

Court No. - 35

Case :- WRIT - A No. - 11605 of 2023

Petitioner :- Sunil Kumar Srivastava

Respondent :- State Of U.P. And 5 Others

Counsel for Petitioner :- Vineet Kumar Singh, Sr. Advocate

Counsel for Respondent :- C.S.C, Ashok Kumar
Pandey, Prabhakar Awasthi, Ramesh Chandra Dwivedi

Hon'ble Vikas Budhwar, J.

1. Heard Sri H.N. Singh, learned Senior Counsel assisted by Sri Ramendra Kumar Yadav, learned counsel for the writ petitioner, Sri Shailendra Singh, learned Standing Counsel who appears for respondents No. 1 to 4, Sri R.C. Dwivedi, learned counsel who appears for the fifth respondent and Sri Prabhakar Awasthi, learned counsel who appears for the sixth respondent.

2. Since counter and rejoinder affidavit have been exchanged between the parties and the rival parties have contended that they do not seek to file any further response, thus, with the consent of the parties, the writ petition is being decided at the fresh stage.

3. The case of the writ petitioner is that there happens to be an institution, fifth respondent, C/M Sri Nehru Inter College, Patherwa, District Kushinagar which is an institution recognized under the provisions of U.P. Intermediate Education Act, 1921, the provisions of U.P. Act No. 5 of 1982 and the provisions of U.P. Act No. 24 of 1971 stand applicable.

4. It is further the case of the writ petitioner that he was appointed on the post of Assistant Teacher L.T. Grade on 20.03.1997 on compassionate ground owing to the death of his father Late Satyadev Lal Srivastava who was working as a Lecturer in the institution in question. It is also the case of the writ petitioner that the sixth respondent, Rajiv Kumar Pathak was appointed as an Assistant Teacher L.T. Grade on 05.05.1998 on compassionate ground. As per the writ petitioner, a seniority list was published in the year 2015-16 in which the name of the writ petitioner found place at serial No.1 as well as the name of the sixth respondent was placed below him at serial No. 2. The writ petitioner further claims to have armed with the necessary qualification of M.A. in Sociology and B.Ed. and he further claims to be qualified for the post of Lecturer Sociology and Sri Rajiv Kumar Pathak, sixth respondent is stated to have

obtained qualification of M.A. Hindi and B.Ed. As per the writ petitioner, there were earlier five posts of Lecturer sanctioned in the institution in question, however, owing to the decision taken in the case of **Druv Narayan Singh Vs. State of U.P. Writ A No. 10637 of 2010** an exercise was undertaken pursuant where to on 22 February, 2016 the post of Lecturer amongst of post stood reduced from five to two. It is further the case of the writ petitioner that he being fully eligible and qualified in all respects, staked his claim for being accorded promotion on the post of Lecturer Sociology and a resolution is stated to have been passed by the fifth respondent, Committee of Management on 13.03.2016 whereby consequent to the superannuation of one Sri Harivansh Prasad Gupta on 31.03.2016 against the post earmarked for promotion, the Committee of Management resolved to promote the writ petitioner on the said post.

5. At that juncture, according to the writ petitioner, a writ petition is stated to have been preferred by the sixth respondent, **Rajiv Kumar Pathak, Writ A No. 14714 of 2016** wherein a prayer was made by the sixth respondent to accord consideration to the representation preferred by the writ petitioner on 26.03.2016 before the District Inspector of Schools, Kushinagar, fourth respondent and the said writ petition stood disposed of directing the fourth respondent to decide the representation of the sixth respondent on 04.04.2016. The writ petitioner being aggrieved against the order passed in the case of the sixth respondent in the above noted writ petition preferred **Special Appeal (D) No. 355 of 2016 (Sunil Kumar Srivastava Vs. State of U.P. & Others)** which came to be disposed of on 12.05.2016 directing the fourth respondent, District Inspector of Schools, Kushinagar to address the claim of the writ petitioner also. As per the writ petitioner, in compliance of the order passed by the Writ Court as modified by the Special Appellate Bench, the fourth respondent, District Inspector of Schools, Kushinagar proceeded to pass an order dated 25.04.2017 whereby it had gone into the issue so raised regarding officiation of a Principal and thereafter, recorded finding to the effect that the writ petitioner is senior to the sixth respondent and further the representation preferred by the sixth respondent was a forged document. According to the writ petitioner, the said order has attained finality. However, according to the writ petitioner now an order is stated to have been passed on 15.06.2023 by the Regional Selection Committee, 7th Region, Gorakhpur, second respondent whereby approval has been accorded for promotion of the sixth respondent as a Lecturer in Hindi in the fifth respondent-institution followed by a consequential order of the District Inspector of Schools, Kushinagar, fourth respondent dated

21.06.2023.

6. This Court entertained the said writ petition and passed the followings on 20.07.2023.-

"Vakalatnama filed by Sri R.C. Dwividi learned counsel for respondent no.6 is taken on record.

Heard Sri H.N. Singh, learned Senior Advocate assisted by Sri Arvind Kumar Tiwari, for the petitioner as well as Sri Awadhesh Kumar Mishra, who appears for the respondents 1, 2 & 4. Sri R.C. Dwividi learned counsel appears for respondent no.6.

The submission of learned Senior Counsel is that so far as the writ petitioner is concerned he was appointed as Assistant Teacher L.T. Grade on 28.3.1997 on compassionate ground and whereas the sixth respondent is concerned he was also appointed as Assistant Teacher L.T. Grade on compassionate ground on 5.5.1998. It is further the case of the writ petitioner that in the seniority list in question the writ petitioner is shown to be senior to the sixth respondent as his assignment is at serial number one as well as of the respondent no.6 at serial number 2. It is further the case of the writ petitioner that earlier there were five sanctioned post of the Lecturer which stood reduced to two. According to the writ petitioner the post of Lecturer is already fell vacant and resolution was passed by the fifth respondent, Committee of Management on 13.3.2016 resolving to promote the writ petitioner on the the said post and the same was transmitted to the fourth respondent, District Inspector of Schools, Kushinagar on 26.3.2016.

As per the writ petitioner the sixth respondent prefer a Writ Petition No.14714 of 2016 which came to be disposed of on 4.4.2016 requiring the D.I.O.S. to decide the representation dated 26.3.2016 against which the writ petitioner herein preferred Special Appeal Defective 355 of 2016 which came to be disposed of on 12.5.2016 modifying the order whereby direction was issued to D.I.O.S. to hear the sixth respondent and the petitioner and to pass fresh order. As per the writ petitioner now an order has been passed by the District Inspector of Schools, Kushinagar on 25.4.2017 whereby the representation preferred by the sixth respondent has been found to be forged. However, the seniority of the writ petitioner vis-a-vis the respondent no.6 as already determined earlier has been accepted treating the writ petitioner to be senior. According to the writ petitioner the District Inspector of Schools, Kushinagar, the fourth respondent by virtue of a communication dated 12.6.2013 addressed to the Regional Director of Education VIIth Region Gorakhpur on the basis of the resolution number two of the Committee of Management dated 21.7.2019 has accorded approval for grant of promotion of the sixth respondent as Lecturer in Hindi.

Learned counsel for the writ petitioner submits that consequential order has been passed by D.I.O.S. on 21.6.2023.

The submission of learned counsel for the writ petitioner is that the aforesaid exercise is illegal particularly in view of the fact that respondent passed four years ago could not be acted upon and pressed into service particularly when the writ petitioner is senior and qualified in all respects and further the entire exercise has been undertaken in the violation of

principles of natural justice as averred in paragraph 16 of the writ petition. Sri R.C. Dwividi learned counsel appears for respondent no.6 submits that a conscious decision has been taken by the management in question whereby Hindi being a compulsory subject as Lecturer Hindi so the promotion has been accorded to respondent no.6.

Learned Standing Counsel also seeks time to file response.

Matter requires consideration.

Issue notice to the fifth respondent.

Steps to be taken by both ways by 25th July, 2023.

Affidavit of service be filed by the learned counsel for the writ petitioner before the next date fixed.

All the respondents may file their counter affidavits within three weeks. A week's time is allowed to the petitioner for filing rejoinder affidavit.

Put up this case on 24.8.2023 as fresh.

When the matter is next listed as fresh name of Sri R.C. Dwividi shall be shown for respondent no.6 in the cause list."

7. A counter affidavit has been filed on behalf of respondents No. 2 to 4 by the District Inspector of Schools, Kushinagar sworn on 27.10.2023 followed by a counter affidavit by the respondent No. 5 of the Manager of the fifth respondent-institution dated 20.08.2023 and a supplementary counter affidavit has been filed by the Manager of the institution on behalf of the Management dated 30.10.2023. A counter affidavit is also available on record filed by the sixth respondent dated 13/17.08.2023. Learned counsel for the writ petitioner has filed rejoinder affidavit to the counter affidavit filed on behalf of the respondents No. 2 to 4, a rejoinder to the counter affidavit to the respondent No. 6 and a rejoinder to the counter affidavit of the fifth respondent.

8. Sri H.N. Singh, learned Senior Counsel while assailing the orders dated 15.06.2023 passed by the second respondent and the order dated 21.06.2023 passed by the fourth respondent has sought to argue that the impugned orders cannot be sustained in law even for a single moment particularly in view of the fact that first of all though there happened to be a resolution dated 13.06.2016 according promotion to the writ petitioner on the post of Lecturer Sociology but without hearing the writ petitioner now the orders impugned have been passed that too behind his back and his vested right for being considered for promotion has been deprived. He in order to buttress the said submission has sought to argue that may be there were five posts of Lecturer sanctioned in the institution in question which

got reduced to two, however, once a resolution had been passed on 13.03.2016 while taking a conscious decision by the Committee of Management for according promotion to him under the post earmarked for the promotion quota consequent to the retirement of one Sri Harivansh Prasad Gupta who was working as Lecturer in Economics then the entire act of the respondents in promoting the sixth respondent on the post of Lecturer Hindi pursuant to the resolution dated 21.07.2019 is per se illegal.

9. The learned Senior Counsel for the writ petitioner also questions the convening of a meeting of the Committee of Management making proposal for promoting the sixth respondent in the fifth respondent-institution according to him, as apparent from the supplementary counter affidavit filed by the fifth respondent and the counter affidavit filed by the State respondents it has come on record that on 04.04.2016 there happens to be a communication of the Manager of the institution in question to the District Inspector of Schools, Kushinagar, fourth respondent seeking to withdraw the resolution dated 13.03.2016 being passed inadvertently, however, he submits that the same has been implanted just in order to denude the claim of the writ petitioner, he submits further that there is no recital about the fact either in the counter affidavit filed by the State-respondents or in the impugned order as to when the said resolution was put to service denuding the claim of the writ petitioner, he submits that the date of letter/decision which has been pressed into service to negate the claim of the writ petitioner is 04.04.2016 and there happens to be an order of the District Inspector of Schools, Kushinagar dated 25.04.2017 which had been passed in pursuance of the order dated 04.04.2016 in a writ petition preferred by the sixth respondent Writ Petition No. 14714 of 2016 there is no recital even about the said fact in the said order that it was the stand of the respondents that the resolution dated 13.03.2016 was canceled though the issue was with regard to Officiating Principal.

10. Sri Singh, has further invited the attention of the Court towards the order dated 25.04.2017 passed by the District Inspector of Schools, Kushinagar, fourth respondent which has been appended as Annexure 8 at page 34 of the paper book while inviting attention towards page 50 of the paper book so as to contend that in the counter affidavit filed on behalf of the fourth respondent it has been stated that the writ petitioner's appointment as an Assistant Teacher was though made on 20.03.2017 against supernumerary post. According to him, the District Inspector of Schools, Kushinagar was not required to go into the said issue while denuding the claim of the writ

petitioner particularly when there happens to be an order of the District Inspector of Schools, Kushinagar dated 25.04.2017 whereby it has been recited and a finding has been recorded that the appointment of the writ petitioner was against a substantive vacancy arisen on account of the promotion of one Sri Vanshu Prasad Sahani as Lecturer Civics. He further submits that the appointment of the sixth respondent was post the appointment of the writ petitioner and according to him the sixth respondent was granted appointment and was made to join on 05.05.1998 against dying-in-harness rules against a supernumerary post but he has been accorded benefits as whereas the writ petitioner has been denuded the same. According to him, the entire exercise is nothing but an act of blocking the promotion avenues as the Management never wanted the writ petitioner to officiate as a principal in that regard.

11. Sri R.C. Dwivedi, learned counsel who appears for the sixth respondent-institution while countering the submission of learned Senior Counsel for the writ petitioner submits that the writ petition is wholly misconceived and is liable to be dismissed for the simple reason that in view of the language employed under Rule 10 read with Rule 11 and Rule 14 of the 1998 Rules, it is the Committee of Management which has to determine the vacancies. In the present case in hand on 13.03.2016 a resolution was though passed resolving to promote the writ petitioner as a Principal in Lecturer Sociology, however, since the same was suffering from various discrepancies, thus, the same rectified on 04.04.2016 while making a communication to the educational authorities for withdrawal of the same and since in the meantime one Sri Wahab Ali who was posted as Lecturer in Hindi stood superannuated on 30.06.2011 and there were as many as 136 students who were being imparted education in Hindi and Hindi being a compulsory subject so a decision was taken so as to promote the sixth respondent as Lecturer Hindi. He submits that there happens to be a decision of the State Government dated 22 February, 2012 now reducing the post of Lecturers from five to two and one post is under promotion quota is of Lecturer Hindi and other being Lecturer Civics and once a conscious decision has been taken that the post of Lecturer Civics is to be filled up by direct recruitment and the requisition to the said extent has already been issued by the Committee of Management of the institution in question then obviously the writ petitioner cannot be promoted as he is not eligible and qualified for the post of Lecturer Hindi and secondly there is no post available to give him a room for accommodation. He further submits that it is not open for the writ petitioner to dictate the terms so as to accord promotion to him even in those

contingencies when there is no post available.

12. Sri Prabhakar Awasthi, learned counsel who appears for the sixth respondent has adopted the submission of the learned counsel for the writ petitioner and according to him the writ petitioner has no indefeasible right to be granted promotion as he has a right to be considered for promotion provided he is eligible qualified and the vacancies are still available under the stream and the quota for which it has been earmarked.

13. Sri Shailendra Singh, learned Standing Counsel who appears for respondents No. 1 to 4, on the other hand, submits that he has already filed a counter affidavit detailing each and every aspect of the matter and according to him the resolution of the Committee of Management according benefit to the writ petitioner dated 13.03.2016 stood withdrawn on 04.04.2016 and further the file in question was returned back in original and according to the new strength of the institution dated 22.02.2012 two posts of Lecturers are sanctioned Hindi and Civics and, thus, the writ petitioner cannot be accorded benefit in this regard, he further submits that the appointment of the writ petitioner was against supernumerary post and, thus, the writ petitioner is not entitled to the benefits.

14. In rejoinder, Sri H.N. Singh, learned Senior Counter submits that though the counter affidavit of the State-respondents seeks to dislodge the claim of the writ petitioner but the same is a feeble attempt particularly in view of the fact that the District Inspector of Schools, Kushinagar has sworn various paragraphs on personal knowledge even without perusing the order passed by his predecessor on 25.04.2017, whereby it was held that the appointment of the writ petitioner was against a substantive post and at that point of time there was no stand taken by the respondents that the resolution dated 13.03.2016 stood withdrawn on 04.04.2016, he further submits that even in fact the fraud played by the sixth respondent stood surfaced as in this regard finding has been recorded in the order dated 25.04.2017 in page 51 of the paper book whereby the claim which was being set up by the sixth respondent on the basis of the document dated 20.07.2006 was found to be unverifiable. He submits that the order in question be set aside, matter be remitted back so as to accord fresh consideration to the writ petitioner strictly in accordance with law.

15. To such a submission, Sri Shailendra Singh, learned Standing Counsel who appears for respondents No. 1 to 4, Sri R.C. Dwivedi, learned counsel who appears for the fifth respondent, Sri Prabhakar Awasthi, learned counsel who appears for the sixth respondent on instructions submits that if it

is the case being so the matter be remitted back to pass a fresh order. However, according to Sri Prabhakar Awasthi and Sri Dwivedi, who appears for the respondents No. 6 and 5, respondent No. 6 has already joined the post in question and he is getting the salary on the post in question, thus, their continuance may not be disturbed by this Court and the same should be made subject to the final orders to be passed with it.

16. I have heard the learned counsel for the parties and perused the record carefully.

17. Undisputedly, the fifth respondent-institution is governed under the provisions of U.P. Intermediate Education Act, 1921 and the rules framed thereunder. It is also not in dispute that in the seniority list the writ petitioner ranks senior to the sixth respondent. It is also not disputed by the parties that earlier on the motion being made at the instance of the sixth respondent while filing writ petition the matter was decided by the District Inspector of Schools, Kushinagar on 25.04.2017 whereby the writ petitioner was held to be senior to the sixth respondent. In the said order also a finding has been recorded in Page 50 of the writ petition that the writ petitioner's appointment was made against the substantive post arisen on account of the superannuation of Sri Vanshu Prasad Sahani. The parties have also not brought before this Court any order whereby the Court can infer that the order of the District Inspector of Schools, Kushinagar dated 25.04.2017 has been set aside by any Competent Court of Law.

18. The bone of contention between the parties is with regard to the fact as to whether the writ petitioner is to be accorded promotion as Lecturer in Sociology or the sixth respondent as Lecturer in Hindi. The writ petitioner claims benefit on the basis of a resolution dated 13.03.2016 as whereas the sixth respondent upon the resolution of the Committee of Management dated 21.07.2019. The learned Senior Counsel for the writ petitioner also disputes that the said resolution dated 13.03.2016 was never cancelled and the communication dated 04.04.2016 for cancellation of the same is a forged document. He further questions the act of the Committee of Management while coming up with a stand while inviting the attention of the Court towards paragraphs No. 2 (b) and (c) so as to contend that though it is being stated that the resolution dated 13.03.2016 has been withdrawn on 04.04.2016 but no document whatsoever has been brought on record to substantiate the same as to what is the mode of service and receipt in the Office of District Inspector of Schools, Kushinagar of the document dated 04.04.2016. He also questions the same on the ground that the said aspect was not even raised in the earlier dispute

which culminated into passing of the order dated 25.04.2007. Thus, the crucial question which arises is with regard to not only of the withdrawal of the resolution but also the issue with regard to the conscious decision taken by the Committee of Management as per the regulations as to which of the post is to be filled either under the promotion category or under direct recruitment quota. Learned counsel for the writ petitioner also questions the promotion of the sixth respondent as Lecturer in Hindi as he while relying upon the counter affidavit filed by the sixth respondent at page 28 of the counter affidavit Annexure 6 has sought to contend that the post of Lecturer Hindi falls within with direct recruitment quota. The said contentions raised by the writ petitioner have been opposed by the counsel for the respondents while coming up with a stand that the reliance so placed upon the communication dated 08.11.2013 of the District Inspector of Schools, Kushinagar Annexure CA-6 at page 28 of the counter affidavit filed by the sixth respondent is only a report and not a conclusive finding in that regard. Though various issues have been raised but the Court finds that the said issues have not been deliberated and taken into consideration in the order in question.

19. Though, ordinarily this Court could have gone into the said aspect of the matter while addressing on the said issues, however, as rightly pointed out by Sri H.N. Singh, learned Senior Counsel assisted by Sri Ramendra Kumar Yadav, Sri Shailendra Singh, learned Standing Counsel for respondents No. 1 to 4, Sri R.C. Dwivedi, learned counsel who appears for respondent No. 5 and Sri Prabhakar Awasthi, learned counsel who appears for respondent No. 6 that the said issues be addressed at the first instance by the Director, Secondary Education, seventh respondent, Director, Secondary Education, U.P. Prayagraj consequently, the order dated 15.06.2023 passed by the second respondent, Regional Selection Committee, Gorakhpur as well as the consequential order dated 21.06.2023 passed by the fourth respondent are liable to be set aside consequently, the writ petition is being decided in the following terms:

(a) The orders dated 15.06.2023 & 21.06.2023 passed by the second and fourth respondent are set aside; (b) the matter stands remitted back to the seventh respondent; (c) since the writ petitioner, fifth and sixth respondents are represented through their counsels, thus, they shall appear on a date fixed by the seventh respondent in the fourth week of November, 2023 along with their versions; (d) version be exchanged between the parties; (d) a date be fixed for hearing in the last week of November, 2023; (e) orders be passed by 15th December, 2023.

20. Since it is not disputed by Sri H.N. Singh, learned Senior Counsel who appears for the writ petitioner that the sixth respondent has already joined the post of Lecturer Hindi in the fifth respondent-institution, thus, till the passing of the fresh orders by the seventh respondent, the sixth respondent shall continue as a Lecturer Hindi and its continuance shall be subject to the final orders passed in compliance of order of this Court.

21. With the aforesaid observation, the writ petition stands partly allowed.

Order Date :- 31.10.2023

Rajesh