

Yogendra Kumar Gond and Others Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Feb-07-2011

Judge : Sudhir Agarwal, J.

Acts : The U.P. State University Act, 1973 - Section 35(2)

Appeal No. : Civil Misc. Writ Petition No.46404 of 2009

Appellant : Yogendra Kumar Gond and Others

Respondent : State of U.P. and Others

Advocate for Pet/Ap. : Shri. S.M. Mishra

Judgement :

1. Heard Shri S.M. Mishra, learned counsel for the petitioner, learned Standing Counsel for the respondent nos.1 to 3 and Shri R.N. Yadav for the respondent no.7.

2. Sri Durga Ji Post Graduate College, Chandesar Azamgarh is a degree college (hereinafter referred to as the 'College') affiliated with Veer Bahadur Singh Purvanchal University, Jaunpur. It appears that some complaints were made against the Principal of the College whereupon the Director, Higher Education sent a letter to the management to look into the matter and do the needful. Consequently the Management resolved on 3.9.2004 to suspend Dr.Durga Prasad Dwivedi, Principal of the College in a contemplated inquiry. The Principal

represented the matter before the Vice Chancellor against the order of suspension, who by order dated 19.10.2004 stayed the suspension order dated 03.09.2004, though permitted the management to continue with inquiry. The suspension order was ultimately set aside by the Vice Chancellor by order dated 16.12.2004. The Management preferred writ petition no.55955 of 2004 against the aforesaid order of the Vice Chancellor. The writ petition was disposed of vide judgment dated 3.1.2005 . The order dated 16.12.2004 was quashed. The Court also issued the following directions:-

" (i) The respondent no.5, if he is so aggrieved, may make an appropriate application for inspection of the record before the present petitioner. The petitioner shall examine the application/representation and shall request the District Administration, which has sealed the record, to open the same. We direct the District the respondent no.5 to have inspection of the relevant record. After inspection of the record, the District administration can seal the record again.

(ii) If the respondent no.5 makes an appropriate application and furnished a satisfactory explanation to the charges levelled against him and requests the petitioner for recalling the suspension order, the present petition shall pass an appropriate order within one week from the date of receipt of such an application.

(iii) In any case, inquiry should be concluded within two months from today."

3. In the meantime it appears that treating as if there existed three vacancies of Class IV employees in the College due to retirement of Shri Kapil Deo Pandey, Shri Rama Shankar Chaubey and resignation of Sri Subash Chandra Gond, proceedings were initiated for recruitment against the said vacancies. It appears that the management after placing Dr.Durga Prasad Dwivedi under suspension directed Dr. Phool Chandra Singh to officiate as Principal who made an application on 10.09.2004 before the Regional Higher Education seeking permission to fill up

the aforesaid three vacancies. Since the permission which is sought, was granted by order dated 16.09.2004 thereafter the vacancy was advertised on 26.09.2004 and interview was held on 24.10.2004 by Dr. Phool Chandra Singh, the officiating Principal and Shri Kanhaiya Singh, the Manager of the College, wherein they selected the petitioners. It is said that 9 candidates were interviewed for Class IV post on the said date. The documents sent to Regional Higher Education, Varanasi, who by letter dated 25.11.2004 granted approval. Consequently the letter of appointments were issued under the signatures of Dr. Phool Chandra Singh, designated himself as Principal of the College on 26.11.2004.

4. Against the above selection one Vinod Kumar filed writ petition no.39432 of 2004 before this Court, wherein an interim order was passed on 4.10.2004 to the following effect:-

" Learned Standing Counsel has put in appearance on behalf of respondent nos. 1 to 5 and Shri Ashok Khare, Senior Advocate has put in appearance on behalf of the respondents no.6 and 7.

Issue notice to the respondent no.8 fixing a date of 3rd November 2004.

Petitioner may take steps for service of notice upon respondent within three days from today.

Respondents are allowed time up 3rd November 2004 to file their counter affidavit.

List on 3rd November 2004.

In the meantime, if any appointment is made on Class-IV posts in the institution, payment of salary shall not be made without the leave of this Court."

5. The question of payment of salary was raised before the Educational Authorities whereupon the Director of Higher Education passed an order on 11.02.2009 holding that selection and appointments made by Dr. Phool Chandra Singh was

not legal. The petitioners no. 1 and 2 preferred writ petition no.19532 of 2009 stating that the order dated 11.02.2009 has been passed without giving any opportunity to them. On the short ground the writ petition was allowed vide judgment dated 10.04.2009 permitting the Director, Higher Education to pass a fresh order after giving opportunity of hearing to all the concerned parties. It is pursuant thereto the impugned order has been passed by Director, Higher Education observing that selection and appointment made by Dr. Phool Chandra Singh, claiming himself to be a Principal of the College was illegal and hence he has cancelled the entire selection.

5. Learned counsel for the petitioner submitted that Dr. Durga Prasad Dwivedi, the Principal of the College was suspended by the management on 03.09.2004 and Dr. Phool Chandra Singh, was permitted to officiate as Principal, hence, the entire selection has been made by him. In any case there is no fault on the part of the petitioners and their selection and appointment cannot be cancelled.

6. On behalf of respondents no.1 to 3 a counter affidavit has been filed by the learned Chief Standing Counsel wherein the decision of the Director, Higher Education has been supported stating that the entire selection and appointment made by Dr. Phool Chandra Singh, was wholly illegal since he was not and could not be a principal of the college on the date when the selections were made and also the letter of appointments were issued. It is pointed out that appointing authority of Class IV employee, under the statute, is Principal.

7. A separate counter affidavit has been filed on behalf of respondent no.7 stating that he was appointed as Officiating Principal on 01.07.1997 and later on 25.03.1991, he was selected by Higher Education Service Commission. He was the only competent authority to make recruitment and appointment on Class IV post. There were 11 vacancies of Class IV employees for which approval was obtained from respondent no.3, Regional Higher Education, Varanasi on 15.06.2004, advertisement was made on 30.07.2004. Interview was to be held on 05.09.2004. Pursuant to the aforesaid advertisement dated 30.07.2004, 1365 applications were received up to the last date of submission of application form i.e.20.08.2004, out of which, 483 were general , 573 Other Backward Class and

8. Shri Kanhaiya Singh, Manager of the College was interested to get appointment of his own and when he apprehended that the respondent no.7 may not act according to his wishes, writ petition no.34917 of 2004 was filed by the Management before this Court, challenging the process of selection and recruitment initiated by respondent no.7 wherein on 01.09.2004, this Court passed the following order:-

" A counter affidavit has been filed on behalf of respondent no.8 which may be placed on record.

Learned counsel for the petitioner prays for and is granted three weeks' time to file rejoinder affidavit. List in the week commencing 27th September, 2004. Learned Standing Counsel may file counter affidavit by the next date.

The appointment if any made in pursuance of the impugned advertisement shall be subject to further orders, of this court."

9. Since no interim order was passed by this Court, the Management adopted a different procedure and published a news in daily newspaper dated 5.9.2004 that the respondent no.7 has been placed under suspension on 3.9.2004, therefore interview on 5.9.2004 on the post of Class IV employee shall be held under the chairmanship of Dr. Phool Chandra Singh, newly appointed Principal of the College. The management in this view proceeded illegally and held interview on 5.9.2004 and selected 11 persons. The respondent no.3 granted approval to six out of these 11 persons namely Rajesh Kumar Vishwakarma, Sri Dinesh Chand Yadav, Sri Satya Prakash Yadav, Hari Om Yadav, Mahendra Sonkar and Ashish Kumar Vishwarkarma. The approval was granted on 16.9.2004, thereafter, the Management submitted another list of 11 candidates in which it altered four names and the respondent no.3 acting illegally passed an order on 1.10.2004 granting approval to these 11 candidates namely Shri Rajesh Kumar Vishwakarma, Shri Dinesh Chandra Yadav, Shri Bal Chandra Yadav, Shri Phool Chandra Yadav, Shri

Satya Prakash Yadav, Shri Prem Prakash Singh, Shri Raj Kumar Singh, Shri Hari Om Yadav, Shri Sunil Kumar Singh, Shri Ram Gopal Vishwakarma and Shri Vijay Kumar and cancelled her earlier approval order dated 16.09.2004. Against the above order of approval and selection writ petition no.39432 of 2004 was filed by Shri Vinod Kumar wherein an order was passed on 4.10.2004, restraining the payment of salary without leave of the Court.

10. The order of suspension was stayed by Vice Chancellor in exercise of power under Section 35(2) of The U.P. State University Act, 1973 on 19.10.2009. It is said that after stay of the order of suspension any proceedings conducted by the respondent no.8 Dr. Phool Chandra Singh, representing himself as a Principal of the College were wholly illegal.

11. No counter affidavit has been filed on behalf of respondents no. 5 and 8 though notice was issued to the respondent no.8 by registered post on 15.10.2009.

12. During the course of argument, learned counsel for the parties did not dispute that under the statute it is the Principal who is competent to make appointment on Class IV post in the college. It is not disputed that in the case in hand petitioners claim to have been interviewed on October 2004 and the appointment letter is said to have been issued on 26.11.2004. On both the dates Dr. Phool Chandra Singh, respondent no.8, designated himself officiating Principal of the College.

13. In my view the short question up for consideration in the facts and circumstances of the case as discussed above can be, who can be said the Principal of the College for the above proceedings.

14. I would not go into the validity of suspension of respondent no.7, which is not necessary to be considered and decided in this case. It is not in dispute that management passed a resolution placing respondent no.7 under suspension on 03.09.2004. It is also not in dispute that in exercise of power under Section 35(2) of "The State University Act, 1973", the Vice-Chancellor stayed order of suspension of respondent no.7 on 19.10.2004. This order of Vice Chancellor had continued thereafter having not been stayed in any other proceedings. Once an

order of suspension passed by the management is stayed by the Vice Chancellor, the effect would be that the suspension becomes inoperative then on. Meaning thereby the employee concerned shall be treated in service and not under suspension. Therefore, when the order of suspension was stayed on 19.10.2004 then on, the respondent no.7 in law continue as Principal of the College having such powers which were to be looked on by Principal. The respondent no.8 could not have thus acted otherwise act as Principal of the College on and after 19.10.2004. On 24.10.2004 as also 26.11.2004, when the interview was held and the letter of appointments were issued, on both the dates the stay order dated 19.10.2004 having continued, the respondent no.7, in law, was Principal of the College and hence proceedings held by respondent no.8 representing himself as Principal of the college were wholly illegal and without authority of law. On this short point the writ petition deserves to fail since the selection and appointment of the petitioner in the case in hand has been held and made by respondent no.8 who had no authority to function as Principal of the College on the date of selection as also on the date when the letters of appointment were issued. Therefore, the impugned order passed by respondent no.2 warrants no interference.

15. However, there is another scene in this matter. No letter or order passed by committee of management appointing respondent no.8 as Officiating Principal of the College has been placed on record. It appears that after placing respondent no.7 under suspension, the respondent no.8 was directed to discharge duties of Principal on an officiating basis. No order for promotion on ad hoc basis or officiating basis appears to have been passed appointing/promoting respondent no.8 as Officiating Principal in a short term vacancy caused due to suspension of respondent no.7 on 3.9.2004.

16. Despite repeated query, learned counsel for the petitioner could not place any order appointing respondent no.8 as officiating principal of the college. Therefore, this Court is of the view that respondent no.8 was only permitted to discharge duties as Principal of the College as a result of suspension of respondent no.7, which could have been continued till the order of suspension was stayed by Vice Chancellor.

17. If a person is discharging duties of higher post, having not been appointed thereon, it cannot be said that he is holding the post and therefore, is competent to discharge superior functions of higher post. The distinction between officiating appointment/promotion and discharge of duties or looking after of duties has been pointed out and observed by this Court in Smt. Vijaya Rani Vs. Regional Inspectress of Girls Schools Region-I, Meerut & Others reported in 2007(2) ESC 987, wherein the court held that the Petitioner-Appellant was only required to look after and discharge the duties of the officiating Principal but was never promoted/appointed on the said post. In other words, it can be said that the Petitioner-Appellant was given only current duty charge in addition to her substantive post and this arrangement did not result in promotion to the post of which, the current duty charge was handed over.

18. In State of Haryana v. S.M. Sharma AIR 1993 SC 2273, the Chief Administrator of the Board entrusted Sri S.M. Sharma, with the current duty charge of the post of Executive Engineer, which was subsequently withdrawn as a result of his transfer to other post. He challenged the said order stating that it amounts to reversion. The Apex Court held that Sri Sharma was only having current duty charge of the Executive Engineer and was never promoted or appointed to the aforesaid post and therefore, on transfer to some other post, it did not result in reversion from the post of Executive Engineer.

19. A somewhat similar situation occurred in Ramakant Shripad Sinai Advalpalkar v. Union of India and others, 1991 Supple (2) SCC 733 and the Apex Court observed as under:-

"The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion."

In view of the above discussions and exposition of law, this Court is also of the view that respondent no.8 was never appointed to officiate as Principal and therefore, could not have discharged statutory functions, which were to be performed only by the Principal. When a person is giving current duty charge or is allowed to look after the duty of the higher post, only day to day routine duties are liable to be performed, but where statutory duties are to be performed by a person on a particular rank and status such duties are not to be performed by a person who is simply looking after the duties or holding current duty charge. This is also a reason which supports the findings of the respondent no.2 and persuade this court not to interfere with the order impugned in this writ petition. The writ petition lacks merit. Dismissed.

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