

## **Rajendra Prasad Tripathi, Assistant Teacher in Lal Bahadur Shastri Uchchatar Madhyamik Vidyalaya Vs The State of U.P. and Others**

**Court:** Allahabad High Court

**Date of Decision:** Aug. 1, 2008

**Acts Referred:** Constitution of India, 1950 " Article 161, 226, 311  
Penal Code, 1860 (IPC) " Section 302, 307, 34

**Hon'ble Judges:** Sudhir Agarwal, J

**Bench:** Single Bench

**Final Decision:** Dismissed

### **Judgement**

Sudhir Agarwal, J.

Sri R.K. Ojha, assisted by Sri Satyanshu Ojha, learned Counsel for the petitioner and learned Standing Counsel for the respondents No. 1 to 4 and Sri A.K. Yadav, who has put in appearance on behalf of respondent No. 6 have been heard. The respondent No. 5

was issued notices by registered post and as per the office report dated 15.3.2005, neither the acknowledgement has been received undelivered

nor the notice has been received back, therefore, service upon respondent No. 5 is deemed sufficient. No one has put in appearance on behalf of

respondent No. 5.

2. Counter affidavit has been filed on behalf of respondents 1 to 4 to which the petitioner has also filed the rejoinder affidavit. The respondent No.

6 has not filed any counter affidavit, but has opposed the writ petition on the basis of the averments contained in the writ petition as well as

adopting the averments made in the counter affidavit filed on behalf of respondents 1 to 4. As requested by the learned Counsel for the parties, the

matter has been heard finally and is being decided at this stage under the Rules of the Court.

3. The petitioner is aggrieved by the order dated 26.10.2004 passed by Joint Director of Education, Gorakhpur Region, Gorakhpur (respondent

No. 3) holding that the petitioner was not entitled for reinstatement in services on the post of Assistant Teacher and, consequently, no salary could

have been paid and revoking the order passed by the District Inspector of Schools, Gorakhpur (hereinafter referred to as "DIOS") dated

18.6.2001 being illegal.

4. He has also sought a writ of mandamus commanding the respondents to pay arrears of salary to the petitioner from the date he has joined the

institution pursuant to the DIOS order dated 18.6.2001. The facts in brief, giving rise to this writ petition, are that Lal Bahadur Shastri Uchchatar

Madhyamik Vidyalaya, Rakhukhor, Gorakhpur (hereinafter referred to as the "College") is an intermediate institution recognized by the Board of

High School and Intermediate under the provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as "1921 Act"), and, the

same being also aided institution, payment of salary to the staff of the college is governed by the provisions of U.P. High Schools and Intermediate

Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (hereinafter referred to as "1971 Act").

5. The petitioner was appointed as Assistant Teacher, C.T. Grade, on 12.9.1976 on purely ad hoc basis, which was approved by the DIOS by

order dated 6.8.1977. He was appointed on substantive basis vide order dated 22.8.1977 passed by DIOS pursuant to State Government's

order dated 21.4.1977. At the time when the petitioner was appointed in the College, he was already convicted and sentenced in Sessions Trial

No. 128 of 1974 under Sections 302, 307/34 I.P.C., and awarded punishment of life imprisonment vide judgment dated 31.5.1975 passed by

Addl. District and Sessions Judge-II, Basti. The appeal there against dismissed by this Court in 1978 whereafter the petitioner was arrested and

sent to jail to undergo sentence on 2.6.1979. The petitioner in the year 1996 was released by the Hon'ble Governor in exercise of power under

Article 161 of the Constitution remitting remaining sentence and he was released from jail on 5.7.1996.

6. Thereafter, the petitioner submitted an application dated 23.12.1999 before DIOS stating that after having been released from jail, he be

allowed to join his services since his services were not terminated at any point of time. The DIOS passed an order on 18.6.2001 (Annexure-13 to

the writ petition) directing the Principal of the College to allow the petitioner to join the College and it was also stated in the said order that the

petitioner shall not be entitled for any salary for the period, he remained absent, but would be paid salary after the date of his joining. The petitioner

claims to have submitted his joining on 2.7.2001 and claims to be working thereafter but was not paid any salary by the respondents.

7. When he made representations for payment of salary, the DIOS sent a letter dated 10.12.2001 referring the matter to Director, Secondary

Education seeking his guidance stating that there was no vacancy in the College, the services of the petitioner were already terminated and his claim

was pending before the Apex Court, therefore, the petitioner could have been reinstated in service.

8. The Director, it appears, sought instructions from the Government and the Special Secretary, U.P. Government vide order dated 28.9.2004

referred the matter to the Joint Director of Education. Gorakhpur for his decision, after examining the entire issue. The respondent No. 3, pursuant

to the aforesaid, considered the matter and after hearing the petitioner. Committee of Management of the College and the Principal as also

respondent No. 6, who claims to to have been working in the vacancy caused due to termination of the petitioner, passed the impugned order

dated 26.10.2004, aggrieved whereby the present writ petition has been filed.

9. On behalf of respondents No. 1 to 4, counter affidavit has been filed stating that the management after conviction of the petitioner, dismissed him

from service with effect from 16.8.1983 and in the resultant vacancy appointed Sri Sunder Prasad, respondent No. 6. It is said that since the

petitioner was already terminated due to his conviction and he was in jail from 2.6.1979 to 6.8.1996, there was no occasion for DIOS to pass any

order for his reinstatement particularly when he was not exonerated or acquitted but only further sentence was remitted by the Hon"ble Governor

in exercise of power under Article 161 of the Constitution.

10. It is said that the Joint Director of education has passed the order after considering the entire facts and circumstances correctly and, therefore,

the writ petition is liable to be dismissed.

The petitioner has filed rejoinder affidavit, wherein he has strongly disputed the fact that his services were ever dismissed and it is said that there is

no order of dismissal nor any approval was obtained by the Committee of Management from the competent authority nor any such order was ever

communicated to the petitioner and, therefore, it cannot be said that the petitioner was dismissed from services.

11. Sri Ojha, learned Counsel for the petitioner vehemently contended that the petitioner was never communicated any order of termination or

dismissal and, therefore, even though it is true that he was convicted and jailed from 2.6.1979 to 6.8.1996, his services were never terminated or

dismissed by the competent authority in accordance with law and, therefore, it cannot be said there existed any vacancy on the post on which he

was appointed. When the petitioner was released from jail, he was entitled to join his services and the DIOS passed a valid order, which has

wrongly and illegally been set aside by the respondent No. 3.

12. He further contended that since there was no vacancy due to non termination or dismissal of the petitioner, the respondent No. 6 could not

have been appointed on the said post and, therefore, the claim of the respondent No. 6 that he was continuing in service since 1981 was wholly

illegal and non est. and would not defeat the claim of the petitioner for reinstatement in service.

The learned Standing Counsel as well as Sri A.K. Yadav, learned counsels arguments based on the stand taken by the respondent in the counter

affidavit as well as the reasons assigned in the order impugned in this writ petition passed by respondent No. 3.

13. 1921 Act and the Regulations framed thereunder do not contain any provision similar to that of proviso to Article 311(2) of the Constitution of

India authorizing the appointing authority to dispense with services of an employee, if he is convicted in a criminal case without holding any enquiry

and none has been brought to the notice of this Court. The provisions with respect to condition of services of teachers and other employees of

secondary institutions governed by 1921 Act is contained in Section 16-G. The procedure of disciplinary action is prescribed in Chapter-III Part

2-A of the Regulations framed under the aforesaid Act. There is nothing on record to show that any such procedure prescribed under the

Regulations was observed by the respondents for the alleged dismissal of petitioner from service.

14. Even the respondents on 3 in the order impugned in this writ petition has not said anything on this aspect but finding it difficult as to how and

under what circumstances, an order can straightforward be passed against a teacher who has been convicted and sent to jail for such a long time,

he has resorted the provisions applicable to the Government servants in this regard, in the absence of any pari materia provision under 1921 Act

and the Regulations framed thereunder. But in my view, in the absence of a specific provision under 1921 Act or the Regulations framed

thereunder, the pari materia provisions applicable to the Government servants would not at all be attracted and the reasoning adopted by

respondents No. 3 to this effect cannot be held correct or valid. But that is not the end of this matter.

15. This Court cannot be oblivious of other admitted facts and circumstances applicable in the present case, namely, the petitioner worked in the

institution for a short period of about three years; even at the time of his appointment, he was already convicted by the Criminal Court where

against his appeal was pending in this Court and during the pendency of the appeal, he was appointed in the institution. In my view, dismissal of

appeal would relate back to the date of his conviction and that being so, the petitioner's very appointment on the post of Assistant Teacher would

not be justified since a person, who is convicted for such a heinous offence like Section 302 I.P.C. could not have been appointed on the post of

Teacher in the College. In any case, admittedly, after the conviction having attained finality, the petitioner was in jail from 2.6.1979 to 6.8.1996.

16. The College could not be expected to keep the post vacant for such a long time so as to affect adversely the interest of the students of the

College. The respondent-College, thus, was entitled to make appointment on the post of Assistant Teacher. C.T. Grade. As per own case of the

petitioner, he was released from jail on 6.8.1996, but he submitted application before DIOS seeking permission to join the College only on

23.12.1999 and pursuant to the order of DIOS, he claims to have joined the College on 2.7.2001. Thus re remained out of College from

2.6.1979 to 2.7.2001.

17. A person who has remained out of the College and has not worked for almost 22 years, in my view, could not have been allowed to join the

College in such a manner as was done by DIOS, particularly, when the fact was also before the DIOS that the incumbent has undergone life

imprisonment pursuant to his conviction in a serious offence, i.e., Section 302 I.P.C. Even if the reasoning assigned by the respondent No. 3 for

setting aside the order of the DIOS may not be satisfactory or does not have the support of any statutory provision, this Court cannot loose sight

of the fact that the petitioner has invoked equitable jurisdiction under Article 226 of the Constitution of India and in the above facts and

circumstances, it is not a fit case where this Court should interfere at the instance of the petitioner.

18. It is well settled that in exercise of power under Article 226, this Court must consider equity and justice also and the remedy is discretionary. In

appropriate cases, the Court can decline to exercise its jurisdiction under Article 226 even if the order impugned may not be within the four

corners of law.

19. In the above facts and circumstances and considering peculiar facts of this case, as discussed above, this Court is fully satisfied that it is not a fit

case warranting any interference in the impugned order passed by respondent No. 3 and, therefore, no relief can be granted to the petitioner. So

far as the appointment of respondent No. 6 is concerned, this Court has not expressed any opinion on the correctness thereof and this order shall

not be construed as this Court has approved the appointment of respondent No. 6 on the post of Teacher in the College entitling him any benefit

pursuant thereto.

20. The writ petition is, accordingly, dismissed. There shall be no order as to costs.