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Court : Allahabad

Decided On : Jul-14-2009

Reported in : 2009(4)AWC3857

Judge : Ran Vijai Singh, J.

Appellant : Parmanand Panday and anr.

Respondent : District Inspector of Schools and ors.

Advocate for Pet/Ap. : Sri. D.S.P. Singh

Judgement :

Ran Vijai Singh, J.

1. This writ petition has been filed for issuing a writ of certiorari quashing the order dated 16.9.1994 by which the services of the petitioners as Class-IV employee have been terminated by the respondent No. 4 on the ground that the D.I.O.S. has orally refused to approve the services of the petitioners as no prior approval was obtained for making appointment.

2. Sri D.S.P. Singh learned Counsel appearing for the petitioners submits that petitioners appointments were made by the competent authority i.e., the Principal of the Institution after advertising the vacancies and for holding the selection of Class-IV employees no prior approval of D.I.O.S.as recorded by the Principal of

the college was necessary if the appointment was made prior to 30.6.1992. Otherwise also in case of Class-IV employee approval of District Inspector of School is not necessary only financial concurrence is required. In his submissions the services of the petitioners should not have been terminated on these grounds.

3. He has further submitted that the petitioner No. 1 has been discriminated by the authorities as on the strength of interim order passed by this Court on 30.9.1994, the service of the petitioner No. 2 has been approved and he is getting salary whereas in the case of petitioner No. 1 the respondents have not passed such order.

4. Refuting the submissions of learned Counsel for the petitioners, learned Standing Counsel submits that the petitioners appointment were made against non sanctioned post, therefore, the question of approval does not arise. In his further submissions there is nothing on record to indicate that the selection has been made after adopting normal procedure of selection for appointment on a post where salary is payable through State exchequer.

5. Learned Standing Counsel has also submitted that the present petition is not maintainable as the State of U.P. through Secretary Madhyamik Education U.P. Government Lucknow has not been impleaded as a necessary party. I have heard Sri D.S.P. Singh learned Counsel for the petitioner and learned Standing Counsel for the State respondents. The case as set up in the writ petition by the petitioner is that according to the norms for sanctioning the posts on the increasing number of students ten posts of peon were required to be sanctioned but only six peons were working, therefore, to cope with the need of the hour petitioners appoints were made by the respondent No. 4 after advertising the vacancies.

6. Earlier there was conflicting decisions on the point in *Karuna Pati Mishra v. District Inspector of Schools Mirzapur* 1986 (1) U.P.L.B.E.C. 172 it was held that once the Board of High School and Intermediate Education U.P. has granted recognition to a particular subject, it will be presumed that the post has been sanctioned but in *Mahipal Singh Pawar v. State of U.P.* 1992 (2) U.P.L.B.E.C 1497 this Court held that power of sanction of post and recognition to a new subject is altogether and different. The power for sanction of post is governed under U.P.

High School and Intermediate Colleges (Payment of Salaries of Teachers and other employees) Act 1971 and the power is vested with the Director of Education Madhyamik Education U.P. Looking into the conflicting decisions on the point following question for determination was referred to the Full Bench.

Whether on recognition being granted by the Board in respect of a subject in an Institution under Section 7-A of the U.P. Intermediate Education Act, 1921 (U.P. Act No. 11 of 1921) (hereinafter referred to as the Intermediate Education Act) it will be presumed that the post of Lecturer in such subject stands sanctioned by the Director of Education under Section 9 of the Payment of Salaries Act ?.

7. Now the question has been answered by this Court in Full Bench decision in the case of Gopal Dubey v. District Inspector of Schools, Maharajganj and Anr. reported in 1999 (1) U.P.L.B.E.C. 1. The Full Bench has opined that unless the post is sanctioned by the competent authority, no salary of an employee can be paid under the provisions of U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971. Admittedly in the present case the post against which petitioners appointments were made were not sanctioned by the competent authority, therefore, neither the approval for such appointment could be made nor any direction can be issued to the authorities for payment of salary.

8. So far as the argument of learned Counsel for the petitioners with regard to the arbitrary action of the respondents in discriminating the petitioner No. 1 is concerned suffice it to say that the concept of equality as envisaged under Article 14 of the Constitution of India is a positive concept which cannot be enforced in a negative manner when any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on the ground of denial thereof to them and no such directions can be issued by the Court directing the authorities to commit another irregularity against the statute. The Apex court in the case of Gursharan Singh and Ors. v. NDMC and Ors. JT 1996 (1) SCC 647 has observed:

Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality

before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination.

9. Again in *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and Ors.* : JT 1996 (8) SC 387 the same view reported by the Apex Court held:

Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents.

10. In *State of Haryana and Ors. v. Ram Kumar Mann* : JT 1997 (3) SC 450 the Apex Court has observed:

The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement The answer is obviously 'No'. In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision

by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right.

11. Same view has been reiterated in : J.T.2000(5) Sc 389 State of Bihar v. Kameshwar Prasad Singh and Ors.

12. Here in the present case undoubtedly petitioner No. 1 and 2 are sailing on the same boat as their appointments have been made against non sanctioned posts but this Court has granted an interim order directing the respondents to allow the petitioners to continue in service provided the petitioners were working on the date on which the interim order was passed. On the strength of the interim order passed by this Court, the services of the petitioner No. 2 was approved but no order in respect of petitioner No. 1 was passed. Prima facie, in that situation the discriminatory behaviour of the authorities reflect on the face of record but looking into the legal position the action of the authorities cannot be approved either in the case of petitioner No. 1 or in the case of petitioner No. 2.

13. I am of the view that the order approving the service of the petitioner No. 2 is illegal and against the statute as the petitioner's initial appointment was made against the non sanctioned post and that too dehorse to the normal mode of recruitment as the vacancies were never advertised in a newspaper of wide circulation.

14. I am also of the view that the writ petition itself is not maintainable for the reasons that the State of U.P. through Secretary Madhyamik Education U.P. Government Lucknow has not been impleaded as a necessary party. In view of the decision of the Apex Court reported in : AIR 1977 S.C. 1701 (Ranjit Mal v. General Manager, Northern Railway, New Delhi and Anr.); : (2003) (3) SCC 472 Chief Conservator of Forests Government of A.P. v. Collector and Ors. and Division Bench decision of this Court reported in 2008 (10) ADJ 530 Regional Manager, U.P.S.R.T.C., Agra v. Compotar.

15. In view of the above legal position the writ petition is dismissed. However, it is observed that since the petitioner No. 2 has been getting salary from the State Exchequer on the strength of the order passed by this Court, therefore, no

recovery of the amount which has already been paid to the petitioner as a salary be made.

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