

State of U.P. and ors. Vs. Ishwar Sahai Pathak and ors.

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Court : Allahabad

Decided On : Nov-30-2004

Reported in : (2005)2UPLBEC1209

Judge : Janardan Sahai, J.

Acts : Uttar Pradesh Intermediate Education Act, 1921 - Sections 2; Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982; Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 - Sections 1, 2, 3, 9, 12 and 18; Specific Relied Act, 1963 - Sections 14, 38, 38(3) and 41; Uttar Pradesh Secondary Education Service Commission (Removal of First Difficulties) Orders, 1981; ;Uttar Pradesh Secondary Education Service Commission (Second Removal of Difficulties) Order, 1981; Payment of Salaries Act, 1971

Appeal No. : Second Appeal No. 172 of 2004

Appellant : State of U.P. and ors.

Respondent : ishwar Sahai Pathak and ors.

Advocate for Def. : D.S.P. Singh, ;S.D. Ojha, ;S.P. Singh, ;Ishwar Sahai Pathak and ;Rakesh Singh, Advs.

Advocate for Pet/Ap. : Shrish Chandra and ;V.C. Dixit, Advs. and ;S.C.

Judgement :

Janardan Sahai, J.

1. This second appeal arises out of a suit for permanent injunction filed by the plaintiffs-respondents Ishwar Sahai Pathak and Rakesh Singh restraining the defendants from terminating the services of the plaintiffs illegally and from interfering in the plaintiffs' working as Assistant Teachers in Jagatpur Inter College and for regular payment of salary of Assistant Teacher and for arrears of salary from the date of their appointment. The suit was dismissed by the trial Court. The appeal filed by the plaintiffs-respondents has been allowed. This second appeal has been filed by the State of U.P., District Inspector of Schools, Varanasi and the Accounts Officer of the Office of District Inspector of Schools, Varanasi who were defendants No. 1 to 3 in the suit.

2. The facts giving rise to this appeal are that Jagatpur Inter College, Rohania, Varanasi is a recognised aided institution and the provisions of U.P. Intermediate Education Act, 1921, U.P. Secondary Education Service Commission and Selection Boards Act, 1982 and U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 are applicable to the institution.

3. The plaintiffs' case is that Bhagelu Singh and Girja Singh, Assistant Teachers in the institution were promoted and the promotion was approved by the District Inspector of Schools and consequently two vacancies arose on the post of Assistant Teachers; that the Management intimated the vacancies to the District Inspector of Schools on 12.4.1995 but neither the District Inspector of Schools nor the Service Commission made any appointment against these vacancies on account of which teaching was suffering and as such the Management made an advertisement for appointment of two teachers under Section 18 of the Act and also constituted a Selection Committee which held interviews and the names of the plaintiffs who were selected were recommended for ad hoc appointment to the post of L.T. Grade Assistant Teachers. On 8.7.1995 the Committee of Management passed a resolution approving the selection and consequently on 10.7.1995 appointment letter was issued to the plaintiffs and the plaintiffs joined, it was also alleged that although the papers were sent by the Management to the

District Inspector of Schools but the District Inspector of Schools neither approved nor disapproved the appointment of the plaintiffs and as such the plaintiffs' appointment would be deemed to have been approved. It was also alleged that on 2.2.1996 the Manager threatened to terminate the services of the plaintiffs and stopped taking work from them. Consequently the suit was filed.

4. The suit was contested by defendants No. 1 to 3 (appellants herein) who filed their written statement. No written statement was filed by the defendant Jagatpur Inter College through its Manager and the case proceeded ex pane against it. The case of the defendants/appellants was that the appointment of the plaintiffs was illegal and there was a ban on appointment imposed by notification dated 31.7.1991 and by the Departmental Order dated 30.8.1991. It was also pleaded that the papers alleged to have been sent by the Manager were not received in the Office of District Inspector of Schools as such the proceeding regarding approval could not be taken in time. It was also alleged that before the appointment intimation to the Department was necessary and advertisement of the vacancies ought to have been published in two newspapers and names to be called from the Employment Exchange.

5. The trial Court dismissed the suit holding that it was barred by the provisions of Section 41(h) of the Specific Relief Act and the plaintiffs had an alternative remedy before the District Inspector of Schools and by filing representation before the Regional Deputy Director of Education. It was also found that vacancies against which the plaintiffs were appointed were vacancies on which the Committee of Management has no power to appoint and that the procedure under the First Removal of Difficulties Order was not followed. Reliance was placed upon the decision of the Full Bench of this Court in Radha Raizada and Ors. v. Committee of Management, Vidyawati Darbari Girls College and other, (1994) 3 UPLBEC 1551 (FB), as well as upon the decision of Apex Court in Prabhat Kumar Sharma and Ors. v. State of U.P. and Ors., (1996) 3 UPLBEC 1959, which lays down that the procedure prescribed in Para 5 of the U.P. Secondary Education Service Commission (Removal of First Difficulties) Orders, 1981 is required to be followed and the District Inspector of Schools is required to advertise the vacancies and make the selection according to quality point marks and the Committee of

Management is to appoint the persons so selected. The Lower Appellate Court has reversed the finding of the trial Court and has held that the nature of the vacancies was Anshukalik (part-time). Although the expression part-time used is not appropriate, the vacancies however were short-term vacancies as the promotion of two teachers Bhagelu Singh and Girja Singh had not been approved they could, therefore, have been reverted to their post of Assistant Teachers. It was held that on such short-term vacancy the Committee of Management was entitled to make the appointment under the U.P. Secondary Education Service Commission (Second Removal of Difficulties) Order, 1981. It was also held that the procedure for making the appointment was followed by the Committee of Management. The suit was consequently decreed.

6. I have heard learned Standing Counsel on behalf of the appellants and Shri D.S.P. Singh Counsel for plaintiff-respondents Ishwar Sahai Pathak and Rakesh Singh and Shri S.D. Ojha Counsel for respondent No. 3 Jagatpur Inter College through its Manager.

7. Although the appeal was admitted on all the substantial questions of law framed in the memorandum of appeal but on 15.9.2004 a statement was made by the learned Standing Counsel for the appellants that only question Nos. 4 and 6 were being pressed and the other questions were not being pressed. Question No. 4 and Question No. 6 as reframed on 14.9.2004 are quoted hereunder as question Nos. (A) and (B).

(A) Whether the Committee of Management while making ad hoc appointment of plaintiff-respondents by way of direct recruitment has followed the procedure provided under the First Removal of Difficulties Orders. 1981 as provided in Para No. 5 of the Order?

(B) Whether the suit filed by the plaintiff respondent is not maintainable.--(a) in view of the provisions of Section 14 of the Specific Relief Act as it seeks enforcement of a contract of personal service?; and (b) under Section 41(h) of that Act as equally efficacious relief is available under the provisions of the removal of difficulties order and the Payment of Salaries Act which provide a complete code for settlement of such cases?

Question No. (A)--The plaintiffs were appointed in the short-term vacancies on account of promotion of Beghelu Singh and Girja Singh. The finding of fact recorded by the Lower Appellate Court is that promotion of Baghelu Singh and Girja Singh had not yet been approved by the U.P. Secondary Education Service Commission and consequently it cannot be said that there was a substantive vacancies on the two posts of Assistant Teachers are there was a possibility of Baghelu Singh and Girja Singh being reverted to their substantive posts of Assistant Teachers. Good reasons have been given by the Lower Appellate Court and it is clear that the vacancies on the two posts of Assistant Teachers were, therefore, short-term vacancies. The Lower Appellate Court has held that under the Second Removal of Difficulties Order 1981, the short-term vacancies have to be filled up by the Management, but as stipulated in that Order itself selection shall be made on the basis of quality point marks specified in the Appendix of the First Removal of Difficulties Order, 1981. The Lower Appellate Court has found that the vacancies were advertised in two newspapers and the procedure required for making the appointment indeed was followed by the Committee. It was also found that the papers relating to the appointment were sent by the Management to the District Inspector of Schools and that the ban on appointment to short-term vacancies was lifted by Government Order dated 21.7.1992. It is not the case of the appellants that the selection was not made on the basis of quality point marks. The provisions of the First Removal of Difficulties Order to the extent to which they have been made applicable to appointments under the Second Removal of Difficulties Orders have thus been followed. In view of the decision of the Full Bench in Radha Raizada's case (supra) the short-term vacancies have to be filled up by the procedure provided under the Second Removal of Difficulties Order. The Lower Appellate Court has found as a fact that the procedure laid down thereunder was followed. The finding is not vitiated by any error of law. The question is answered in the terms that part of the First Removal Difficulties Order to the extent to which it has been made applicable to appointment on short-term vacancies under the First Removal of Difficulties Order was followed and the appointments were validly made.

Question No. (B).--It was submitted by the learned Standing Counsel that the suit is barred by Section 41(h) of the Specific Relief Act as the plaintiff have '

alternative remedy under the First Removal of Difficulties Orders and also under the Payment of Salaries Act. Reliance is placed upon the decision in Padam Singh Verma v. District Inspector of Schools, Etah and Ors., 1994 AWC 1452. In that case the plaintiff had filed a suit against the District Inspector of Schools, Accounts Officer and the State of U.P. and the institution through its Manager for a mandatory injunction directing the defendants to pay salary to the plaintiff and to restrain the defendants from interfering in the working of the plaintiff. The plaintiff Raj Bahadur Singh in that suit claimed to have been appointed as LT Grade Teacher on direct recruitment after the District Inspector of Schools had disapproved the promotion of one Ram Veer Singh as L. T. Grade Teacher. This Court quashed the proceedings in the civil suit holding that the suit is not maintainable. It was held that under Para 7 of the First Removal of Difficulties Order as amended by the Fourth Removal of Difficulties Order a dispute regarding promotion or direct recruitment under the Order had to be referred to the Deputy Director of Education and his decision would be appealable to the Director whose decision was made final. Under these Orders the Director has the power to look into the complaint, if any, regarding the award of the quality point marks mentioned in the appendix or the validity or propriety of any promotion or direct recruitment order and to cancel any promotion, recruitment or appointment made in contravention of such order. It was held that the procedure relating to the settlement of disputes provided under the Order was exhaustive and consequently the jurisdiction of the Civil Court was impliedly barred. It was also held that Payment of Salaries Act (Act No. 24 of 1971) is a complete code in itself and that the State Government has statutory obligation to ensure that the teacher who is entitled to get his salary should be paid his salary in accordance with the provisions of the Act every month and if such salary was not being paid the teacher could approach the District Inspector of Schools under Section 3 of the Act and the District Inspector of Schools has to ensure payment of salary to the teacher. Reliance was placed in this decision upon an earlier Division Bench decision of this Court in Mahipal Singh Pawar v. State of U.P., (1992) 2 UPLBEC 1947, in which it was held that Act No. 24 of 1971 is self contained, exhaustive and is a complete code in itself, as far as payment of salary to a teacher by the State Government is concerned and taking that view the Division Bench dismissed

the writ petition on the ground that there was alternative remedy under Act No. 24 of 1971. Section 12 of U.P. Act No. 24 of 1971 was also relied upon and it was held that under that provision the orders passed by the State Government, Director, Regional Deputy Director or the Inspectors or other officer in exercise of any power conferred under the Act could not be questioned in any Court, it was held in P.S. Verma's case that perpetual injunction can be granted under Section 38(3)(b) of the Specific Relief Act where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion to the plaintiff's right to property and as the damages 'could be quantified in that case on the measure of salary no injunction could be granted.

8. Padam Singh Verma's case (supra) was decided before the Full Bench decision of this Court in the Radha Raizada (supra). In Radha Raizada case it has been held that a short-term vacancy is to be filled up under the Second Removal of Difficulties Order, 1981. The forum of the Deputy Director of Education for settlement of disputes relating to appointment and of appeal to the Director has been constituted under the First Removal of Difficulties Order as amended by the Fourth Order. There is no such provision in the Second Removal of Difficulties Order. The First Removal of Difficulties Order applies to the ad hoc appointment of teacher against substantive vacancy. The procedure for appointment under the First Removal of Difficulties Order is different from that of appointment on short-term vacancy under the Second Removal of Difficulties Order. In the First Removal of Difficulties Order the Committee under the District Inspector of Schools is to hold the selection and the candidates selected by such a Selection Committee is to be appointed by the Committee of Management. In such a selection procedure it is possible that the candidate selected by the District Inspector of Schools may not be given any appointment by the Committee of Management and a dispute may arise and in such a case the dispute can be referred by the Committee or the selected candidate not given appointment to the Deputy Director of Education and an appeal may be preferred to the Director whose decision has been made final. Under the Second Removal of Difficulties Order, however, the selection is to be made by the Management itself and if the selected candidate has been given appointment by the Committee of Management there would be no occasion for such an appointed candidate to make any

reference. The procedure for appointment made under the Second Removal of Difficulties Order is different from the procedure laid down under the First Removal of Difficulties Order. There is no provision for making any reference or filing any appeal under the Second Removal of Difficulties Order. The implied bar to the jurisdiction of the Civil Court by alternative forum of redressal of grievance cannot be widened because it is well settled that the Civil Court is a Court of plenary jurisdiction and an implied bar to its jurisdiction must flow out by necessary implication. The view taken in Padam Singh Verma's case is based on the scheme under the First Removal of Difficulties Order as amended by the Fourth Removal of Difficulties Order. Correctness of that decision was challenged by Shri D.S.P. Singh and it was said that a different view was taken in other cases but it is not necessary to go into that question in this case as that decision did not consider the question involved here whether the alternative forum was available to disputes under the Second Removal of Difficulties Order.

9. Shri D.S.P. Singh Counsel for the plaintiff-respondent relied upon the decision in Siya Nand Singh Tyagi v. Smt. Shashi Prabha Sharma and Ors., reported in (1996) 2 UPLBEC 1203 in which a different view was taken. In that case the plaintiff had prayed for a declaration that the defendant No. 3 who was the appellant in the second appeal before the High Court was illegally appointed as Lecturer and his appointment was illegal and he also sought injunction for restraining the defendant No. 3 from working on the post of Lecturer and also sought a mandatory injunction to promote the plaintiff on the post of Lecturer. It was held that such a suit was not barred by the provisions of Sections 14 and 41 of the Specific Relief Act. That apart the plaintiffs having been given an appointment by the Committee of Management could not have raised any dispute about their appointment even if it is assumed that the forum provided under the First Removal of Difficulties Order was available. The plaintiffs, therefore, cannot be non-suited on the ground that they had any remedy under the Removal of Difficulties Order.

10. It has also been held in Padam Singh Verma case that Payment of Salaries Act is an exhaustive code and grievances relating to non-payment of salary can be redressed there and that an order passed under Section 12 of the Act is final. In

the present case the defence of the appellants was that the appointment of the plaintiff is not valid. The question is whether a dispute of such a nature can be decided under the Payment of Salaries Act when it relates to the appointment of ad hoc teacher. It is to be noted that under the Payment of Salaries Act the authority entrusted with the power to ensure payment of salary and therefore, to decide a dispute relating to salary is the District Inspector of Schools. The forum under the Removal of Difficulties Order, however is the Deputy Director of Education and the appellate forum is the Director of Education. The decision of the Director has been made final under the Removal of Difficulties Order. If it is held that under the Payment of Salaries Act the question of validity of the appointment of an ad hoc teacher can also be examined, there would be two different forums one under the Removal of Difficulties Order and the other under the Payment of Salaries Act for the settlement of a dispute of the same nature at least when it relates to appointments made under the First Removal of Difficulties Order. In P.S. Verma case reliance was placed upon a Division Bench of this Court in Mahipal Singh Pawar and Ors. v. State of U.P. and Ors., (1992) 2 UPLBEC 1497. The circumstances in which an order for payment of salary under the Payment of Salaries Act can be passed have been outlined in that case as follows :--

1. The teacher must be serving in an institution as defined in Section 2(b) of U.P. Intermediate Education Act, 1921 (hereinafter referred to as Act No. 11 of 1921) and the institution must be recognised one as defined under Section 2(d) of Act No. 11 of 1921.
2. The institution for the time being must be receiving maintenance grant from the State Government as defined in Section 2(c) of the U.P. Act No. 24 of 1971.
3. The institution must be included in the list of the institutions prepared under Act No. 24 of 1971. The teachers and the employees of the institution teacher must be receiving salary from the State Government.
4. The post against which teacher claim to have been appointed must be a sanctioned post by the Director of Education as provided under Section 9 of the U.P. Act No. 24 of 1971.

5. A teacher must possess minimum qualification for being appointed on the said post as provided under the U.P. Intermediate Education Act.

11. The ground on which the appointment of the plaintiffs is being questioned is not one of any of the aforementioned grounds. It therefore, appears that the validity of ad hoc appointment of the plaintiffs under the Removal of Difficulties Order could not have been decided under the Payment of Salaries Act. That apart, in the present suit the plaintiffs have also claimed an injunction that their appointment may not be terminated illegal and that the defendants be restrained from interfering with their working. These reliefs cannot, be granted under the Payment of Salaries Act. Section 41(h) of the Specific Relief Act provides for a bar only in a case where equally efficacious relief can be provided under another provision, the remedy under the Payment of Salaries Act cannot in this case be said to be an equally efficacious remedy in view of the fact that all the reliefs claimed in the suit cannot be granted thereunder. In Padam Singh Verma's case reliance was placed upon Section 38 of the Specific, Relief Act, which provides that an injunction may not be granted where damages can be awarded. In Om Vaishya Vidyalaya Committee, Kanpur (supra), which was a case relating to termination of service, it has been held that in present days it is very difficult to get an employment and damages would be a poor substitute for reinstatement and to deny reinstatement in such a case would throw the plaintiff to the mercy of the employer. It is, therefore, cannot be said that the suit is barred by Section 41(h) of the Specific Relief Act.

12. In Executive Committee of Vaish Degree College, Shamli and Ors. v. Laxmi Narain and Ors., AIR 1976 SC 888, it was held that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists. In the present case the College was impleaded as a defendant through the Manager. No doubt the college is not a juristic entity but as it was arrayed through the Manager it is a case of mis-description of a party and it cannot be said that the Management was not represented. However, the suit was not contested by the Manager and even against the decree passed by the Lower Appellate Court no appeal has been filed by the Committee of Management. It was for the Committee of Management which

was the employer of the plaintiff-respondent to challenge the decree on the ground that the discretion was not properly exercised by the Lower Appellate Court and to say that on the facts and circumstances the Lower Appellate Court erred in passing a decree for enforcement of a contract of personal service. The appellants State of U.P. and others are not the employers of the plaintiffs although the State and its Officers are responsible for payment of salary and have some powers under the statutory enactments. In this appeal the Management has however supported the stand of the State.

13. The injunction sought by the plaintiffs was to restrain the defendants from terminating the services of the plaintiffs illegally and from interfering in the plaintiff's working as Assistant Teachers in the college and for regular payment of salary. Under the Removal of Difficulties Order, the plaintiffs are entitled to continue until the short-term vacancy exists. This tenure of appointment until the short-term vacancy exists is provided under the Second Removal of Difficulties Order, 1981.

14. In *Om Vaishya Vidyalaya Committee, Kanpur and Anr.*, (2004) 4 ESC 1994 reliance was placed upon the separate judgment of the Hon'ble P.N. Bhagwati, J. in *Vaish Degree College (supra)* in which it was held that in a case where the relationship between the employee and employer is governed by the statute or subordinate legislation the termination of the services of the employee may be declared as null and void and such a declaration would not amount to enforcement of a contract of personal service but would be a declaration that the action of the employer was invalid under the Statute. The Lower Appellate Court could, therefore, have passed a decree that the defendants may not interfere in the plaintiff's working for such time that the short-term vacancy against which they were appointed exists except by way of disciplinary proceedings or as otherwise provided by law and such a decree would not amount to enforcement of a contract of personal service because it only safeguards the right of the plaintiffs to continue till such time that the statute provides. However, the absolute terms in which the decree has been passed may affect even a disciplinary proceeding which the employer may in some matter like to take and would have the effect of restraining the District Inspector of Schools and other statutory authorities from exercising

powers available to them under the statutory provisions and to that extent the decree requires modification. The question No. B is accordingly answered party in favour of the plaintiffs-respondents. The decree passed by the Lower Appellate Court is maintained but the injunction granted by the Lower Appellate Court is only modified to the extent that the defendants except by disciplinary proceedings or as otherwise provided by law are restrained from interfering in the working of the plaintiff's as Assistant Teachers until the short-term vacancy caused by the promotion of Bhagelu Singh and Girja Singh as lecturer continues.

15. Appeal partly allowed. Second appeal partly allowed.

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