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(2016) 11 AHC CK 0052

ALLAHABAD HIGH COURT

Case No: Civil Misc. Writ Petition No. 26858 of 2016.

Sudhanshu Malik and 3 Others - Petitioners @HASH State of U.P. and 4 Others — APPELLANT

Vs

RESPONDENT

Date of Decision: Nov. 10, 2016

Acts Referred:

- Uttar Pradesh Public Service (Reservation of Schedule Castes, Schedule Tribes and other backward classes) Act, 1994 - Section 3(5)

Citation: (2016) 11 ADJ 169 : (2017) 2 AllLJ 551 : (2016) 6 AllWC 6429 : (2017) 1 ESC 14 : (2017) LIC 1747

Hon'ble Judges: Manoj Misra, J.

Bench: Single Bench

Advocate: Siddharth Khare and Ashok Khare, Advocates, for the Petitioner; C.S.C., Ravi Agrawal and Vimlendu Tripathi, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Manoj Misra, J. - The petitioners were appointed as Guest Lecturer on contract basis, session by session, in Gandhi Polytechnic, Muzaffarnagar (hereinafter referred to as the Institution), which is a privately managed polytechnic affiliated to the Board of Technical Education, U.P. and is on grant-in-aid. The institution is governed by U.P. Pravidhik Shiksha Adhiniyam, 1962 (hereinafter referred to as Act, 1962) and the regulations framed thereunder.

2. According to the petitioners, the petitioner no.1 was appointed as a Guest Lecturer in Mechanical Engineering on 01.09.2012; the petitioner no.2 was appointed on 07.09.2010 as a Guest Lecturer in Physics and both had been working as such till date. In respect of petitioner no.2 it has been stated that he had been working in both shifts. It is claimed that

the petitioners 1 and 2 both belong to the OBC (other backward classes) category. In so far as petitioner nos. 3 and 4 are concerned, they belong to Scheduled Caste category. It has been claimed that petitioner no.3 had been working as Guest Lecturer (Electrical Engineering) since 16.08.2010 whereas petitioner no.4 had been working as a Guest Lecturer (Mechanical Engineering) since 01.09.2012.

3. The grievance of the petitioners is that they are being paid at the rate of Rs. 140/- per theory period and Rs. 70/- per practical period though under Government Order dated 18.01.2013 they are entitled to payment at the rate of Rs. 300/- per theory period and Rs. 150/- per practical period. The other grievance of the petitioners is that for appointment of regular faculty in the institution, an advertisement was published on 14.08.2015 where under five posts of Lecturer (Technical) in the pay band Rs. 15,600-39,100, Grade Pay Rs. 5,400/- were advertised. Out of the said five posts, post of Lecturer (Civil) was reserved for Scheduled Caste candidate and post of Lecturer (Electrical) was reserved for OBC candidate whereas three posts were left unreserved. But, later, the advertisement was withdrawn and a fresh advertisement was issued where under all the above posts were kept unreserved thereby diminishing the chance of the petitioners to get selected.

4. In addition to above, the petitioners are also aggrieved by a note put in the advertisement, in respect of the preferential qualification, which provides that preference shall be given to only those who have earned one year of industrial experience as a full time employee in any Government/Government aided institution, Public Sector undertakings or Limited liability undertakings.

5. It is the case of the petitioners that under Section 22 E of the Act, 1962, qualifications for appointment on the post of principal and teachers are to be laid down by Regulations framed by the Board of Technical Education, U.P. in exercise of its power under Section 23 of the Act, 1962. It is their case that in exercise of the power conferred by Section 23 of the Act, 1962, the U.P. Board of Technical Education framed Government Aided Technical Education Institution Regulations, 1996 (hereinafter referred to as the Regulations). Regulation 3 of the Regulations provide for cadre strength of each category of posts of teaching as well as non teaching staff in an institution. According to which, in any institution, there shall be such number of posts in different categories of teaching and non-teaching employees as the Government may, from time to time, determine, though it would be open to the Director to leave the posts unfilled or for the Governor to abolish the said posts and it would also be open for the Governor to create such number of permanent as well as temporary posts as he may deem fit. Regulation 4 provides that posts in a cadre shall be filled from such sources as has been specified in Appendix A of the Regulations. Regulation 5 provides that reservation shall be applied as provided by the Act and the Government orders applicable. Regulation 13 provides that the appointing authority shall determine the vacancies to be filled each year and shall also determine the number of posts to be reserved for Scheduled Castes and Scheduled Tribes and for other categories in accordance with Regulation 5.

6. It is the case of the petitioners that as per Appendix A there is no subject-wise description of post of Lecturer in an institution though lecturers are classified into two categories, one is Lecturer (Technical) and the other is Lecturer (Non-Technical). It is thus the case of the petitioners that as five posts of lecturer (technical) have been advertised, the reservation rule would apply and, therefore, the impugned advertisement which leaves all five posts unreserved is not legally justified and requires rectification accordingly.

7. It is also the case of the petitioners that the note put in the advertisement that preferential treatment would be given for having one year of industrial experience only if a candidate has gained experience as a full time employee, is contrary to what has been prescribed in Appendix B of the Regulations, inasmuch as there is no such condition in the Regulations that industrial experience should be gained as a full time employee.

8. It is thus the prayer of the petitioners that the note appended to the preferential qualification mentioned in the advertisement No. 4/2015-16 be quashed to the extent it qualifies experience by the word "Full Time". It is also the prayer of the petitioners that the advertisement No. 4 of 2015-16 be revised by applying the rules of reservation for Scheduled Castes and other backward classes to cluster of posts qualifying as Lecturer (Technical) and only thereafter selection be held. In addition to above, the petitioners have also prayed that they may be allowed to function as Guest Lecturer in the institution till they are replaced by regularly selected candidate. It is further the prayer of the petitioners that they be paid monthly emoluments at the rate specified under Government Order dated 18.01.2013 which provides that payment would be made at the rate of Rs. 300/- per theory period and Rs. 150/- per practical period.

9. In response to the case set up by the petitioners, the respondents have taken a plea that the petitioners have been appointed/ engaged as Guest Lecturer in the second shift of teaching schedule on per lecture remuneration basis at the prescribed rate of Rs. 140/- per lecture in theory and Rs. 70/- per lecture in practical, subject to a ceiling of Rs. 10,000/- per month. It is their case that the service of the petitioners is purely temporary/ part-time, based on a contract, for a fixed period of ten months or less, therefore, they would have no claim over the post. It is also their case that the payment of remuneration to the petitioners is not from the Government aid but it is borne by the institution from its own sources. It is the case of the respondents that the aforesaid payment is made as per the guidelines laid down in Government Order dated 22nd June, 2011 (Annexure CA-2 to the counter affidavit) which provides for the remuneration to be paid to a Guest Lecturer in aided institution to enable the institution to carry out second shift. The Government notification clearly specifies that payment shall be made to such Guest Lecturer from the own sources of the institution for which no aid would be provided.

10. In respect of the petitioners" contention that the advertisement fails to provide for reservation even though it is the mandate of law, the respondents case is that reservation is to be applied on the post of Lecturer trade-wise (i.e. subject-wise) as per the

Government Order dated 15.01.2016 (annexure 8 to the writ petition, at page 86), which places reliance on an earlier Government Order dated 26.02.1976, providing that the posts of Lecturer trade-wise have different educational qualifications and are not inter changeable therefore they cannot be clubbed to constitute a cluster/unit for the purpose of applying reservation as per the roster. It is the case of the respondents that minimum five posts are required for applicability of reservation, therefore, the posts of Lecturer, when considered trade-wise, being lesser in number than five, were rightly kept unreserved and, as such, there is no infirmity in the advertisement in that regard.

11. In so far as the challenge to the note put in the advertisement in respect of preferential qualification is concerned, the respondents have taken a plea that by a Government Notification dated 24.05.2001 it has been provided that the benefit of one year industrial experience would be available only to full time employee and, therefore, the note was put in the advertisement to explain the aforesaid preferential qualification. As regards the petitioners" claim for right to continue till fresh regular appointments are made, the respondents" case is that as the petitioners were appointed on contractual basis and were paid salary from the own sources of the institution and not from the funds received from the State, they would have no such right because their right would be governed by the contract. It is thus the prayer of the respondents that the petition be dismissed.

12. I have heard Sri Ashok Khare, learned senior counsel, assisted by Sri Siddharth Khare, for the petitioners; learned Standing Counsel for the respondents 1, 2 and 3; and Sri Vimlendu Tripathi for the respondents 4 and 5.

13. From the submissions of the learned counsel for the parties and on perusal of the pleadings on record, following issues arise for determination:

(i) Whether all posts of Lecturer (Technical) in the institution, irrespective of different trades/ subjects, are to be treated as a cluster so as to form a unit for applying the rules of reservation or they have to be separately counted, trade-wise, for applicability of reservation?

(ii) Whether the note put in the advertisement, that the benefit of gaining one year industrial experience would be considered as a preferential qualification only if it had been obtained as a full time employee, is in conflict with the qualifications specified in Appendix B of the Regulations and as such void?

(iii) Whether the petitioners are entitled to the benefit of Government Order dated 18.01.2013 which provides for payment at the rate of Rs. 300/- per theory period and Rs. 150/- per practical period?

(iv) Whether the petitioners are entitled to continue as Guest Lecturer till they are replaced by a regularly selected candidate?

ISSUE No.1

14. In respect of the first issue, the contention of the learned counsel for the petitioners had been that Regulation 3 of the Regulations provide that in any institution there shall be such number of posts in different classes of teaching and non-teaching employees as the State may from time to time create. It has been submitted that Regulation 4 provides that in a cadre appointments shall be made in different categories of posts from sources specified in Appendix A. It has been submitted that Appendix A does not disclose the post of Lecturer subject-wise. It only discloses the posts of Lecturer (Technical) and Lecturer (Non-Technical). Therefore, where five or more posts exist in either Lecturer (Technical) or Lecturer (Non Technical) they have to be clubbed together and counted as a single cluster, regardless of different trades or subjects, for applicability of reservation. Accordingly, as five posts of Lecturer (Technical) have been notified by the advertisement, the rule of reservation would apply and leaving all of those posts unreserved would be violation of the mandate of reservation applicable. It is the submission of the learned counsel for the petitioners that since five posts have been notified, a minimum of one post ought to be reserved for OBC category candidate and one for SC category candidate as was done earlier vide advertisement dated 14.08.2015, which was withdrawn and replaced by the impugned advertisement.

15. In reply to the above submission, the learned counsel for the respondent-institution has argued that Regulation 3 does not in any way prohibits creation of the posts subject-wise and neither the Appendix A nor the Appendix B provide for the number of posts. It has been submitted by him that since posts have been created subject-wise and the qualification for the post subject-wise is different, therefore, the posts cannot be clubbed so as to constitute a cluster for applying the reservation roster. It has been submitted that the Government Notification dated 15th January, 2016 clearly specifies that the reservation would have to be considered in technical education institutions by counting the posts trade-wise. The said notification places reliance on an earlier notification dated 26.02.1976 which has not been challenged by the petitioners, therefore, the petitioners cannot have any grievance that the posts advertised have been kept unreserved.

16. Learned counsel for the respondent-institution has also placed reliance on a Division Bench decision of this Court in **Dr. Vishwajeet Singh and others v. State of U.P. and others : 2009 (3) AWC 2929** in which, while dealing with a question whether, for reservation, each college is to be treated a separate unit and the reservation is to be applied for all the sanctioned posts of Lecturer in a college, this Court held that all posts of Lecturer in one college cannot be clubbed together for applying the reservation roster and that reservation roster as per U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as U.P. Act No.4 of 1994) has to be applied subject-wise in a college.

17. I have given thoughtful consideration to the rival submissions made in respect of issue no.1.

18. The contention of the learned counsel for the petitioners that all posts of Lecturer (Technical) have to be clubbed together for determination of applicability of reservation roster cannot be accepted because there is neither any challenge in the writ petition that posts are not created subject-wise /trade-wise nor there is any challenge to the Government Notifications dated 15.01.2016 or 26.02.1976 which specifies that for applicability of reservation roster, each institution will have to be taken separately and the posts have to be counted trade-wise /subject-wise. It has been specifically mentioned in the said notifications that for the posts to constitute a cluster, their has to be similarity in respect of work, nature, status and salary and in addition thereto they have to be interchangeable and further, the prescribed qualifications for recruitment on the posts should be same. It has not been disputed at the Bar that the posts which have been advertised carry different eligibility qualifications, which are subject wise, and, therefore, by no means they could be considered interchangeable.

19. To wriggle out of the aforesaid limitation, the learned senior counsel appearing on behalf of the petitioners submitted that the aforesaid Government notifications would not come in way because of the provisions contained in the Regulations which specifies only two cadres i.e. Lecturer (Technical) and Lecturer (Non Technical), and since Section 3 (5) of U.P. Act No.4 of 1994 provides for applicability of reservation roster on total cadre strength therefore all posts of Lecturer (Technical) have to be counted to constitute a cluster for applicability of reservation roster. In support of the said submission reliance was placed on Appendix A to demonstrate that the posts of lecturer are specified either as Lecturer (Technical) or as Lecturer (Non-Technical) and, therefore, the trade-wise/ subject-wise determination of posts for the purpose of applicability of reservation roster was not contemplated by the Regulations.

20. The aforesaid contention cannot be accepted because neither Appendix A nor Appendix B of the Regulations provide for the cadre strength. Appendix A provide for various posts, their source of recruitment and their respective pay scale. Appendix B specifies minimum eligibility qualification as well as preferential qualification for the posts. A perusal of Appendix B would reveal that for a person to be eligible for a post he must hold necessary qualification for the subject concerned, which signifies that posts are to be determined /created/ sanctioned subject-wise/trade-wise. Further, Regulation 3 of Regulations 1996, which deals with cadre strength, provides that in a given institution the cadre strength of teaching and non teaching employees in each category of posts shall be such which the Government may from time to time create. This clearly signify that posts are created subject-wise or trade-wise. Therefore, in absence of any challenge in the writ petition denying the subject-wise creation of posts, as also there being no challenge to the Government Notification dated 15.01.2016 which specifies that for determining the applicability of reservation roster, each institution would have to be considered separately and posts would have to be counted trade-wise, the challenge to

the advertisement on the ground that it does not apply the rules of reservation, cannot be accepted, particularly, in absence of any plea that there were five or more posts of Lecturer in a given trade for which recruitment was notified. The issue no.1 is decided accordingly.

ISSUE No.2

21. In so far as the second issue is concerned, the learned counsel for the petitioner in order to demonstrate that the note put in the advertisement, thereby qualifying the preferential qualification, was in conflict with the provision of the Regulations, invited the attention of the court to item no.3 in Appendix B of the Regulations, which deals with qualifications of a Lecturer. The preferential qualifications specified therein are as follows:- (1) post-graduate degree in the concerned subject; (2) one year industrial experience. Note: Experience obtained from Government /Government Aided Institutions; Public Sector Undertakings; or Limited Liability Organisation, would be acceptable.

22. The preferential qualification noticed herein above does not disclose that one year industrial experience ought to be obtained as a full time employee or as a part-time employee. From the record, it appears that by Notification dated 24.05.2001 (Annexure CA-8 to the Counter affidavit) the Government to remove any ambiguity clarified that such experience must be gained as a full time employee.

23. The contention of the learned counsel for the petitioners that such Government Notification being in violation of the Statutory Regulation would not be operative, cannot be accepted. Because it is well settled in law that by way of executive instructions, the statutory rules/regulations can be supplemented. Since the relevant provision of the Regulations, 1996 is silent as to whether the industrial experience has to be gained as a full time employee or as a part-time employee, the State was well within its authority to fill up the gap and specify that the experience must be obtained as a full time employee. Such supplement, to fill up the gap in the Regulations, provided by way of executive instruction, cannot be termed ultra vires the Regulations. Accordingly, it is held that the note put in the advertisement qualifying the attainment of industrial experience of one year as a full time employee is in conformity with Government Order dated 24.05.2001 and it does not violate the Regulations, 1996, therefore it is neither void nor illegal. The issue no. 2 is decided accordingly.

ISSUE No. 3

24. In respect of issue no.3, the learned counsel for the petitioners has placed reliance on a Government Order dated 18.01.2013 (Annexure No.3 to the writ petition) which revises the payment of remuneration to part-time Guest Lecturers. It is the contention of the learned counsel for the petitioners that the Government Order dated 18.01.2013 does not draw any distinction between a Guest Lecturer receiving remuneration from State funds and the one who receives remuneration from institution''s own sources. It only seeks to

revise the remuneration payable to part time guest lecturers who are working in Government run or Government aided polytechnics and hold minimum prescribed eligibility qualification. It is thus the argument of the learned counsel for the petitioner that since the subsequent Government notification seeks to revise the remuneration payable to such part time guest lecturers, the remuneration ought to be provided to the petitioners at the rate specified in notification dated 18.01.2013, which is Rs. 300/- per theory lecture and Rs. 150/- per practical lecture, and not at the rate provided by notification dated 22.06.2011.

25. In response to the above submission, the learned counsel for the respondent-institution has submitted that the remuneration payable to a Guest Lecturer in an institution which makes payment from its own sources has been fixed by Government Order dated 22.06.2011. It has been submitted that the Government Order dated 18.01.2013 neither rescinds nor modifies earlier notification dated 22.06.2011 and, in fact, from a bare reading of paragraph no.2 of the notification dated 18.01.2013 it is clear that the additional burden of revised remuneration was to be borne by the State. Meaning thereby that it was applicable to only those guest part-time lecturer who are paid from State Aid and not to those who are provided remuneration from the own resources of the institution. Attention of the Court has been invited to Annexure CA-2 so as to demonstrate that the Government Notification dated 22.06.2011 specifically relates to those institutions which are running a second shift for training with the help of part-time lecturers; further, it is clearly specified therein that the State shall not bear the burden of payment of remuneration to such lecturers. It has been submitted that the notification dated 18.01.2013 though deals with part-time guest lecturer but it neither specifies their employment in second shift nor it provides that they are to be paid from own sources of the institution. It has thus been submitted that since all the petitioners have been appointed as Guest Lecturer and are working in the second shift on contractual basis, and they are being paid in conformity with the terms of the contract, as per the notification dated 22.06.2011, they are not entitled to payment at an enhanced rate provided by notification dated 18.01.2013.

26. In reply to the above submission, the learned counsel for the petitioners has invited attention of the Court to the time table maintained by the institution, which has been annexed along with the rejoinder-affidavit. The time table relates to the petitioner no.2 (Lalit Kumar) disclosing that he has been given morning shift as well.

27. Sri Vimlendu Tripathi, who appears on behalf of respondent-institution, very fairly stated that from instructions which he has received, it appears that the petitioner no.2 had been working in the morning shift also.

28. I have given thoughtful consideration to the rival submissions on the above issue and have carefully perused both the concerned notifications. The Government order dated 22.06.2011 is specific in respect of appointment of part-time guest lecturers for teaching in the second shift and it is specified therein that they are to be paid from the own sources

of the institution. The subsequent Government order dated 18.01.2013, which seeks to revise the remuneration payable to part-time guest lecturers, in paragraph 2 thereof, specifically state that the additional burden of the remuneration would be borne by the State. The subsequent notification neither mentions the earlier notification dated 22.06.2011 nor it specifically deals with part-time lecturers drawing remuneration from the own sources of the institution. Further, it is nobody''s case that the Government by the subsequent notification has taken on to itself the additional burden of enhanced remuneration even where the earlier stipulated remuneration was to be paid from the own sources of the institution. Accordingly, the aforesaid two notifications operate in different fields. Notification dated 22.06.2011 deals with part-time lecturer paid from own sources of the institution whereas the subsequent notification is applicable where the part-time lecturers are being paid from the state aid.

29. In addition to above, the counter affidavit of the respondents encloses copy of the contract of engagement of each petitioner. The contract clearly disclose that remuneration would be paid at the rate of Rs. 140/- per theory period and Rs. 70/- per practical period. The signing of these contracts have not been disputed by the petitioners. There is no dispute that the petitioners have been engaged and paid by the institution from its own sources. Accordingly, and in view of the above, the benefit of subsequent notification is not available to the petitioners.

30. At this stage, it would be appropriate to deal with the plea taken by the petitioners in the rejoinder affidavit. In the rejoinder affidavit a stand has been taken that the petitioner no.2 has been working both shifts and therefore is entitled to the benefit of the subsequent notification because the teachers who work in the morning shift are paid from State Aid. The aforesaid contention cannot be accepted because it has not been demonstrated that the petitioner no.2 has been specifically appointed for both shifts or that any remuneration was agreed upon in that regard. Therefore, since admittedly the petitioner no.2 is also engaged on contractual terms and is not drawing remuneration from State Aid, no relief can be granted to the petitioner no.2 in the writ jurisdiction on the claim of his working both shifts. In case the petitioner no.2 has any grievance in that regard, he may take recourse to appropriate civil remedies as may be advised to him.

ISSUE No.4

31. In respect of issue no.4, the submission of the learned counsel for the petitioners is that it is well settled legal principle that one ad hoc arrangement cannot be replaced by another ad hoc arrangement, therefore, since the respondents have already notified the posts for regular selection, the petitioners are entitled to continue as Guest Lecturer till regular selection is made. In support of the aforesaid submission, the learned counsel for the petitioners has placed reliance on a Division Bench decision dated 17.07.2013 of this Court in Writ A No. 38156 of 2013 (Dr. Arvind Kumar Srivastava and Anr v. Union of India and Ors.) in which, while dealing with the rights of Guest/Part-time teachers in a college affiliated to the University of Allahabad, it was provided that till the posts are filled on a

regular basis, the claim of the petitioners for continuance on the post would be considered favourably because one contract employee cannot be replaced by another set of contract employees. Another Division Bench decision of this Court in **Ramji Pathak and another v. D.I.O.S., Allahabad and another : 1986 UPLBEC 344** has also been relied upon in support of the above contention, which deals with an entirely different fact situation based upon interpretation of statutory provisions of U.P. Act No.5 of 1982.

32. Learned counsel for the respondent-institution has submitted that the decisions cited by the learned counsel for the petitioners would not be applicable to the present case because here the petitioners were appointed on contract basis as part time guest lecturer to be paid from own sources of the institution whereas the advertisement relate to regular appointment of permanent lecturer, drawing salary from state aid, therefore, it is not a case where one ad hoc arrangement is being replaced by another ad hoc arrangement. It has been submitted that since the appointment of the petitioner was for a limited period on contract, the respondent-institution cannot be forced to extend the contract till regular selection is made.

33. Having considered the rival submissions on the above issue, this Court finds that the fundamental principle on which Writ A No. 38156 of 2013 (supra) was decided was that one set of contract employees ought not be replaced by another set of contract employees. In this case, the petitioners are not being replaced by another set of part time guest lecturers. The advertisement is in respect of appointment of regular faculty, which is to be provided salary from state aid not from own sources of the institution as is in the case of the petitioners. Therefore, the relief sought by the petitioners that they be allowed to continue till regular selection is made, cannot be accepted, in as much as, the petitioners have been appointed on a contract for a specified period. The issue no.4 is decided accordingly.

34. In view of the discussion made herein above, the writ petition is dismissed. There is no order as to costs.