(2012) 11 AHC CK 0150

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 19607 of 1993

Sibte Hasan		APPELLANT
	Vs	
State of UP. and Others		RESPONDENT

Date of Decision: Nov. 2, 2012

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 226, 30

Citation: (2013) 1 UPLBEC 129

Hon'ble Judges: Rajes Kumar, J

Bench: Single Bench

Advocate: Ch. N.A. Khan, for the Appellant; Irshad Ali and S.C., for the Respondent

Final Decision: Dismissed

Judgement

Rajes Kumar, J.

Heard Sri N.A. Khan, learned Counsel appearing on behalf of the petitioner, Sri Irshad Ali, learned Counsel appearing on behalf of respondent No. 4 and learned Standing Counsel appearing on behalf of respondent Nos. 1, 2 and 3. There is an institution named as Muslim Inter College, Thakurdwara, Moradabad. As per the pleading in the writ petition, the institution was being administered by the Muslim Minority Committee. However, the department has not recognised the status of the institution as the minority institution and the general service rules in appointment are being adopted by the Department. A vacancy in L.T. Grade teacher occurred on 1.7.1986 due to promotion of Sri Munna Singh. The vacancy was communicated to the District Inspector of Schools for appointment by the Commission and when the demand was not acceded, respondent No. 4 directed the petitioner to teach in the institution. Several reminders were sent by the respondent No. 4 but all in vain. The Commission made an advertisement of the vacancy and the appointments were made by the Commission and one appointee was selected but he never turned up and the vacancy remained vacant. This communication was made to the respondent No. 2 but no step has been taken. On 22.2.1993, the petitioner was already teaching

in the institution. The Manager of the institution sent the letter to the District Inspector of Schools, Moradabad stating therein that the Committee of Management has appointed the petitioner as L.T. Grade teacher till the selection by the Secondary Education Services Board and sought the approval. The said letter is Annexure-4 to the writ petition. The District Inspector of Schools, Moradabad vide letter dated 3.3.1993 informed the Manager that since the educational session has been closed there is no justification for granting the approval. The order dated 3.3.1993 passed by the District Inspector of Schools, Moradabad is impugned in the writ petition.

2. Learned Counsel for the petitioner submitted that the institution was the minority institution. No declaration in this regard is required as it is enshrined and conferred under the Constitution itself. However, the institution has been declared as minority institution by the State Government vide letter dated 12.9.1995 for the purposes of Section 16-FF of the Intermediate Education Act, 1921 (hereinafter referred to as the "Act, 1921"). The copy of the letter has been filed alongwith the supplementary affidavit dated 16.1.1996. He submitted that being the minority institution, Act No. 5 of 1982 and the Removal of Difficulties Order, 1981 issued in exercise of the power u/s 33 of the Act No. 5 of 1982 are not applicable. He submitted that in 1989 one Sri Lokman Singh has been appointed after following the procedure, by the Committee of Management as L.T. Grade teacher. The District Inspector of Schools rejected the approval against which Writ Petition No. 14631 of 1989 was filed, which was allowed. He submitted that procedure contemplated u/s 16-FF of the Act, 1921 are not mandatory and for not following such procedure the appointment cannot be declared invalid. He submitted that an interim order has been granted by this Court on 27.5.1993 and on the basis of the interim order the petitioner is serving as a teacher. Reliance is placed on the decisions of the Apex Court in the case of N. Ammad Vs. The Manager, Emjay High School and Others, , in the case of M.S. Mudhol and Another Vs. S.D. Halegkar and Others, SCand in the case of Smt. Shanti Devi Verma v. The Deputy Director of Education, Region I, Meerut and Others, reported in 1982 UPLBEC 365.

3. Sri Irshad Ali, learned Counsel appearing on behalf of respondent No. 4 submitted that as per the petitioner''s own pleading in Paras-2 and 4 of the writ petition, the institution was not the minority institution. It was declared as minority institution for the first time by the State Government in the year 1995, for the purposes of Section 16-FF of the Act, 1921 and the said declaration was prospective in nature. Therefore, general rule of the appointment of the teacher was applicable and the ad hoc appointment of the teacher ought to have been made in accordance to Act No. 5 of 1982 and in accordance to Para-5 of the Removal of Difficulties Order, 1981 as held by the Full Bench decision of this Court in the case of Radha Raizada and Others v. Committee of Management, Vidyawati Darbari Girl''s Inter College and Others, reported in 1994 (3) UPLBEC 1551 which has been affirmed by the Apex Court in the case of Prabhat Kumar Sharma and others Vs. State of U.P. and others, . He

submitted that even assuming that the institution was the minority institution prior to 1986, the procedure provided u/s 16-FF of the Act, 1921 was not followed and, therefore, the alleged appointment of the petitioner on the post of L.T. Grade teacher on ad hoc basis by the Committee of Management was patently illegal.

4. I have considered the rival submissions and perused the record.

5. It would be appropriate to refer Paras 2 & 4 of the writ petition.

Para-2. That the Department has not yet recognised the status of the Institution as Minority Institution and general service rules in appointment are being adopted by the Department.

Para-4. That the vacancy was communicated and a demand letter was made through the District Inspector of Schools for appointment by the Commission as the Department is Institution as general.

6. As per the own pleading of the petitioner, referred hereinabove, the petitioner admitted that the institution was not the minority institution and the general service rules for the appointment would be applicable. As per the Full Bench decision of this Court in the case of Radha Raizada and Others v. Committee of Management, Vidyawati Darbari Girl''s Inter College and Others (supra) the ad hoc appointment of a teacher could be made in accordance to Para 5 of the First Removal of Difficulties Order, 1981. Para 5 of the Removal of Difficulties Order, 1981 reads as follows:

Para-5. Ad hoc appointment by direct recruitment.--(1) Where any vacancy cannot be filled by promotion under Paragraph 4, the same may be filled by direct recruitment in accordance with clauses (2) to (5).

(2) The management shall, as soon as may be, inform the District Inspector of Schools about the details of the vacancy and such Inspector shall invite applications from the local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh.

(3) Every application referred to in clause (2) shall be addressed to the District Inspector of Schools and shall be accompanied-

(a) by a crossed postal order worth ten rupees payable to such Inspector;

(b) by a self addressed envelope bearing postal stamp for purposes of registration.

(4) The District Inspector of Schools shall cause the best candidates selected on the basis of quality specified in Appendix. The compilation of quality points may be done on remunerative basis by the retired Gazetted Government servants under the personal supervision of such Inspector.

(5) If more than one teacher of the same subject or category is to be recruited for more than one institution, the names of the selected teachers and the names of the institutions shall be arranged in Hindi Alphabetical order. The candidates whose

name appears on the top of the list shall be allotted to the institution the name whereof appears on the top of the list of the institution. This process shall be repeated till both the lists are exhausted.

Explanation.--In relation to an institution imparting instruction to women the expression "District Inspector of Schools" shall mean the "Regional Inspectress of Girls Schools.

7. Admittedly, the aforesaid procedure has not been adopted and, therefore, the appointment of the petitioner was ab initio illegal. The institution was declared as minority institution in the year 1995. The declaration was prospective and not retrospective. There is nothing in the Government Order to show that the institution has been declared as minority institution and order would operate retrospectively.

8. Even assuming that the institution was the minority institution, for the appointment of the teacher the procedure contemplated u/s 16-FF of the Act, 1921 was applicable. Section 16-FF of the Act, 1921 reads as follows:

Section 16-FF. Savings as to minority institutions.--(1) Notwithstanding anything in sub-section (4) of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management:

Provided that one of the members of the Selection Committee shall-

(a) in the case of appointment of the Head of an institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director;

(b) in the case of appointment of a teacher, be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

(3) No person selected under this Section shall be appointed, unless-

(a) in the case of the Head of institution the proposal of appointment has been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this Section where the person selected possesses the minimum qualification prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of a candidate selected under this Section the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of teacher.

(6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final.

9. Learned Counsel for the petitioner himself admitted that the procedure given u/s 16-FF of the Act, 1921 has not been followed in the case of the appointment of the petitioner. The submission is that even if the procedure is not followed, the appointment cannot be declared invalid. The reliance placed by the learned Counsel for the petitioner in the case of N. Ammad v. The Manager, Emjay High School & Others (supra) is not applicable to the present case. The facts are entirely distinguishable. It relates to Kerala Education Act, 1958. It has been held that the management of a minority school is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy. It is for the management of the minority education institution to choose the modality for selecting the qualified persons for appointment. There was no such provision like Section 16-FF of the Act, 1921, as referred hereinabove, in Kerala Education Act, 1958 and the issue for consideration was not ad hoc appointment of teacher following the procedure contemplated under the proviso. The decision of Smt. Shanti Devi Verma v. The Deputy Director of Education, Region I, Meerut and Others (supra) also does not apply to the present case. On consideration of Section 16-F (1) of the Act, it was held that lack of prescribed qualification at the time of appointment of teacher will not be void if such appointment was not obtained by fraud and will only be irregular and such disqualification can be cured by that teacher by getting himself qualified after his appointment.
10. It is stated that interim order could not validate the illegal order and could not confer any right to continue.

11. In Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another, , the services of the respondent came to be terminated on 30.6.1988, where after he obtained interim order and continued thereunder. Thus, he continued in service not by virtue of his own right under an order of appointment, but on account of interim order and the Court, thus, held that no benefit of such continuance can be allowed. In South Eastern Coalfields Ltd. Vs. State of M.P. and Others, , the Court recognized the principle that wrong order should not be perpetuated by keeping it alive. Recognizing the maxim actus curiae neminem gravabit, it was held that no one shall suffer by an act of the Court and such a rule is not confined to an erroneous act of the Court but act of the Court embraces within its purview all such acts as to which the Court may form an opinion in any legal proceedings that the Court would not

have so acted had it been correctly apprised of the facts and law. It is duty of the Court to apply the restitution putting the parties in the same position as they would have been, had the order, subsequently found to be erroneous by the Court, would not have been passed. In para 28 of the judgment, it was held (para 26 of AIR).

The injury, if any, caused by the act of the Court shall be undone and the gain which the parties would have earned unless it was interdicted by the order of the Court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Court persuading the Court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced.

(emphasis added)

12. Considering from Another angle, where an interim order is passed and the writ petition is ultimately dismissed, the effect would be as if no order was ever passed. That being so, the incumbent does not gain on the basis of mere continuance since he has no legal or valid right to continue. An interim order passed by the Court merges with the final order and, therefore, the result brought by dismissal of the writ petition is that the interim order becomes non est.

13. A Division Bench of this Court in Shyam Lal Vs. State of Uttar Pradesh, Lucknow and Others, ., while considering the effect of dismissal of writ petition on interim order passed by the Court has laid down as under:

It is well-settled that an interim order merges in the final order and does not exist by itself. So the result brought about by an interim order would be non est in the eye of law if the final order grants no relief. The grant of interim relief when the petition was ultimately dismissed could not have the effect to postponing implementation of the order of compulsory retirement. It must in the circumstances take effect as if there was no interim order.

14. The same principle has been reiterated in the following cases:

(A) Sri Ram Charan Das Vs. Pyare Lal,

In Shyam Lal Vs. State of Uttar Pradesh, Lucknow and Others, , a Bench of this Court has held that orders of stay or injunction are interim orders that merge in final orders passed in the proceedings. The result brought about by the interim order becomes non est in the eye of law if final order grants no relief. In this view of the matter it seems to us that the interim stay became non est and lost all the efficacy,

the Commissioner having upheld the permission which became effective from the date it was passed.

(B) Shyam Manohar Shukla Vs. State of U.P. and Others, .

It is settled law that in interim order passed in a case which is ultimately dismissed is to be treated as not having been passed at all see Shyam Lal Vs. State of Uttar Pradesh, Lucknow and Others, and Sri Ram Charan Das Vs. Pyare Lal, .

(C) M/s. Kanoria Chemicals and Industries Ltd. Vs. U.P. State Electricity Board and other, .

After the dismissal of the writ petitions wherein notification dated 21-4-1990 was stayed, the result brought about by the interim orders staying the notification, became non est in the eye of law and lost all its efficacy and the notification became effective from the beginning.

15. In the case of Raghavendra Rao Etc. Vs. State of Karnataka and Others Etc., , the Apex Court held as follows:

16. It is now a well-settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service. This Court in Uma Devi (3) (supra), held as under:

Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of the temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of

the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as ''litigious employment'' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas the interim direction to continue his employment would hold up the regular procedure for selection or imposed on the State the burden of paying an employee who is really not required. The Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

17. Recently in Official Liquidator Vs. Dayanand and Others, , this Court has reiterated the same view. In view of the above, the writ petition is devoid of merit and is accordingly dismissed.