

Prem Prakash Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Jan-13-2011

Judge : Sudhir Agarwal, J.

Appeal No. : WRIT - A No. - 19095 of 2007

Appellant : Prem Prakash

Respondent : State of U.P. and Others

Advocate for Def. : C.S.C.; Ashok Khare; C.K.Singh; D.P.Singh; S.K. Srivastava; S.K.Singh; S.N.Singh, Advs

Advocate for Pet/Ap. : V.K. Singh; G.K. Singh; Prabhat Singh, Advs

Judgement :

1. Heard Sri Prabhat Singh, Advocate for the petitioner, learned Standing Counsel for respondents no. 1 and 2, Sri V.K. Upadhyay holding brief on behalf of Sri S.K. Singh, learned counsel appearing for respondent no. 5 and perused the record.

2. By means of the impugned order dated 07.04.2007 the District Inspector of Schools, Chandauli has held respondent no. 5 senior to petitioner on the ground that on the date of appointment of petitioner he was minor hence his appointment was not valid and, therefore, for the purpose of seniority petitioner cannot be treated senior to respondent no. 5. It is, however, not in dispute that the petitioner's appointment has not been revoked by District Inspector of Schools and

still the petitioner is working.

3. It is not disputed that the date of birth of petitioner is 05.06.1956 and he was engaged as Class-IV employee on 01.07.1972 on a fixed pay of Rs. 25/- per month. At that time the institution concerned was not in grant-in-aid. It was brought in grant-in-aid on 01.07.1974 and for the purpose of payment of salary from the State Exchequer the petitioner's regular appointment was treated from 01.07.1974 and he was paid salary accordingly.

4. The respondent no. 5 was appointed as Class-IV employee on 01.06.1979. At no point of time he ever claim seniority over the petitioner or challenged his appointment on Class-IV post.

5. On 15.08.2002 a post of Daftari fell vacant due to death of one Sri Jawahir Ram holding the said post. The Principal of the institution recommended the name of petitioner being the senior most Class-IV employee. The respondent no. 5 who was the third senior most made representation since at the time initial appointment, the petitioner was minor hence the said appointment was illegal and, therefore, for the purpose of seniority, petitioner cannot be given benefit of the said appointment, and the respondent no. 5 be treated senior most and be promoted on the post of Daftari. The management rejected the said representation of respondent no. 5 observing that for the purpose of regular salary petitioner's appointment was treated w.e.f. 1.07.1974 when he became major and, therefore, for all purposes he ought to be treated senior to respondent no. 5.

6. Thereafter a representation was made before the District Inspector of Schools and then Writ Petition No. 45561 of 2003 was filed before this Court which was disposed of on 13.01.2003 directing the District Inspector of Schools to decide the representation of respondent no. 5 whereupon the impugned order has been passed observing that petitioner on the date of his initial appointment was minor hence his appointment cannot be said to be valid. It is interesting to notice that the District Inspector of Schools did not cancel appointment of petitioner but only for the purpose of seniority has treated respondent no. 5 senior to petitioner.

7. Learned counsel for the petitioner submitted that while raising a dispute with regard to seniority it is not open to an employee to assail the very appointment itself and, therefore, the impugned order is liable to be set aside. He also submitted that in any case when respondent no. 5 joined, the petitioner was not only major but was working in the institution and hence also he was entitled to be treated as senior. Moreover, the appointment of petitioner having not been challenged for almost 23 years, it was not open to respondent no. 5 to assail the same only for the purpose of seniority. He also submitted that Division Bench decision in Ram Ashish Chaudhary and others v. State of U.P. and others, 2003(1) ESC 170 is not applicable to this case. Therein the very appointment was in dispute and there was no question of seniority. The validity of appointment of petitioners in that case was involved in order to claim salary from State Exchequer and the Court took a view that the appointments having been made on the date when the incumbents were minor, such appointment are void and hence direction for payment of salary from State Exchequer cannot be issued.

8. Learned counsel appearing for respondent no. 5, however, submitted that the very contract being void, held by this Court in Ram Ashish Chaudhary (supra), benefit of promotion, seniority etc. cannot be claimed by petitioner and, therefore, the decision taken by District Inspector of Schools does not warrant any interference since it is consistent with the law laid down by this Court in Ram Ashish Chaudhary (supra).

9. The first question is whether an incidental and ancillary aspect, i.e., the validity of appointment can be looked into in a dispute which basically relates to seniority.

10. In Vijay Narain Sharma v. District Inspector of Schools, Etawah and others, 1986 UPLBEC 44, this Court in paragraphs 25 and 26 of the judgment held as under:

"25. On a reading of Regulation 3 of Chapter II, it is clear that it nowhere contemplated that the teacher who challenges the seniority list can again challenge the validity of the appointment or

promotion of a teacher in the college. He can only be aggrieved by the factors, if wrongly decided, as mentioned in Regulation 3. The dispute can be taken in appeal under Clause (1) of Regulation 3 quoted above. In my opinion, it is clear that while disputing the validity of the seniority list, it is not open to a teacher to challenge the appointment and promotion which had already been done. The challenge to the appointment and promotion has been specifically provided. If no challenge is made at that stage then the appointment and promotion becomes final. If the Legislature intended that the appointment and promotion can be challenged at the time of determining seniority, the Legislature would have specifically provided in the Regulations. This has not been done.

26. There is another aspect of the matter that once the appointment or promotion becomes final, a vested right is created in favour of a teacher. A colleague of his in the institution having acquiesced to the appointment and promotion cannot be, subsequently, permitted to raise the dispute."

11. In the case of Smt. Rani Srivastava v. State of U.P. and others, 1990(1) UPLBEC 425 this Court has held as under:

"5. Principle infirmity in appointment of petitioner, that could be pointed out, was that it was made without issuing any advertisement and recommendation by Selection Committee. May be but could the management which appointed petitioner in 1984 and the Basic Shiksha Adhikari who did not raise any objection to payment of salary for five years raise this objection in 1989. The appointing authority under rules is the committee of Management. And the approving authority is the Basic Shiksha Adhikari, who under U.P. Act No. 6 of 1979 is also to supervise the payment of salary and is empowered to inspect and check. For five years no objection was raised by him. And then suddenly when one of the members desired that a male principal, should be appointed, he

also raised an objection. The petitioner had raised objection as far back as 1985 against her being treated as temporary employee. No action was taken on it. Nor any decision was given. For procedural irregularity the petitioner should not be made to suffer. Normally it is to be presumed that Management must have sent papers for appointment of petitioner to Basic Shiksha Adhikari who must have granted approval unless it is rebutted either by placing any communication by Management from record of Basic Shiksha Adhikari to show that things did not proceed as they are provided in the Act. In absence of any material there is no reason to doubt that Committee of Management would have appointed without intimating Basic Shiksha Adhikari and would have even issued letter appointing petitioner permanently and Basic Shiksha Adhikari would not have raised any objection in respect of payment of salary etc. from 1984 to 1989. Change of Secretary or Basic Shiksha Adhikari should not be permitted to create any difference otherwise it shall result in creating arbitrariness and expose teachers of being thrown out of employment on one or the other pretext and shall never have security which is necessary for efficient discharge of duty. Equity stands in her favour and prevents both the appointing and approving authority from taking recourse to their own mistakes, for causing prejudice to petitioner. Estoppel, the principle of equity, is the shield for such unjust and unfair actions."

12. In the case of Dr. Asha Saxena v. Smt. S.K. Chaudhary and others, 1991(2) UPLBEC 1202 a Full Bench of this Court has held as follows:

"16.In any view of the matter, the appointments which were existing for the last 17 years could not be set aside after a lapse of such a long period. Even the earlier Full Bench had quashed the order of the Regional Inspectress of Girls Schools referring the matter under Section 16-E (10) of the Act and we are also of the opinion that the aforesaid order is liable to be quashed. It is true

that there is power under Section 16-E (10) of the Act to cancel the appointments but the power has to be exercised within a reasonable time. The appointment had been made in the year 1973 and by no stretch of imagination it can be said that the exercise of that power after the lapse of 17 years by the Director of Education under Section 16-E(10), on the facts and circumstances of the case can be said to be exercise of a power within a reasonable time."

13. This Court in the case of Smt. Manju Keshi Dixit v. State of U.P. and others reported in 2004(4) AWC 3758 reiterated the aforesaid view by following observations:

"13. Thus, the consistent view of this Court is that the appointment cannot be challenged while determining the seniority and if the appointment has been made and is continued for long period, it should not be disturbed or set aside on some technicalities or procedural irregularities."

14. Both the above judgements have been followed recently in Smt. Bharti Roy v. Deputy Director of Education, II, Kanpur and others, 2008(2)ESC 911 and Sughar Singh v. State of U.P. and others, Civil Misc. Writ Petition No. 67796 of 2009, decided on 15.12.2009.

15. Thus, the consistent view of this Court is that the appointment cannot be challenged while determining the seniority and if the appointment has been made and is continued for long period, it should not be disturbed or set aside on some technicalities or procedural irregularities.

16. It is evident from the record that respondent no. 5 was appointed in the institution concerned in 1979 and at no point of time he ever challenged the appointment of petitioner or anybody else before the competent authority. The representation made by respondent no. 5 for the first time after occurrence of vacancy on 15.08.2002 also basically relates to question of seniority and not that of appointment of petitioner. In view of the exposition of law laid down in the above

cases in a dispute relating to seniority the validity of appointment cannot be looked into and hence it was not open to respondent no. 5 to challenge the validity of appointment of petitioner in an incidental and ancillary question which is basically relates to seniority. Moreover, nothing has been placed on record to show as to how and why the respondent no. 5 could not challenge the appointment of petitioner for more than two decades and, therefore, the respondent no. 5 could not have been allowed to raise this issue after such a long time. It is however not disputed that the institution in question was brought to grant-in-aid in 1974 as also admitted by respondent no. 5 in para 18 of his counter affidavit and, therefore, salary from the State Exchequer was allowed to petitioner only w.e.f. 01.07.1974 and earlier thereto a meager sum of Rs. 25/- per month was paid to petitioner which became Rs. 165/- per month on application of regular pay scale.

17. In the circumstances and as discussed above, in my view, the petitioner's appointment could not have been allowed to be disputed in the garb of raising dispute of seniority and respondent no. 5 having been joined only in 1979 could have claimed seniority over petitioner who is working on that day.

18. In the result, the writ petition is allowed. The impugned order dated 07.04.2007 is hereby quashed. There shall be no order as to costs.

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