

Court No. - 18

Case :- WRIT - A No. - 1414 of 2023

Petitioner :- Anand Kumar Mishra

Respondent :- State Of U.P. Thru. Prin. Secy. Deptt. Medical Education Lko. 3 Others

Counsel for Petitioner :- Srideep Chatterjee, Abhishek Singh

Counsel for Respondent :- C.S.C., Shubham Tripathi

Hon'ble Manish Mathur, J.

1. Heard Mr. Srideep Chatterjee, learned counsel for petitioner, learned State Counsel for opposite party no.1 and Mr. Shubham Tripathi, learned counsel for opposite parties 2 to 4.
2. Petition has been filed challenging order dated 2nd December, 2022 whereby petitioner working on the post of Head Assistant in the University has been removed from service on the ground of having obtained compassionate appointment with material concealment of fact pertaining to his mother already being in employment with the University.
3. It has been submitted that petitioner's father Ram Dayal Mishra passed away on 30th November 2003 while in service on the post of Guard with opposite party-King George's Medical University. It is submitted that in pursuance thereof, petitioner's mother made an Application for appointment of petitioner on compassionate basis on 16th December, 2003 with petitioner reiterating the same in his Application dated 19th December, 2003. In pursuance thereof, petitioner was appointed on the post of Junior Clerk on compassionate basis on 21st April 2004 and was confirmed on the same on 27th July, 2005 whereafter he was promoted on the post of Senior Clerk on 31st May, 2006 and was also subsequently promoted on the post of Senior Assistant on 1st September, 2010 whereafter due to cadre

restructuring, he was absorbed on the post of Head Assistant vide order dated 2nd January 2015 with effect from 22nd December 2011. On 4th July, 2018, a complaint was filed by a local lawyer before the Chancellor as well as the State Government that petitioner had obtained compassionate appointment dehors the rules whereafter the State Government vide letter dated 20th, July 2018 wrote a letter to Registrar of the University to enquire into the same.

4. In pursuance thereof, disciplinary proceedings were initiated against petitioner by issuance of charge sheet dated 22nd, February 2019 in which it was specifically alleged that petitioner had obtained compassionate appointment dehors the provisions of Rule 5 of U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 [hereinafter referred to as the Rules of 1974] and as evidence, the Rules of 1974 as well as Applications dated 16th December, 2003 and 19th December, 2003 were indicated. Upon conclusion of enquiry, the enquiry officer submitted enquiry report dated 5th December, 2019 exonerating petitioner on the ground that charges against him were not proved. The aforesaid report was thereafter produced before the Vice Chancellor of the University who vide noting dated 14th January, 2020 approved the aforesaid enquiry report.

5. It appears that subsequently on 27th April, 2020, the complainant again made a complaint to State Government whereafter directions were issued to re-submit a point-wise report. On 2nd June, 2020, Government Order was issued raising serious objections to findings of the Enquiry Officer exonerating petitioner. The State Government disagreed with the entire exercise and directed the Disciplinary Authority to take a decision with regard to petitioner's appointment as per the Rules of 1974. Aforesaid Government Order dated 2nd

June,2020, was thereafter challenged by petitioner in WRIT - A No. - 9049 of 2020 which was disposed of vide judgment and order dated 10th May, 2022 holding that the disciplinary authority of petitioner being Registrar of the University should have taken a call on the enquiry report instead of Vice Chancellor who has made the noting on 14th, January 2020. This Court held that the aforesaid noting is a cryptic one which did not disclose any application of mind. The judgment also noticed that although the disciplinary authority is not bound to accept the enquiry report but is required to give reasons for it in writing in case he differs from the same. In view thereof, instead of quashing Government Order dated 2nd June,2020, this Court provided that the competent authority would take appropriate decision in light of the Rules applicable and law on the subject. The Government Order was directed to be treated only as a communication to the University about its concern. The disciplinary authority was also directed to issue a fresh show cause notice to petitioner requiring him to submit his response to same whereafter the disciplinary authority was required to take a final decision in the matter independently ignoring noting of Vice Chancellor dated 14th January, 2020 and Government Order dated 2nd June, 2020.

6. Judgment and order dated 10th May, 2022 as well as the show cause notice were challenged by petitioner in Special Appeal no.239 of 2022 which is still pending consideration without any interim order. However due to the fact that the judgment and order dated 10th May, 2022 has subsequently been acted upon and fresh orders in pursuance thereof have been passed, therefore such special appeal has been rendered virtually infructuous and therefore this Court is proceeding to adjudicate the present dispute on its own merit.

7. In pursuance of judgment and order dated 10th May, 2022, a

fresh show cause notice was issued to petitioner on 13th May, 2022 whereafter petitioner's services were terminated vide order dated 6th June, 2022 which was challenged in Writ A No. 4805 of 2022. The said petition was allowed by means of judgment and order dated 4th August, 2022 on limited ground of violation of principles of natural justice. The impugned order dated 6th June, 2022 was set aside granting liberty to the authorities to pass fresh order in accordance with law and in terms of paragraph 38 of the judgment and order dated 10th May, 2022.

8. In pursuance thereof, petitioner submitted his reply to the show cause notice on 8th November, 2022 in which a specific ground was taken that the show cause notice dated 13th May, 2022 has placed reliance on a document not mentioned in the charge sheet dated 22nd February, 2019 and therefore a prayer was made for oral inquiry with regard to the aforesaid additional document. Vide letter dated 16th November, 2022, petitioner preferred a representation requesting a copy of the additional document indicated in the show cause notice being the proforma allegedly submitted by petitioner for compassionate appointment.

9. However thereafter the impugned order terminating services of petitioner has been passed.

10. Learned counsel for petitioner has raised two fold submission challenging the proceedings as well as impugned order. It has firstly has been contended that the inquiry proceedings as well as the punishment order are vitiated on account of the fact that they placed reliance on a document which was never a part of the inquiry proceedings and therefore it was incumbent upon opposite parties to have conducted the inquiry afresh permitting oral inquiry before placing reliance on such additional document. It is submitted that such a procedure

having not been followed, vitiates the entire process.

11. It is submitted that although it is evident that the alleged document being the application form in prescribed format filled by petitioner has not been indicated in the charge sheet but was subsequently supplied to petitioner at the time of inquiry proceedings and was specifically denied by him. With regard to such document, the inquiry report has clearly indicated that there are no signatures of petitioner on the said document which was a compulsory requirement. It is also a relevant fact that the alleged witness in the aforesaid document Nisar Ahmad was examined by the inquiry officer and had denied his signatures on the said form. The inquiry officer had thereafter discarded the said document for any evidentiary value and had exonerated the petitioner from charge levelled against him.

12. It is also contended that the impugned order has thereafter placed specific reliance on the aforesaid document without advertng to any reasons for disagreeing with the inquiry report regarding admissibility of the said document in evidence particularly in view of denial by not only the petitioner but also by the alleged witness of the said document.

13. It has secondly been submitted that even otherwise, the petitioner having been appointed by the competent authority in terms of extant rules, the lacuna in his appointment can merely be indicated as irregular and not illegal and therefore it can not be said that petitioner's services were void ab initio. It is therefore submitted that petitioner now having rendered almost two decades of service without any complaint and also having been promoted twice, such irregularity stood deemed regularized.

14. Learned counsel for petitioner has placed reliance on judgments rendered by Hon'ble Supreme Court in the cases of

State of M.P. and others versus Lalit Kumar Verma, A.I.R. 2007 Supreme Court 528; Union of India and others versus K.P. Tiwari, 2002 A.I.R. SCW 2684 and M. Kendra Devi versus Government of Tamil Nadu and others, A.I.R Online 2022 SC 300.

15. Learned counsel appearing for opposite party-university has refuted submissions advanced by learned counsel for petitioner with submission that the provisions of The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 are applicable in the university in terms of which petitioner has been appointed. He has specifically adverted to Rule 6 of the aforesaid Rules of 1974 to submit that it was incumbent upon the petitioner to have revealed the fact that his mother was already employed with the university at the time when he made application for compassionate appointment. He has submitted that such a fact having not been disclosed, petitioner's appointment was in violation of Rule 6 of the Rules of 1974 and also on the ground of suppression and concealment of material fact. It is therefore submitted that petitioner's appointment is not merely irregular but illegal and therefore void ab initio.

16. It has also been submitted that even if the inquiry proceedings may be assumed not to be in accordance with law, though not admitted, remitting the matter afresh for further inquiry would be an empty formality in view of admitted fact that petitioner never disclosed the fact of his mother being in employment with the university and therefore due to concealment of this relevant fact required to be provided by petitioner under Rule 6 of Rules of 1974, there is no occasion to interfere with the order impugned. It is also submitted that fraud vitiates every solemn act and since service law has no concept of adverse possession, the long services rendered by petitioner

can not come under provision of extenuating circumstances since there is no general or vested right to compassionate appointment which even otherwise is an alternate mode apart from regular recruitment.

17. Learned counsel for opposite party has placed reliance on the following judgments:-

Shesh Mani Shukla versus Director Inspector of Schools, Deoria and others, (2009) 15 SCC 436; R. Vishwanatha Pillai versus State of Kerala and others, (2004) 2 SCC 105; M.S. Patil versus Gulbarga University and others, (2010) 10 SCC 63; Ram Chandra Singh versus Savitri Devi and others (2003) 8 SCC 319, Madarsa Arabia Ahle Sunnat Madinatul Uloom and another versus State of U.P. and others, 2019 SCC OnLine All 5058 and Government of Andhra Pradesh and others versus K. Brahmanandam and others, (2008) 5 Supreme Court Cases 241

18. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, the following questions arise for determination:-

(A) Whether the inquiry proceedings were vitiated on account of placing reliance on a document not mentioned in the charge sheet, if so, its consequences?

(B) Whether petitioner's appointment was irregular or void ab initio?

19. The answer to the following questions is as follows:-

(A) With regard to aforesaid question, it is evident that the charge sheet has been issued with regard to only one charge that petitioner concealed the aspect of his mother already in service with the university at the time when application for compassionate appointment was made and therefore petitioner has concealed material fact. The charge sheet has placed

reliance on the Rules of 1974 as well as applications of petitioner and his mother dated 16th December, 2003 and 19th December, 2003. There is no other document mentioned in the charge sheet.

20. It is on account of directions issued by this Court on 10th May, 2022 that a fresh show cause notice was issued to the petitioner on 13th May, 2022. A perusal of the judgment and order dated 10th May, 2022 indicates that the basis for any further action against petitioner has to be an independent and objective decision on the part of Registrar being the competent authority and can not be on the basis of the government order dated 2nd June, 2020. Therefore this Court directed the authority concerned to issue a fresh show cause notice to petitioner in the light of relevant rules which may be applicable.

21. A perusal of the consequent show cause notice reveals that apart from the applications dated 16th December, 2003 and 19th December, 2003, petitioner has been required to explain concealment of fact in the application submitted by him under the prescribed proforma.

22. Consequent upon petitioner's reply, the impugned order dated 2nd December, 2022 has placed reliance on the inquiry report as well as the fact that petitioner did not reveal his mother's continuing services with the university in the application preferred by him in the prescribed format. Apart from the aforesaid document, the earlier application by petitioner and his mother has also been taken into account. The aspect of concealment of material fact of petitioner's mother being in continuance employment with the university therefore forms the basis of the impugned order.

23. Clearly the impugned order has been passed relying not only on the earlier representations dated 16th December, 2003

and 19th December, 2003 but also on the alleged application on the prescribed format submitted by petitioner. It is therefore evident that one of the documents which forms the basis of the impugned order, being the prescribed format, is a document relied upon for first time after conclusion of the inquiry proceedings. Such a document has not been mentioned in the charge sheet. To that extent error in the inquiry proceedings is evident.

24. Although ordinarily in case of a procedural lacuna in inquiry proceedings, the dispute is referred to the authority concerned for decision afresh, in the present case, it is admitted by the petitioner that no information was ever supplied by him to the authorities regarding his mother's continuous services with the university itself. As is evident from inquiry report where petitioner's admission that no such information was ever sought from him has been indicated. Such admission of the petitioner is also evident from a perusal of paragraphs 9 to 12 of the reply submitted by petitioner dated 11th November, 2022 to the show cause notice as well as in paragraph 65 of the writ petition.

25. It is thus evident that petitioner has clearly admitted the fact that his mother was in active employment of the university at the time when application for compassionate appointment was made but such a fact was not disclosed by him.

26. In such circumstances, in the considered opinion of this Court, remitting the matter for consideration afresh would clearly be an empty formality in the light of admission made by petitioner. Therefore this Court refrains from remitting the matter to the authority concerned for decision afresh.

(B) This question pertains to the fact whether petitioner's employment on compassionate basis can be termed to be illegal,

void ab initio or merely irregular?

27. It is the case of opposite parties that in terms of Rule 6 of the Rules 1974, it was incumbent upon petitioner to have disclosed information regarding his mother's employment with the university at the time of making application for compassionate appointment. It is also submitted that provisions of Rule 6 of the aforesaid rule being mandatory in nature, the violation of which would render petitioner's appointment illegal.

28. A perusal of Rule 6 of the Rules of 1974 clearly indicates that for the purposes of compassionate appointment, the dependent member of family who comes within purview of the aforesaid rules is required to make an application indicating the factors stated in the aforesaid rule which clearly also adverts to information being supplied pertaining to financial condition of the family.

29. It is thus evident that for the purposes of fulfillment of conditions of Rule 6 of the Rules of 1974, it was incumbent upon petitioner to have supplied information regarding the financial condition of his family and for the said purpose, he was also required to inform the university regarding service of his mother. To that extent, learned counsel for opposite parties is right in his submission.

30. However an aspect also requiring consideration is that opposite parties also could have required petitioner to supply such information once the application form was submitted and such a lacuna was noticed. It is evident from the appointment letter issued to petitioner on 21st April, 2004 that there was no consideration of the financial condition of petitioner's family at all. The appointment order in fact merely refers to the Rules of 1974 and indicates that petitioner is being appointed in terms

thereof. In such circumstances, it would be relevant to examine the effect of information not supplied by petitioner regarding his mother's services with the university. In the considered opinion of this Court, suppression of such a fact would have been material in case petitioner's appointment was after taking into consideration the financial conditions of the family of deceased. Since the financial condition of the family has not been taken into account by the appointing officer, such suppression of fact even though required in terms of Rule 6 of Rules of 1974 can not be termed to be material suppression of fact which may result in petitioner's appointment being illegal.

31. On the aforesaid aspect, Hon'ble Supreme Court in the case of Harjas Rai Makhija versus Pushparani Jain, (2017) 2 SCC 797 has held as follows:-

" 20. We agree that when there is an allegation of fraud by non-disclosure of necessary and relevant facts or concealment of material facts, it must be inquired into. It is only after evidence is led coupled with intent to deceive that a conclusion of fraud could be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every case where relevant facts are not disclosed, the decree obtained would be fraudulent, is stretching the principle to a vanishing point."

32. In view of aforesaid judgment as well as in the facts and circumstances of the case, particularly the twin reasons that firstly, petitioner's appointment is not based on financial conditions of the family and secondly that the university itself was aware of petitioner's mother being in its active employment as indicated in petitioner's reply is a factor due to which it can not be said that petitioner's appointment itself was illegal. Once

his mother was in service with the university, it can be safely concluded that the university was clearly aware of her employment with them, particularly since post retiral benefits of deceased were paid to her and therefore the university impliedly can be said to have taken this factor into account while appointing petitioner on compassionate basis.

33. The aspect of distinction between illegal and irregular appointment has been clearly enunciated by Hon'ble Supreme Court in the case of State of Madhya Pradesh and others versus Lalit Kumar Verma, A.I.R. 2007 Supreme Court 528 in the following manner:

"13. The question which, thus, arises for consideration, would be: Is there any distinction between "irregular appointment" and "illegal appointment"? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is "State" within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance with the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to."

34. Upon applicability of aforesaid judgment in the present facts and circumstances, it is evident that petitioner's appointment is in consonance with constitutional scheme and the recruitment rules framed by the university with which substantial compliance has been made. In view thereof, it is held that petitioner's appointment would be irregular and not void ab initio, therefore not illegal.

35. It is also a relevant fact that petitioner has subsequent to his

appointment rendered services with the university for two decades and has also been promoted thrice thereafter, firstly on the post of Senior Clear on 31st May, 2006, Senior Assistant on 1st September, 2010 and thereafter being absorbed on the post of Head Assistant with effect from 2nd October, 2015 with effect from 22nd December, 2011.

36. The aspect of long civil services rendered even as a consequence of appointment which can be termed to be irregular, Hon'ble Supreme Court has declined to quash the same in the case of M. Kendra Devi versus Government of Tamil Nadu and others, A.I.R. Online 2022, SC 300 in the following terms:-

" After taking note of the rival submissions and the view which we have expressed, although we deprecate the practice of State Government in making such compassionate appointments under Group 'B' post after the judgment of this Court in Nagpal's case (supra), still this Court refrain to disturb seniority list which has been assigned to the respective compassionate appointees, vis#vis, direct recruits Assistant Engineers to whom consequential seniority has been assigned undisputedly under Rule 35(aa) of Rules, 1955 which may not call for our interference, at this belated stage, after each of them is in service for more than two decades and indeed right is being conferred to each of them and an individual although a beneficiary but was not at fault at any given point of time either at the time of entry into service or thereafter."

37. Similarly in the case of Union of India versus K.P. Tiwari, AIR 2002 SCW 2684 has held as follows:

"4. It is unnecessary in this case to examine either questions of law or fact arising in the matter. Suffice to say that the respondent has been appointed now and has been in service for

more than five years. We do not think, it would be appropriate to disturb that state of affairs by making any other order resulting in uprooting the respondent from his livelihood."

38. The aforesaid aspect has also been dealt with by Hon'ble Supreme Court in the case of Mohd. Jamil Ahmad versus State of Bihar and others, (2016) 12 SCC 342 in following manner:-

"12. In the light of aforementioned reasons, which rightly persuaded the State to grant compassionate appointment to the appellant, we do not find any justification on the part of the State to dig out the appellant's case after 15 years of his appointment and terminate his services on the ground that as per the State policy, the appellant did not fall within the definition of the expression "dependant of deceased" to claim compassionate appointment.

13. The fact that the appellant was the younger brother of the deceased was within the knowledge of the State. Similarly, the State was aware that the brother does not fall within the definition of "dependant" at the relevant time and still the State authorities obtained the undertaking from the appellant that he would maintain the family of the deceased once given the appointment.

14. In our considered view, the aforesaid facts would clearly show that it was a conscious decision taken by the State for giving an appointment to the appellant for the benefit of the family members of the deceased who were facing financial hardship due to sudden demise of their breadearner. The appellant being the only close relative of the deceased could be given the appointment in the circumstances prevailing in the family. In our view, it was a right decision taken by the State as a welfare State to help the family of the deceased at the time of need of the family.

15. In these circumstances, we are of the view that there was no justification on the part of the State to wake up after the lapse of 15 years and terminate the services of the appellant on such ground. In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State."

39. In the aforesaid case, however Supreme Court has made a distinction where the person appointed had committed some kind of fraud or manipulation or suppression of material fact for securing appointment. As has already been indicated herein above that the suppression of fact alleged against petitioner can not be said to be material since it did not form the basis of appointment of petitioner and therefore the aforesaid judgement would be applicable in the present facts.

40. So far as judgments cited by learned counsel for opposite parties are concerned, Supreme Court in the case of Shesh Mani Shukla (supra) has held that where appointment is in

contravention of statutory provision, it would be illegal and thus void ab initio, the said aspect has clearly been considered by Supreme Court itself in Lalit Kumar Verma (supra) therefore there is a distinction between an appointment which is completely in contravention of statutory provision and where the statutory provision has been substantially complied with and only irregularity is noticed. The aforesaid judgment therefore is clearly distinguishable in the facts and circumstances of the case.

41. Learned counsel has also placed reliance on judgments rendered in the case of R. Viswantha Pillai (supra). However the said judgment is clearly inapplicable since it pertains to appointment being obtained on the basis of fraud claiming the appointee having belonged to a scheduled caste community where it was found that he did not belong to the aforesaid category. The aforesaid case where appointment has been obtained on the basis of submission of a false caste certificate is clearly distinguishable and inapplicable in the present case.

42. In the case of M.S. Patil (supra) the petitioner therein had been continuing in service only on account of interim orders passed by the court which was held not to confer any substantive right on the person. Evidently the said judgment does not apply where the petitioner has not continued in service on the basis of any interim order passed by this Court.

43. The aspect of fraud vitiating any solemn act as enunciated in the case of Ram Chandra Singh (supra) would apply in cases where fraud is perpetuated but in the considered opinion of this Court, would not be applicable in the present case where there is no allegation of any fraud on the part of petitioner with the only allegation being of suppression of fact.

44. Learned counsel has also placed reliance on judgment

rendered in the case of Madarsa Arabia (supra) to submit that there is no general or vested right to compassionate appointment. There obviously can not be any exception to the aforesaid law but would be inapplicable in the present case where petitioner has already been granted compassionate appointment and continued in terms thereof for almost 20 years.

45. Learned counsel for opposite parties however has placed reliance on judgment rendered in the case of Government of Andhra Pradesh and others (supra) in which paragraph 16 is as follows:-

" 16. Appointments made in violation of the mandatory provisions of a statute would be illegal and and, thus, void. Illegality cannot be ratified. Illegality cannot be regularised, only an irregularity can be."

46. The aforesaid judgment also is a proposition that irregularity can be regularized although illegality can not be. Since this Court has already held petitioner's appointment to be an irregularity and not an illegality, the aforesaid judgment would definitely be applicable whereunder the irregularity in petitioner's initial appointment stood regularized by his subsequent continuation in service for almost two decades.

47. In view of aforesaid, this question is answered to the effect that petitioner's appointment being merely irregular initially, stood regularized by his consequent services rendered for almost two decades and subsequent promotions as well.

48. In view of aforesaid discussion, this Court finds in favour of petitioner due to which the impugned order of termination dated 2nd December, 2022 is hereby quashed by issuance of writ in the nature of Certiorari. A further writ in the nature of Mandamus is issued commanding the opposite parties to reinstate petitioner on the post of Head Assistant of the

university with all consequential benefits.

49. Resultantly the petition succeeds and is allowed. Parties to bear their own cost.

Order Date :- 15.7.2024

prabhat