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Sunil Kumar Vs. District Inspector of Schools, Ghazipur and anr.

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Court : Allahabad

Decided On : Aug-09-2001

Reported in : 2001(4)AWC2540; (2001)3UPLBEC2619

Judge : Ashok Bhushan, J.

Acts : [Constitution of India](#) - Articles 14 and 16; Uttar Pradesh Intermediate Education Act, 1921; Uttar Pradesh Intermediate Education Regulations - Regulations 2, 101 and 103 to 106; Uttar Pradesh Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981

Appeal No. : C.M.W.P. No. 936 of 1997

Appellant : Sunil Kumar

Respondent : District Inspector of Schools, Ghazipur and anr.

Advocate for Def. : S.C. and ;S.P. Srivastava, Adv.

Advocate for Pet/Ap. : Siddharth Verma and ;S.K. Verma, Adv.

Disposition : Petition dismissed

Judgement :

Ashok Bhushan, J.

1. Heard Sri S.K. Varma, senior advocate assisted by Sri Siddarath Varma appearing for the petitioner and Sri S.P. Srivastava learned standing counsel. Counter and rejoinder-affidavits have been exchanged. With the consent of the parties, the writ petition is being disposed of.

2. This writ petition has been filed praying for quashing the impugned order dated 25.1.1996 passed by the District Inspector of Schools, Ghazipur and further prayer is made for a writ of mandamus directing the respondents to make payment to the petitioner from month to month along with arrears of salary.

3. Petitioner's case as set out in the writ petition is that there is a recognised Institution, namely. Hindu Inter College. Zamanla, Ghazipur. One assistant clerk Ramji Ram went on leave from 16.6.1994 to 15.2.1995. This leave was extended from time to time. Petitioner states that since the work was suffering, hence he was appointed by the committee of management as clerk on leave vacancy vide order dated 25.7.1994. Petitioner states that his appointment was extended from time to time. A resolution dated 15.1,1995 is claimed to have been passed appointing the petitioner on ad hoc basis with effect from 1.2.1995. One post of clerk fell vacant due to retirement of Siya Ram Gupta on 31.1.1995 and on the aforesaid post, appointment of the petitioner was made on ad hoc basis from 1.2.1995. The said fact has been stated in the resolution dated 15.1.1995 filed along with the writ petition as Annexure-2 to the writ petition. Annexure-3 to the writ petition is the appointment letter given to the petitioner appointing him on the post of clerk. A reference has also been made to the letter of District Inspector of Schools dated 25.1.1996 by which the appointment of the petitioner in the leave vacancy of Sri Ram Ji Ram was approved up to 31.1.1995.

4. Petitioner claimed that he has submitted representation that he has not been paid salary from 1995 and the District Inspector of Schools has to pay his salary. Petitioner claimed that he has given several reminders but in vain. Petitioner thereafter filed a Writ Petition No. 429 of 1996 in which an order was passed on 5.1.1996 directing the District Inspector of Schools to decide the representation of the petitioner. The District Inspector of Schools in pursuance of the order of this Court passed an order on 25.1.1996 refusing to approve the appointment of the

petitioner as clerk. The District Inspector of Schools in the aforesaid order has given following two reasons for rejecting the claim of the petitioner.

(i) Prior approval of the District Inspector of Schools as required by the Regulation 101 of Chapter III of the U. P. Intermediate Education Act. 1921. has not been taken.

(ii) The clerks working in the district as dependent of the deceased employees on supernumerary posts have to be adjusted.

5. A counter-affidavit has been filed by the District Inspector of Schools, Ghazipur, in which it was stated that the post had substantively fallen vacant on 1.2.1995. and for appointment on said post, the approval of the District Inspector of Schools was required under Regulation 101. Chapter III of the U. P. Intermediate Education Act. The committee of management has no power to make appointment without prior approval of the District Inspector of Schools. In paragraph 13 of the counter-affidavit, it was stated that in district, there are many clerks who are working on supernumerary posts who have to be adjusted. The management has also filed a counter-affidavit. In paragraph 9 of the said counter-affidavit of the management, it has been stated that the provisions of Regulation 101 are directory. It has been stated that no guidelines have been provided for giving approval. Petitioner has filed rejoinder-affidavit in which it was claimed that the appointment of the petitioner was only an ad hoc appointment. It was further stated that the provisions of Regulation 101 of Chapter 111 is void. It was further stated that since there was no filling of post on permanent basis hence there was no necessity of getting any approval of the District Inspector of Schools.

6. Sri S.K. Varma raised following three submissions :

(i) The reasons given by the District Inspector of Schools in rejecting the claim of the petitioner are erroneous. The reasons given for refusing to approve the appointment is not relevant nor mentioned in Regulation 101 of Chapter III of the U. P. Intermediate Education Act. The reasons for refusal being illegal, the petitioner's appointment ought to have been approved.

(ii) The committee of management is competent authority to make appointment and Regulation 101 cannot fetter the right of management to make appointment. The appointment of the petitioner was valid and since the petitioner has been working continuously, he is entitled for salary.

(iii) Regulation 101 of Chapter III of the U. P. Intermediate Education Act. 1921. does not contain any guidelines as to on what ground the District Inspector of Schools will approve the appointment, hence the said provision itself is void and unenforceable.

7. Before considering the submission of the counsel for the petitioner, it is relevant to note as to what is the procedure adopted for appointment of the petitioner on the post of clerk. In the writ petition or in the counter-affidavit of the committee of management, there is not even a whisper that before making appointment of the petitioner, any advertisement was issued in any news paper. The petitioner has filed resolution of the committee of management dated 15.1.1995 as Annexure-2 to the writ petition in support of his claim. The resolution itself makes it clear that no selection of any kind was held for filling the post of assistant clerk. Only consideration for appointment of the petitioner was that he was appointed in leave vacancy for six months. From the pleadings of the parties it is established that the before appointment of the petitioner on the post of clerk with effect from 1.2.1995. neither any advertisement was made nor any selection was conducted giving opportunity to other eligible candidates to participate in the selection. It is true that the provisions of Chapter III of the U. P. Intermediate Education Act, 1921. did not provide any procedure for selection on the post of the clerk. In the absence of any prescribed procedure under the rules, it is open to the management to adopt a procedure which conforms the provisions of Articles 14 and 16 of the [Constitution of India](#). The committee of management was free to issue advertisement in the news paper and to call names from the Employment Exchange for making selection. In the aided Institution, the salary to the teachers and the staff is paid by the State Government. Since the salary is paid by the State Government, for all purposes the employment to the post of clerk is public employment. For a public employment, the minimum requirement which is needed is to advertise the post to enable all the eligible candidates to apply for the post. The committee of

management cannot claim to select any person on its own choice without advertising the post in any news paper. The petitioner's appointment made by the management without advertisement of the vacancy and without inviting any candidate to participate is void appointment.

8. The question regarding making ad hoc appointment on the post of teachers in aided institutions came for consideration before the Full Bench of this Court in the case of Kumari Radha Raizada and, etc. etc. v. Committee of Management, Vidyawati Darbari Girls Inter College and others etc. etc., 1994 All LJ 1077. The Court was considering the procedure of ad hoc appointment as prescribed under the U. P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981. In the aforesaid Order, 1981. the procedure prescribed for appointment was only requiring a notice to be published in the notice board of the institution. The Full Bench held that the aforesaid notice is no notice in the eye of law and does not satisfy the requirement of Article 16 of the [Constitution of India](#). The Full Bench held in paragraph 42 as under :

'42..... The advertisement of short term vacancy on the notice board of the institution, according to me. in fact no notice to the prospective eligible candidates as no prospective candidate is expected to visit each institution to see the notice board for finding out whether any short term vacancy has been advertised. Since the payment of ' salary to the teachers appointed against the short term vacancy is the liability of the State Government, the advertisement of short term vacancy must conform to the requirement of Article 16(1) of the Constitution which prohibit the State from doing anything whether by making rule or by executive order which would deny equal opportunity to all the citizens. The provision contained in sub-paragraph (3) of paragraph 2 of the Second Removal of Difficulties Order which provides that the short term vacancy shall be notified on the notice board of the institution does not give equal opportunity to all the eligible candidates of the District, Region or the State to apply for consideration for the appointment against the said short term vacancy. Such kind of notice is an eye-wash for the requirement of Article 16 of the Constitution. This aspect can be examined from another angle. If the notice of short term vacancy, through the notice board of the institution is accepted, it will throw open the doors for manipulation and nepotism.

A management of an institution may or may not notify the short term vacancy on the notice board of the institution and yet may show to the authority that such vacancy has been notified on the notice board of the institution and may process the application of its own candidate for the appointment against the short term vacancy. I am, therefore, of the view that the procedure for notifying the short term vacancy should be the same as it is for the ad hoc appointment by direct recruitment under the First Removal of Difficulties Order. The management after intimating such vacancy to the District Inspector of Schools advertise such short term vacancy at least in two newspapers having adequate circulation in Uttar Pradesh in addition to notifying the said vacancy on the notice board of the institution and further the application may also be invited from the local employment exchange.'

9. The principles which were laid down by the Full Bench with regard to ad hoc appointment on the post of assistant teacher will also be applicable with regard to the appointment on the post of clerk at least with regard to advertisement of vacancy. Management for selection on the post of clerk can adopt any procedure which conforms the provisions of Articles 14 and 16 of the [Constitution of India](#). When in the short term vacancy, Full Bench has held that the advertisement is required to be published in two newspapers. It cannot be said that for appointment on the post of clerk, no advertisement in any newspaper is required. The petitioner's selection and appointment having been made without any advertisement in the newspaper is an arbitrary appointment and on the basis of such appointment, the petitioner cannot claim any relief in respect of salary.

10. With regard to submission of counsel for the petitioner that the reasons given by the District Inspector of Schools in his order dated 25.1.1996 for not approving the appointment of the petitioner is Irrelevant, it is to be noted that the provision of Regulation 101 of Chapter III of U. P. Intermediate Education Act, 1921, has been held to be mandatory by the learned single Judge of this Court in the case of Amit Kumar v. District Inspector of Schools, Jaunpur and others, 2000 (4) ESC 2758 (AH). In the aforesaid judgment, the learned single Judge after considering the provisions of Regulation 101 has held that without prior approval of the District Inspector of Schools, no appointment can be made by the management. In

paragraph 8, it was held :

'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 District Inspector of Schools. In my opinion use of these two words 'shall' and 'except' have been used in imperative terms. And clearly express that prior approval of District Inspector of Schools is a condition precedent for making any appointment on a non-teaching post. Use of word 'except' with the prior approval of District Inspector of Schools 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 District Inspector of Schools. 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 District Inspector of Schools. 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 District Inspector of Schools, has an element of public interest. Regulation 103 providing for appointments under the Dying-in-Harness Rules makes it obligatory on the District Inspector of Schools to provide appointment to dependents 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 there is 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 District inspector of Schools 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 second reason given by the District Inspector of Schools in rejecting the claim of the petitioner also cannot be held to be irrelevant. Regulation 106 of Chapter III of the U. P. Intermediate Education Act was amended by the notification dated 2.2.1995. The amended Regulation 106 provides that if there are no vacancy in class IV post, the appointment of the dependent of deceased employee can be made on supernumerary post. However, the provisions of appointment in Class III employee on supernumerary post has been done away with vide amendment dated 2.2.1995. Regulation 106 prior to amendment dated 2.2.1995 required that for appointment of dependent of the deceased employee if in the Institution concerned in non-teaching category, there is no post, then he can be appointed in any other institution of the district and if no post is vacant in any aided institution of the district, then at the institution where the deceased was working, appointment will be made against the supernumerary post and the said supernumerary post will be continued till in that institution or in any other institution of the district, another post is made available. The aforesaid Regulation 106 clearly contemplated adjustment of class III employee working against the supernumerary post. The District Inspector of Schools when in his order dated 25.1.1996 stated about the aforesaid fact, no error was committed by him. Regulation 106 was amended on 2.2.1995 and the appointment on supernumerary post of class III post were permissible prior to 2.2.1995. The vacancy in question on which the petitioner claims appointment came into existence on 31.1.1995 thus, the said vacancy prior to amendment was covered by the unamended Regulation 106.

12. In view of the above, the reasons given by the District Inspector of Schools in refusing the claim of the petitioner is not irrelevant. The management has illegally appointed the petitioner without taking prior approval hence the petitioner's appointment is void and does not confer any right on him. A.W.C. 160

13. The submission of Sri Varma that Regulation 101 is void since no guidelines have been provided for granting approval, is also not acceptable. Although the Regulation 101 only provides that no appointment will be made without prior

approval of the District Inspector of Schools, the guidelines and factors on which the District Inspector of Schools has to accord or refuse approval can be found out in other provisions of Regulation of Chapter III, e.g.. Chapter III Regulation 2 providing that 50% posts of clerks will be filled up by promotion from class IV employees. If the management makes selection on a post of clerk which is required to be filled up by promotion under Chapter III Regulation 2, the District Inspector of Schools has to refuse approval of the appointment. Further, if on a post which has fallen vacant there is eligible dependent of the deceased employee waiting for appointment, the District Inspector of Schools can in his discretion refuse the approval to adjust the dependent of the deceased employee on vacant post. The guidelines for exercising power under Regulation 101 have thus to be found in other provisions of Regulation and have to be read together. The argument of Sri Varma that Regulation 101 is void is unacceptable. The State pays the salary to the teachers and staff of the aided Institutions and the restriction on management's power to appoint with approval of the Inspector is a reasonable restriction to check the arbitrary and illegal acts of the management. I do not find that Regulation 101 suffers from any illegality or is void. The counsel for the petitioner has laid much emphasis that the petitioner has been working since his appointment and is not being paid his salary. The petitioner's appointment not being valid appointment, the State cannot be saddled with the liability of payment of salary- Petitioner can always claim his salary from the management who has taken work from the petitioner.

14. In view of the above discussion the writ petition lacks merit and is dismissed.

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