appointing authority for grant of prior approval. But in absence of prior approval by the D.I.O.S., the appointing authority could not have proceeded to make appointment of the petitioner. And the appointment made by the appointing authority of the petitioner without obtaining prior approval of the D.I.O.S. on a non-teaching post was in violation of mandatory provision of Regulation 101 and the petitioner could not claim any benefit from such an appointment made by the appointing authority.

13. The petitioner is not entitled to any relief, as the management in violation of mandatory provisions of Regulation 101 made his appointment. Therefore, it is not necessary for me to consider the other questions raised by the learned counsel for the parties.

14. For the aforesaid reasons, I do not find any merit in this writ petition.

This writ petition fails and is accordingly dismissed.

