

Sunil Kumar Singh Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : May-23-2003

Reported in : (2003)3UPLBEC2341

Judge : R.B. Misra, J.

Acts : Uttar Pradesh Municipalities Act, 1916 - Sections 74

Appeal No. : Civil Misc. Writ Petition No. 35115 of 1998

Appellant : Sunil Kumar Singh

Respondent : State of U.P. and ors.

Advocate for Def. : Ramanuj Pandey, ;Ashok Gupta, ;Brajesh Singh and ; Ashok Kumar, Advs. and ;S.C.

Advocate for Pet/Ap. : Birendra Singh and ;V.K. Shukla, Advs.

Judgement :

R.B. Misra, J.

1. By means of Writ Petition No. 35115 of 1998 petitioner has prayed to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay the salary of the petitioner, since July, 1997, continuously and by means of Writ Petition No. 9678 of 1999, the petitioner has challenged the order of

termination dated 10.3.1999 (Annexure-11 to the writ petition) and further prayed that the respondents be restrained from the peaceful functioning of the petitioner as Clerk in the Nagar Palika Parishad, Atarra, District Banda.

2. Heard learned Counsel for the petitioner as well as learned Counsel for the respondents.

3. The facts relating to Writ Petition No. 35115 of 1998 are as follows :-

In the year 1996, a substantive post of clerk was fallen vacant in the Nagar Parishad, Atarra, on account of incumbent of the post, due to resignation of Laxmi Prasad. However Shri Satish Chandra Awasthi Head Clerk of the said Nagar Palika Parishad, made a recommendation to the Executive Officer, Nagar Palika Parishad, Atarra that due to resignation of Laxmi Prasad proper functioning of Nagar Palika Parishad is being effected, therefore, a fresh recruitment may be made on the substantive post. On the recommendation made by Sri Satish Chandra Awasthi, the Executive Officer, wrote a letter to the Chairman, Nagar Palika Parishad, requesting to constitute the Selection Committee for making a selection on substantive post of Class III.

A Public notice was published, inviting the applications from eligible candidates and a Selection Committee was constituted by the Chairman, containing 3 members, namely Smt. Rama Singh Rathor, Sri Sanjai Singh, Smt. Shiv Devi Soni. Thereafter a selection list was prepared and accordingly the interview letter was issued to 6 candidates, namely Ram Saran son of Judi Raikwar, Ram Pratap son of Malkhan, Kamla Kant Srivastava son of Onkar Srivastava, Sunil Kumar Singh (petitioner) son of Sri Ganesh Bux Singh, Om Prakash son of Ganesh Prasad Srivastava, Ajai Singh son of late Girja Singh. All the abovementioned candidates, who were invited for interview, appeared before the Interview Board. The Selection Committee declared the result, and petitioner was found suitable candidate and accordingly he was selected as Clerk, the Selection Committee on 3.3.1997 had recommended the name of the petitioner to the Chairman and appointment letter was issued on 6.3.1997, the petitioner submitted his joining report to the Executive Officer on 8.3.1997 and as contended since then he is regularly performing his duties.

In meeting of the Board of Nagar Palika Parishad, Atarra, held on 21.3.1997, the appointment of the petitioner was approved by proposal No. 10(1) as evident from Annexure-4 of Writ petition No. 9678, however, the petitioner was not paid salary since 1997, hence he filed present writ petition.

4. The Writ Petition No. 35115 of 1998, was taken up and this Court on 10.11.1998 passed the order, which reads as below :-

'List after 6 weeks, showing the name of Sri Ashok Kumar as Counsel for the respondents in addition to the name of the learned Standing Counsel. Counter-affidavit may be filed by next date of listing.

In. the meanwhile, third respondent shall consider the petitioner's representation dated 14.10.1997, 22.10.1997 and 6.3.1998 and disposed of them by a reasoned order and communicate the decision to the petitioner by next date of listing of the case.

Sd/- S.R. Singh, 'J'

10.11.1998.'

5. The respondent authorities did not comply the direction dated 10.11.98 of this Court, the petitioner filed a Contempt Application No. 271 of 1999. It appears the District Magistrate, the respondent wrote a letter to the Executive Officer on 19th February, 1999, directing him to terminate the services of the petitioner. The Chairman thereafter terminated the services of the petitioner on 10.3.1999.

6. The petitioner also filed Writ Petition No. 9678 of 1999, for quashing the illegal termination order dated 10.3.1999 mainly on the following grounds :-

(a) Absolutely no notice or opportunity, whatsoever, has ever been given to the petitioner before passing the order dated 19th February, 1999, 10.3.99. As such the order impugned is violative to the principles of natural justice.

(b) The impugned order has been passed behind the back of the petitioner. Neither any enquiry has been contemplated against the petitioner nor any explanation has been called, as such the order impugned, is wholly illegal,

erroneous and unwarranted.

(c) The respondents did not comply with the order dated 10.11.98 passed by this Court in Writ Petition No. 35115 of 1998. Neither any communication has been made to the petitioner, nor they have decided the representation of the petitioner.

(d) During the pendency of the Writ Petition No. 35115 of 1998, before this Court the order for termination dated 10.3.99 is wholly arbitrary, unjustified.

(e) The petitioner's appointment was made, after adopting due process prescribed under the law, statute and Act and the Chairman issued the appointment letter, exercising the power as mentioned under Rule 74 of U.P. Municipalities Act and accordingly the approval was granted by the Board.

7. According to petitioner he was appointed in accordance with law and there was no any lacuna in the process of the appointments or selection for making appointment. The Chairman, Nagar Palika Parishad, has acted, according to the powers conferred upon him, under the Statute the Act. The exclusive powers confers to the President, under Section 74 with regard to the appointment and dismissal of permanent Superior Staff, subject to the approval of the Board.

8. This Court on 17.5.2001 had directed the respondent No. 4 i.e., Chairman, Nagar Palika Parishad to consider and take the decision with regard to claim of the petitioner on the representation submitted by the petitioner, as the petitioner had claimed that he was working on 17.5.2001 but he was not being paid salary, therefore, on 3.7.2001 this Court was pleased to direct the respondents to pay the salary of the Clerk to the petitioner.

9. Counter-affidavit has been filed on behalf of Nagar Palika Parishad. In Para 5 of the counter-affidavit it is stated that Laxmi Prasad Gupta had resigned on 13.9.93 and his resignation was duly accepted by the Chairman. It is further submitted that the then Chairman has wrongly promoted three persons as mentioend in the supplmentary counter-affidavit on the one post, which itself is illegal and wrong. The appointment of the petitioner is not made by the authority concern according to Nagar Palika Parishad Service Rules. According to Para 6 of the counter-

affidavit the then Chairman has wrongly appointed the petitioner without following the due procedure of law and as such, the appointment of the petitioner is not sustainable in the eye of law. According to Paras 7 and 8 of the counter-affidavit when there is no post vacant, then there is no use of performing the duties of the petitioner as his appointment itself is illegal, the payment of salary of the petitioner was made on the direction and risk of the then Chairman as is evident from Annexure No. 2 to the supplementary counter-affidavit. In Para 11 of the counter-affidavit it has been submitted that when there is no post then there is no question to make the payment of salary of the petitioner.

10. In compliance to the order dated 3.7.2001 the representation of the petitioner dated 15.10.1997, 22.10.1997 and 6.3.1998 were decided on 28.7.2001 by Nagar Palika Parishad, which is annexed as Annexure C.A-1 to the counter-affidavit. According to Para 4 of the decision dated 28.7.2001 it reveals that the service of the petitioner was terminated' on the basis of enquiry made against the petitioner. As appears from the decision dated 28.7.2001 no post of Clerk was available at the representation time, no advertisement or notice was ever published in the newspaper nor the names were demanded from the Employment Exchange and the post, to which the appointment of the petitioner was made, on that post Sri Ram Kishun Jatav was already deployed and Sri Satish Chandra Awasthi and Sri Virendra Tiwari were also promoted on the same post, who have filed Writ Petition Nos. 19475 of 1994, 450 of 1998/Special Appeal No. 287 of 1994, which were pending for adjudication in this Court, therefore, the payment of the salary was not to be made to any of the person without disposal of the pending petitions in the High Court. In the supplementary counter-affidavit filed on behalf of Nagar Palika Parishad it appears from Para 3 that the petitioner had earlier filed a Writ Petition No. 8843 of 1998 for similar and same cause of action, which was dismissed on 9.3.1999. This fact was concealed by the petitioner when the petitioner preferred Writ Petition No. 9678 of 1999 and obtained an order dated 17.3.1999 thereafter got the earlier Writ Petition No. 8843 of 1999 dismissed on 29.3.1999. According to Para 5 only one post of Clerk in Nagar Palika Parishad was available and earlier Chairman Ramesh Chand Kuril appointed three persons namely Virendra Kumar Tiwari, Ram Kishun Jatav and Sri Satish Chandra Awasthi on single post, thereafter the formal Chairman promoted the aforesaid three persons on one post

and got appointed the petitioner by misusing his powers and the writ petitions namely 44319 of 1997, 450 of 1998, 19475 of 1994 and Special Appeal No. 287 of 1994 in respect of above persons were pending in consideration before this Court.

11. In case of Salek Chandra Gupta v. U.P. Public Service Tribunal, Lucknow and Ors., reported in (1989) 1 UPLBEC 259, the Apex Court has held that the U.P. Municipalities Act, 1916, Sections 74 and 57 to 73, General Clauses Act, 1897, Section 16, U.P. Municipalities Servants Appeal Rules, 1957, Rule 3, powers under Section 74, vested in the President, does not act as delegate of Board power to the appointment, and dismissal-lies exclusively in the President.

12. In case of Naseem Bano v. State of U.P. and Ors., reported in (1994) 2 UPLBEC 1172, the Supreme Court has held that Regulation/Act cannot be construed, as referring to the Notification, because the Notification is only an executive and the qualification prescribed therein cannot override the qualification prescribed in the Regulation/Act, which are statutory in character.

13. In case of Ilam Singh v. District Magistrate, Muzaffar Nagar and Ors., reported in 1999 AWC 929, the Apex Court has held that the District Magistrate, directing the Appointing Authority to suspend the petitioner Appointing Authority the order of suspension not sustainable and liable to be quashed. In Para 12 of the judgment, it is held that there was no proper application of mind by the Competent Authority, on the other hand the order was issued at the behest of the Superior.

14. In case of Basudev Tiwari v. Sido Kanhu University and Ors., SCC (1998) 8 SCC 194, in Para 12 Hon'ble Supreme Court held that an appointment could be terminated at any time, without notice, if the same has been made contrary to the provisions of the Act, Statutes, rules or regulations, or in any irregular or unauthorised manner. The condition precedent for exercise of this power is that an appointment had been made contrary to the Act, Rules, Statute and Regulations, or otherwise. In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, Rules, Statute or Regulation. THE FINDINGS HAS TO BE RECORDED AND UNLESS SUCH FINDING HAS TO BE RECORDED AND UNLESS SUCH FINDINGS IS RECORDED THE TERMINATION CANNOT BE MADE, but to arrive at such conclusion, necessarily an enquiry will have to be

made as to whether such appointment was contrary to the provisions of the Act etc, If in given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a findings necessary enquiry will have to be held and in holding such an enquiry will have to be issued a notice. If notice is not given to him, it is like playing hamlet without the prince of Denmark that if the employee concern whose rights are effected, is not given notice of such a proceedings and a conclusion is drawn in his absence, such a conclusion would not be just.

15. As claimed by the petitioner, the appointment, was made according to the provisions of the Act, Statute, Rules and the President of the Nagar Palika Parishad, Atarra has exercised the power as authorised under Rule 74 of the U.P. Municipalities Act, therefore, it could not be said that the petitioner was appointed, contrary to the provisions of the Act and accordingly the case of the petitioner is fully covered with the judgment of Basdeo Tiwari.

In case of A.P. State Fed of Co-op. Spinning Mills Ltd. and Ors. v. P.M. Swami Nathan, reported in the JT 2001 (3) SC 530, the Hon'ble Supreme Court held that since the penalty has been imposed, without following any procedure and without affording any opportunity to the delinquent to meet any right, the said order cannot be sustained.

16. In case of Ram Vikas v. State of U.P. and Ors., reported in (2002) 1 UPLBEC 352, the Apex Court held that on recommendation of the Selection Committee the appointments were made on the complaint of irregularities in the selection etc., an enquiry was made by the Higher Authorities Government passed order for cancellation oif appointment, cancelled, without giving any opportunityoif hearing to such appointee-held order cancelling the appointment was violative to natural justice, liable to be quashed. In this judgment all the current case law have been discussed.

17. In case of Pradeep Kumar Singh v. State Sugar Corpn. and Ors., reported in (2002) 2 UPLBEC 705, the Division Bench of this Hon'ble Court held termination in violation of the principles of natural justice, and order violative to the principle of natural justice, liable to be quashed.

18. In case of Ugrasen Tiwari v. Collector, Varanasi and Ors., reported in (1992) 1 UPLBEC 162, the Apex Court has held termination of service on the ground that the petitioner is not fit for appointment, without affording an opportunity held unconstitutional.

19. In case of Smt. Shanti Devi v. State of U.P. and Ors., reported in (1990) 3 UPLBEC 1858, termination of service without opportunity of hearing and the termination, as, major despite that appointment, was contractual not allowed to stand in the way of judicial scrutiny, petition was allowed and termination of service quashed.

20. In case of Shankar Saran v. Belsi Inter College, Azamgarh and Ors., reported in (1991) 1 UPLBEC 467, termination of service, order passed to punish the petitioner, the order is absolutely illegal and invalid for want of opportunity of hearing, and against the principles of natural justice.

21. It has also been submitted by the petitioner:

(a) The respondents would have been passed the order to produce the record and justify the establishment, as well as the validity of promotion of Ram Kishun Jatav and Sri Satish Chandra Awasthi and Shri Virendra Tiwari, whose names have been mentioned in Para 7 of the said annexure. That they were never promoted and the petitioner has specifically denied their promotion in Para 7 of his rejoinder affidavit, filed in Writ Petition No. 35115 with regard to promotion of Shri Satish Chandra Awasthi. That initially the recommendation was made by Satish Chandra Awasthi, to fulfil the substantive post and accordingly the process of selection was started.

(b) The respondents are also liable to be punished under the law, because they tried to make out their case, by way of filing forged, fabricated and manufactured, documents, which were duly prepared by Kallu Ram Jatav, present Chairman with intention to provide promotion of his real brother Ram Kishun Jatav. The complaint as referred in Annexure No. 1 to the counter-affidavit of Writ Petition No. 9678 of 1999, in the name of Yadu Nandan Prasad, who died in 1988-89 and as such he was not alive on the day of appointment of the petitioner. The said complaint is

undated and the complaint as referred in Annexure-2 in the said writ petition has been submitted in the name of Shiv Kumar Tiwari alias Bara Bhahiya. He specifically denied about the said complaint and stated that the said documents has been constructed by Shri Kallu Ram Jatav, the present Chairman of Nagar Palika Parishad, who was very much interested for promotion of his real brother Ram Kishun Jatav, whose Writ Petition No. 4131 of 1997, Ram Kishun Jatav v. Nagar Palika Parishad, Atarra, is pending.

(c) The Government Orders filed as Annexure in the counter-affidavit are not applicable in the case of the petitioner, because the petitioner has been appointed on substantive post, after completion of requirement as prescribed under the Act and Statute. The said Government Orders could not override, upon the Statute. The Statute only can be deleted/ enacted by making an amendment, therefore, the appointment of the petitioner was wholly justified in accordance with law and according to Statute and the Act.

(d) There is enmity between the family of the petitioner and Shri Kallu Ram Jatav, the present Chairman of Nagar Palika Parishad, Atarra, because of which there is apprehension in the mind of the petitioner that he may cause irreparable loss to the petitioner.

22. After hearing the learned Counsel for the parties and perusing the documents it appears that existence of post is disputed and appointment of the petitioner is also disputed for non-availability of the post and for deficiency for not publishing the advertisements in the newspaper widely circulation area not notified the vacancies and have not called the names of the candidates from the Employment Exchange and by misusing the power by the then Chairman, Nagar Palika Parishad and the petitioner, however, was given appointment and had been serving as claimed by him, but not getting salary and his service has been terminated without affording opportunity of hearing. In view of the above observations made in different judgments of the Courts it appears that the petitioner's appointment cannot be taken away without providing the opportunity of hearing, therefore, the order dated 10.3.1999 is hereby quashed and the District Magistrate, Banda is directed to consider the entire case of the petitioner and shall

hear the Sub-Divisional Magistrate, Atarra, Banda, the Executive Officer, Nagar Palika Parishad, Atarra, Banda and Chairman, Nagar Palika Parishad, Atarra, Banda and shall also hear the petitioner, shall also peruse all the documents proeduced by the petitioner as well as on behalf of the authorities of the Nagar Palika Parishad and after affording the proper opportunity of hearing shall pass an appropriate order preferably within six months from the passing of this order. The District Magistrate shall consider all the facts and circumstances, Act and procedure of law and availability of the vacancy and shall pass a reaosned order accordingly and before taking decision by the District Magistrate the petitioner shall not be reinstated or to be paid the salary and the fate of further deployment of the petitioner shall depend upon decision is to be taken by the District Magistrate keeping in view the above observations.

23. In view of the above observations the writ petitions are disposed off.

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