

Court No. - 8

Case :- WRIT - A No. - 6463 of 2000

Petitioner :- Pankaj Srivastava

Respondent :- The Director Of Education And 2 Ors.

Counsel for Petitioner :- Avadheseh Kumar, Anoop Srivastava, K.D. Nag

Counsel for Respondent :- C.S.C., Rohit Tripathi, Shailendra Kumar Singh, Umesh Chandra

Hon'ble Saral Srivastava, J.

1. Sri K.D. Nag, learned counsel for the petitioner, Sri R.S. Tomar, learned Standing Counsel for the respondent-State and Sri Rohit Tripathi, learned counsel for respondent No.3.

2. The petitioner by means of present petition has prayed for following reliefs:

"(i) A writ, direction or order in the nature of mandamus be issued commanding the opposite parties to pay the regular salary to the petitioner and to approve the appointment of the petitioner,

(ii) Any other writ direction or order may be issued in which petitioner found entitled to,

(iii) The Hon'ble Court may be pleased to issue a writ, direction or order in the nature of Certiorari quashing the impugned order dated 19.12.2000 (Annexure No.8) passed by the D.I.O.S."

3. The brief facts of the case are that there is a college in the name of Rani Luxmi Bai Kanya Vidyalay Mandir Inter College, Unnao

(hereinafter referred to as 'College') duly recognized by the Board of High School and Intermediate Education, Uttar Pradesh and provisions of Payment of Salaries Act, 1971 are applicable to the employees of the said College.

4. In the College, there are three sanctioned posts of Class-III viz. one post of Head Clerk, one post of Assistant Clerk and one post of Librarian. On account of superannuation of one Jagdish Prasad Gupta, post of Head Clerk became vacant. The Assistant Clerk in the college Ram Kishore Nigam was promoted on the post of Head Clerk, consequent upon which, one post of Assistant Clerk fell vacant.

5. According to the petitioner, due intimation with regard to the vacancy of Assistant Clerk was given to the District Inspector of Schools, Unnao. Thereafter, the Principal of the College advertised the vacancy in the newspaper. The petitioner, being fully eligible and qualified, applied for the appointment on the post of Assistant Clerk in the college. A selection committee was constituted to hold the selection for appointment to the post of Assistant Clerk, and after completing the selection process, it found the petitioner most suitable and accordingly, selected the petitioner. A resolution was passed by the Committee of Management of the College to appoint the petitioner as Assistant Clerk on the vacant post in the College.

Thereafter, the petitioner was given appointment in the College on 01.08.2000 and the petitioner on the same date joined as Assistant Clerk.

6. The petitioner further states that the Manager of the College personally contacted the District Inspector of Schools in the last week of August, 2000 for grant of approval to appointment of petitioner. However, the District Inspector of Schools asked the Manager of the College to advertise the vacant post of Assistant Clerk in newspaper. Consequently, the post of Assistant Clerk was advertised in the newspaper on 01.09.2000 and fresh selection was again held in accordance with procedure contemplated under law.

7. It is stated that several candidates applied pursuant to the said advertisement, however, the petitioner being the most eligible was selected. Consequently, the petitioner was allowed to continue as Assistant Clerk on regular basis from 02.10.2000. The petitioner further states that manager of the college sent a letter dated 03.10.2000 to the District Inspector of Schools for seeking approval to the petitioner's appointment as Assistant Clerk. The District Inspector of Schools did not take any action, and since the petitioner has been discharging his duty and signing the attendance register and has not been paid the salary, he has approached this Court by filing the present petition and prayed for the relief,

extracted above.

8. A counter affidavit has been filed by respondent-State in which specific stand was taken that under Regulation 101 under Chapter III of the Regulation framed under the provisions of Uttar Pradesh Intermediate Education Act, 1921, the appointing authority cannot make any appointment on non-teaching post without prior approval of the District Inspector of Schools. It is also averred that the Committee of the Management of the College unlawfully without seeking any prior approval of the District Inspector of Schools has appointed the petitioner, and the appointment of the petitioner has been disapproved by District Inspector of Schools vide order dated 09.10.2000 which is enclosed as Annexure No. A-2 to the counter affidavit.

9. It is further stated that number of dependents of the deceased employee are yet to be given compassionate appointment, and that certain supernumerary posts were created for giving compensate appointment to the dependents of the deceased employees and these posts are to be adjusted against the regular post. It is further stated that the Management of the College did not act in consonance with the provisions of the regulation in proceeding with the selection process and appointing the petitioner on a Class-III post.

10. The Committee of Management of the College has also filed a supplementary counter affidavit dated 09.01.2023 stating that the petitioner is the real brother of the Principal of the College.

11. The petitioner filed a rejoinder affidavit to the counter affidavit of the State Government denying the averments made in the counter affidavit of the State Government and stating therein that the appointment of the petitioner is in accordance with law and action of the respondent in not granting approval to the appointment of the petitioner is illegal and arbitrary.

12. The petitioner also filed rejoinder affidavit to the supplementary counter affidavit of the Management stating therein that the FIR was lodged against the Manager of the College for demanding ransom and he was arrested and subsequently, he was enlarged on bail. It is also stated that when the counter affidavit was filed, the term of the Management of the College had already expired and Committee of Management of the College became *functus officio* and has no authority to file counter affidavit. Since counter affidavit has not been filed by a competent person, therefore, counter affidavit of Management may be ignored.

13. Sri K.D. Nag, learned counsel for the petitioner has contended that the action of the respondent in not granting approval to the appointment of the petitioner is illegal and arbitrary. It is

contended that the appointment of the petitioner has been made in accordance with procedure contemplated under Regulation framed under Chapter III of the Intermediate Education Act, 1921 governing the procedure for appointment on the post of Assistant Clerk. He submits that the post in question was advertised and pursuant to the said advertisement, several candidates submitted application and the selection committee was constituted to hold selection, since the petitioner was found most suitable candidate, therefore, he was given appointment. Thereafter, the Management of the College forwarded the papers of the petitioner to the District Inspector of Schools for approval.

14. It is contended that it is the specific case of the petitioner that the District Inspector of Schools did not maintain any Register or list as contemplated under Regulation 104 of the Regulations which provides for maintaining the list of the dependents of the deceased-employees who died in harness. Accordingly, it is submitted that since there was no candidate available under the dying in harness category, therefore, post cannot be kept vacant for indefinite period of time and in such an event, the respondent had to make direct appointment and as the petitioner's appointment is in accordance with procedure contemplated under Regulation, therefore, denial of approval to the appointment of the petitioner is

illegal and is an arbitrary exercise of power by the District Inspector of Schools. In support of the said contention, learned counsel for the petitioner has placed reliance upon the judgments in the cases of ***Sayed Athar Ali Vs. DIOS (1995) 2 UPLBEC 968***, ***Vinod Kumar & another Vs. DIOS (1999) 2 UPLBEC 1603*** and ***Sri Ram Prakash Rai Vs. DIOS (WP No.37073 of 1993)***.

15. He further submits that under the interim orders passed by this Court, the District Inspector of Schools has paid salary to the petitioner. The petitioner is continuously working for the last 22 years, therefore, the petitioner is entitled to be continued on the said post and necessary approval be granted by the District Inspector of Schools to the appointment of the petitioner. In support of the said contention, he has placed reliance upon following judgments in the cases of ***Rajendra Pd. Srivastava Vs. DIOS, (1994) All. C.J. 781 (DB)*** and ***Miss Shainda Hasan Vs. State of U.P. (1990) 3 SCC 48***.

16. It is also urged that one of the grounds stated in supplementary counter affidavit that the petitioner does not possess typing efficiency which qualification is mandatory for appointment on Class-III post is misconceived for the reasons that the requirement of possessing typing efficiency in the regulation has been incorporated after appointment of the petitioner, and therefore, it

cannot be a ground to deny the regular appointment to the petitioner after 22 years. In support of said contention, he has placed reliance upon the judgment of this Court passed in ***Writ-A No.9255 of 2017*** in the case of ***Shakuntala Devi Vs. State of U.P.*** decided on 20.04.2017.

17. Accordingly, it is submitted that the action of the respondent in not approving the appointment of the petitioner is illegal and cannot be sustained in law and the petitioner has made out a case for grant of relief as extracted above.

18. Per contra, learned counsel for the respondent would contend that under Regulation 101 of Chapter III of the Intermediate Education Act framed under the Intermediate Education Act, 1921, the Management of the College has to take prior approval before making any appointment. It is submitted that there is no pleading in the writ petition that any prior approval from the District Inspector of Schools was taken by the Manager of the College before initiating the process of appointment on the post of Assistant Clerk. It is submitted that since the appointment of the petitioner was de hors the rules, therefore, the District Inspector of Schools has rightly refused to grant approval to the appointment of the petitioner.

19. He has further contended that the reading of the appointment

letter of the petitioner enclosed as Annexure No.2 to the writ petition discloses that it was only an ad-hoc appointment made by the Manager of the College and the salary to the petitioner was to be paid subject to approval obtained from the Education Department. It is further contended that the respondent's specific case in the counter affidavit is that number of dependent candidates were waiting in queue seeking compassionate appointment. He submits that several supernumerary posts were created to accommodate the candidates under dying in harness rules, and therefore, the petitioner could not be appointed on the said post.

20. He has also urged that it is stated in the supplementary counter affidavit of the Management that the petitioner is the real brother of the Principal which fact has not been specifically denied by the petitioner in the rejoinder affidavit, therefore, the petitioner being relative of the Principal of the College could not have been appointed.

21. I have considered rival contentions of learned counsel for the parties and perused the record.

22. The facts as emanate from the record are that there are three sanctioned posts of ministerial staff in the College; one post is of Head Clerk, one post of Assistant Clerk and one post of Librarian.

On account of the retirement of regular incumbent of the post of Head Clerk, Sri Ram Kishore Nigam Assistant Clerk was promoted on the post of Head Clerk, due to which, the post of Assistant Clerk became vacant. According to the petitioner, the Management proceeded with the selection on the said post and the post was duly advertised in the newspaper. Subsequently, selection was held in which the petitioner was found suitable and accordingly, he was appointed vide appointment letter dated 01.08.2000.

23. It appears that a fresh selection again took place for the aforesaid post inasmuch as when the Manager of the College met the District Inspector of Schools seeking approval to the appointment of the petitioner on 01.08.2000 on the post of Head Clerk, he was advised to get post advertised, and consequently, the selection was made by advertising the post and the petitioner was appointed.

24. The Regulation 101 reads as under:-

"101. नियुक्ति प्राधिकारी, निरीक्षक के पूर्वानुमोदन के सिवाय किसी मान्यताप्राप्त, सहायताप्राप्त संस्था के शिक्षणेतर स्टाफ में किसी रिक्ति को नहीं भरेगा:

प्रतिबन्ध यह है कि जमादार के पद की रिक्ति को निरीक्षक द्वारा भरने की अनुमति दी जा सकती है।"

25. The language of Regulation 101 is clear and specific and it

provides that any appointment on the post of non-teaching ministerial staffs shall be made after taking prior approval of the District Inspector of Schools. In the instant case, the petitioner has not placed any material on record to demonstrate that the District Inspector of Schools granted prior approval or granted permission to the Management to initiate the process of selection and granted approval to the appointment of the petitioner before he was given appointment by the Committee of Management.

26. Even the averments made in the writ petition with regard to procedure of selection are vague inasmuch as though the petitioner has stated that the vacancy was advertised in newspaper and the selection was held, but the writ petition is silent as to the date on which the advertisement was published in the newspapers and the name of the newspapers in which the advertisement was published. The writ petition also does not disclose the date on which the selection committee conducted selection process. The petitioner was given appointment letter on 01.08.2000 which was issued to him after the first selection which selection has been rescinded as per the own case of the petitioner inasmuch as again the selection took place on the asking of District Inspector of Schools and the petitioner was given appointment on 02.10.2000.

27. The Regulation specifically provides that the appointment can

be made only after obtaining the prior approval from the District Inspector Schools, whereas in the instant case, admittedly it was not done, therefore, the petitioner could not have been appointed.

28. So far as the contention of learned counsel for the petitioner is that since there was no candidate waiting under the Dying in Harness Rules and there was no bar for making direct recruitment in case of non-availability of candidates seeking compassionate appointment inasmuch as a post cannot remain vacant infinite is concerned, this Court may note that had the process of selection being initiated as per procedure and a permission to initiate selection process had been sought from the District Inspector of Schools, he would have apprised the fact whether any candidate is waiting for compassionate appointment.

29. The petitioner has made only bald averment in the writ petition that the District Inspector Schools has not maintained any list or register as contemplated under Regulation 104 of Chapter III containing the name of the candidates waiting in queue to be appointed under Dying in Harness Rules which fact has been specifically denied by the respondent in the counter affidavit, and the respondent has also stated in the counter affidavit that supernumerary posts have been created to adjust the candidates waiting for compassionate appointment. Since the mandatory

requirement for appointment of the petitioner i.e. prior approval of the District Inspector of Schools before making any appointment is not adhered to, therefore, the judgments relied upon by learned counsel for the petitioner on the aforesaid point in the cases of ***Sayed Athar Ali (supra)***, ***Vinod Kumar (supra)*** and ***Sri Ram Prakash Rai (supra)*** are not applicable in the present case.

30. At this stage, it is pertinent to point out that the Committee of Management has filed a supplementary counter affidavit in which it is stated in paragraph No.10 that the petitioner is the real brother of the Principal of the College. Paragraph No.10 of the supplementary counter affidavit of Committee of Management is reproduced hereinbelow:

"10. That the petitioner is the real brother of the principal in the institution, he does not do any work even then he could not write Hindi whose investigation is very important."

31. The said paragraph has been replied by the petitioner in paragraph No.19 of the rejoinder affidavit which is reproduced hereinbelow:

"19. That the contents of paragraph 10 and 11 of the Short Counter Affidavit under reply are vehemently denied. In reply it is submitted that the deponent was appointed against a substantive vacancy in accordance with law. Even prior to his appointment, the petitioner had passed M.A. (Sociology) in the

year 1999. The petitioner completed and passed 'Course on Computer Concepts' (CCC) from the 'National Institute of Electronics & Information Technology' (NIELIT), Ministry of Electronics & Information Technology, Government of India, in May 2019. The said Course on Computer Concepts' (CCC) is admissible eligibility for all posts of clerks in all Departments of State Govt. as well as that of Central Govt. In this connection the National Institute of Electronics & Information Technology issued certificate dated 19.08.2019 (Ann RA-5)."

32. The perusal of the paragraph No.19 of the rejoinder affidavit of the petitioner discloses that the fact that he is real brother of the Principal of the College is not denied. It is duty of the petitioner to have disclosed the correct fact in the writ petition which has not been done by the petitioner in the writ petition. It is the settled principle of law that the petitioner should approach the Court with clean hands and as the petitioner being relative of the Principal could not have been appointed, this fact has bearing on the matter and the petitioner should have disclosed this fact in the writ petition.

33. It is also pertinent to note that this Court perhaps because of the reason that the correct fact has not been disclosed passed the following order on 14.12.2022:-

"Heard.

As prayed by learned counsel for Committee of Management, three days' time

is granted to him for filing counter affidavit as he says that typing test of the petitioner was held under the supervision of a government employee on the request of Committee of Management and even after 22 years of service, albeit, based on an wholly illegal appointment, he failed in the typing test.

Let the matter come up on 22.12.2022.

Learned Standing Counsel shall also file an affidavit of D.I.O.S. as regards functioning of the petitioner during these 22 years on the strength of interim order and also as to whether petitioner's typing test was held, if so, what was the result, if not held, he may get a typing test conducted and submit an affidavit in this regard."

34. In compliance of the aforesaid order of this Court, the respondent conducted the typing test and it was found that the petitioner does not possess efficiency in typing. Now, once the petitioner has acceded to the order passed by this Court and obtained interim order, it is not open to the petitioner to challenge the non approval of the petitioner on the ground that the requirement of typing skill has been incorporated after the appointment of the petitioner. It is pertinent to note that even otherwise the question that the candidate should possess typing proficiency as one of the eligibility criteria for appointment is incorporated after appointment of petitioner, therefore, requirement of typing skill is not applicable to the petitioner as it would apply prospectively does not arise in the present petition inasmuch as the appointment of the petitioner is illegal and de hors

the Rules.

35. It has also been urged by learned counsel for the petitioner that since the petitioner has been continuously working for the last 22 years, therefore, his case may be considered sympathetically and direction be issued to the competent authority to consider the approval to the appointment of the petitioner.

36. This Court may note that in this case, the petitioner's appointment is dehors the Rules, and further the petitioner is the relative of the Principal of the College which fact has not been denied by the petitioner, therefore, the petitioner could not have been appointed. Consequently, the appointment of the petitioner is void and in such view of the fact, no sympathy can be given to the petitioner because of the fact that he has been working for the last 22 years. In fact the petitioner has sufficiently enjoyed for the last 22 years despite the fact that his appointment was void, therefore, the said contention of learned counsel for the petitioner is also rejected.

37. For the reasons given above, the writ petition lacks merit and is accordingly ***dismissed*** without any order as to costs.

Order Date :- 7.11.2023
R.S. Tiwari