

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Appeal No. 222 of 2021**

Romanch Ram Yadva, S/o Vidyadhar Ram Yadav, aged about 55 years,
R/o Village Jaikari, Tahsil Kunkuri, District Jashpur Nagar (C.G.)

---- Appellant

Versus

1. State of Chhattisgarh, Through Secretary, School Education Department, Mahanadi Bhawan, Atal Nagar, Nava Raipur, District Raipur (C.G.)
2. District Education Officer, Jashpur, District Jashpur (C.G.)
3. Head Master, Durga Krishi Higher Secondary School, Jaikari, Tahsil Kunkuri, District Jashpur (C.G.)
4. President, Lakshmi Kumari Seva Samiti, Jashpur Nagar, District Jashpur Nagar (C.G.)

---- Respondents

(Cause-title taken from Case Information System)

For Appellant	:	Ms. Meena Shastri, Advocate.
For Respondents No. 1 & 2	:	Mr. Sudeep Agrawal, Deputy Advocate General.
For Respondents No. 3 & 4	:	Mr. A.K. Prasad, Advocate.
Date of hearing	:	10.11.2021
Date of Judgment	:	10.12.2021

Hon'ble Shri Arup Kumar Goswami, Chief Justice

Hon'ble Shri Justice Goutam Bhaduri, Judge

CAV Judgment

Per Arup Kumar Goswami, Chief Justice

This writ appeal is preferred against the order dated 07.07.2021 passed by the learned Single Judge in Writ Petition (S) No. 7080 of 2007, whereby, while not acceding to the prayer made by the petitioner for reinstatement in

the post of Assistant Teacher, direction was issued to the respondents No. 2 to 4 to consider payment of salary for the period from 01.01.1996 to July, 2001 if a representation is made within 30 days, by disposing such representation by a speaking and reasoned order and specifying as to whether the petitioner had worked in the school during that period or not.

2. The case of the appellant, as set out in the writ petition, in brief, is that Durga Krishi Higher Secondary School, Jaikari is an establishment run by a registered society, named and styled as 'Laxmi Kumari Seva Samiti, Jashpur Nagar' and that the said school is a government-aided school. On his application, as he had the requisite qualification for the post of Teacher, he was appointed vide order dated 01.01.1996 and that the respondent No. 2, District Education Officer, Jashpur had regularized his service w.e.f. 06.06.1996 vide order dated 04.09.1999. However, while he continued to work up to 02.07.2001, on and from 03.07.2001, he was prevented from signing the attendance register and his name was also not mentioned in that register and resultantly, he was not given any teaching assignment. Though repeated representations had been made, the same failed to evoke any response and as such, recourse was taken by filing the writ petition praying for a direction to respondents to re-instate him and to provide salary from 01.01.1996 till his reinstatement with bank rate interest.

3. The respondent No. 3, *i.e.*, the Head Master of the school filed a reply-affidavit stating that the writ petition was liable to be dismissed on the ground of inordinate delay and laches in filing the writ petition. It is stated that the appellant was appointed as an Assistant Teacher in anticipation of grant of a sanctioned post of Science Teacher, which, however, was not sanctioned and that the appellant was, thus, appointed to a non-existent post. There were only three sanctioned posts of Science / Mathematics Teacher which were all

filled up. It is also pleaded that neither any advertisement was issued nor any procedure was followed for appointment of the appellant. When the post was not sanctioned, the appellant was asked not to attend school. It is further stated that the regularization order of the appellant recited that the order of regularization would stand cancelled if the appointment was on a non-sanctioned post or if the 100-point roster of the State Government was not followed. Both the conditions having not been fulfilled, it is stated that the regularization order is of no consequence. It is stated that salary of the appellant was also not disbursed by the District Education Officer, as a result of which, no salary could be paid.

4. A reply-affidavit was also filed by the respondent No. 4, i.e., President of the Society, which is, more or less in the same lines as that of the respondent No. 3. It is further stated that the school is a Middle School having classes 6 to 8. There were only 60 students and three sanctioned posts were filled up and as such, the appellant could not be continued in service due to non-sanction of an additional post by the State Government.

5. Without referring to which reply-affidavit, the appellant filed a re-joinder affidavit, wherein it is stated that appellant's appointment was made after death of one Sahdeo Singh, who died on 22.12.1992. It is asserted that appointment of the petitioner was made to a vacant post of additional teacher and a document, Annexure P/14, is annexed to that effect.

6. The learned Single Judge, by the impugned order, held that filing of representation could not explain the delay in filing the writ petition. It was held that the appellant was appointed to a non-sanctioned post and no advertisement was issued before making such appointment. It is also observed that all the three sanctioned posts were filled up and therefore, the appellant cannot be allowed to continue in the absence of a sanctioned post and

therefore, no order of re-instatement can be passed.

7. Relying on Annexure P/14, which is annexed with the rejoinder-affidavit filed by the appellant, Ms. Meena Shastri, learned counsel for the appellant, submits that the aforesaid document establishes the fact that the appellant was appointed to a vacant post and that the appellant was appointed through a recruitment process, and therefore, the finding recorded by the learned Single Judge that the appellant was appointed to a non-sanctioned post and without issuing any advertisement, is not sustainable in law. Placing reliance on Rule 3 of Chhattisgarh Ashaskiya Sikshan Sanstha (Adhyapakon Tatha Anya Karmcharyon Ko Padchute Karne / Seva se Hatane Sambandhi Prakriya) Niyam, 1983, for short, Rules, Ms. Shastri contends that no one can be terminated or removed without initiating any proceedings of enquiry and therefore, non-holding of enquiry being an admitted fact, the respondents are liable to be directed to reinstate the appellant. The appellant having been regularized by the order dated 04.09.1999, the action of the respondents in not permitting the appellant to discharge his duties from 03.07.2021 is, *ex facie*, arbitrary and illegal, she submits.

8. It is also submitted by her that all the teachers in the school had been appointed without publishing any advertisement and in such circumstance, when the appellant was singled out, the learned Single Judge had passed an order dated 09.03.2020 directing the respondents No. 3 and 4 to file an additional affidavit and to produce relevant original records pertaining to occurrence of vacancy during the pendency of the writ petition. However, such interim direction was not complied with and the aforesaid aspect of the matter has also not been considered at the time of disposal of the writ petition. It is submitted that when Annexure P/14 has not been controverted, contents thereof must be deemed to have been admitted by the respondents.

9. Mr. A.K. Prasad, learned counsel appearing for respondents No. 3 and 4 reiterates the stand taken in the reply-affidavits filed and supports the order of the learned Single Judge.
10. We have considered the submissions of the learned counsel for the parties and have perused the materials on record.
11. During the course of the writ proceedings before the learned Single Judge, as submitted by Ms. Shastri, on 09.03.2020 an order was passed directing the respondents No. 3 and 4 to file an additional affidavit and to produce the relevant original records pertaining to occurrence of vacancy during the pendency of the writ petition and the steps taken for filling up of the vacancies.
12. Perusal of the records of the writ petition goes to show that an additional affidavit was filed on 17.06.2021 by the Head Master of the school pursuant to the order of the Court dated 09.03.2020, stating, amongst others, that during the pendency of the writ petition, two posts of Shiksha Karmi Grade-III became vacant due to superannuation of one teacher and promotion of another and that after getting permission and approval from District Education Officer, Jashpur and after issuance of advertisement and calling for applications from the interested candidates, interviews were conducted and on the basis of selection process, one teacher, namely, Ku. Pushpa Kujur was appointed as Siksha Karmi Grade-III (Mathematics subject) and such appointment was approved by the District Education Officer, Jashpur on 07.02.2011. It is also stated therein that one teacher is working against three sanctioned posts and two posts are vacant. It appears that the copy of the said affidavit was received on behalf of the learned counsel for the appellant on 17.06.2021. However, fact of filing of the aforesaid additional affidavit was not brought to the notice of either the learned Single Judge or this Court, by the learned counsel for the parties and it

is only when entire record was perused by this Court, filing of such affidavit has come to light. However, records relating to appointment of Ku. Pushpa Kujur was not produced before the learned Single Judge.

13. Annexure P/14 of the rejoinder-affidavit, on which much reliance is placed by Ms. Shastri to contend that the appellant was appointed to a sanctioned post by following due recruitment process is an un-dated chart, wherein, it is indicated that appointment was made in terms of recruitment process. However, submission before this Court was also made by Ms. Shastri that all appointments of teachers were made without any advertisement and the appellant was singled out.

14. A recruitment process starts with inviting applications from interested candidates. In the writ petition, there is no averment that there was any advertisement pursuant to which the appellant had applied. The pleas taken by the appellant is contradictory in the sense that by asserting on the basis of Annexure P/14, the appellant seeks to contend that his appointment was made by following recruitment process known in law and at the same time, it is contended that no appointment including that of the appellant had taken place pursuant to issuance of any advertisement. Therefore, we are not inclined to place any reliance on Annexure P/14, more so, because in the rejoinder-affidavit also the appellant had not contended that the stand taken by the respondents No. 3 and 4 that there was no advertisement or selection process is not correct.

15. The stand taken in the affidavits of the respondents No. 3 and 4 is that there are three sanctioned posts of Assistant Teachers which were all filled up at the time when the appellant was appointed.

16. A perusal of the appointment letter goes to show that the appellant was

appointed purely on a temporary basis. It was also stated in the affidavits of respondents No. 3 and 4 that the appellant was appointed in a non-sanctioned post in anticipation of getting approval of a sanctioned post, but when such sanction was not granted, the appellant was restrained from signing the attendance register and in effect, from taking classes. Reliance placed by Ms. Shastri on Rule 3 of the Rules is misconceived as Rule 3 comes into play only when a penalty is sought to be imposed for misconduct, which is not the case here.

17. The materials on record go to show that the appellant was appointed to a non-sanctioned post or in other words, to a non-existent post. Such appointment was also made without following the due process by issuance of advertisement, *etc.* The order of regularization dated 04.09.1999 was also explicit that the order of regularization will not hold good in case the appointment was made to a non-sanctioned post.

18. In the case of *Ashwani Kumar & Others v. State of Bihar & Others*, reported in *(1997) 2 SCC 1*, the Hon'ble Supreme Court had stated that it is axiomatic that unless there is a vacancy, there is no question of filling it up. The question of confirmation or regularization of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on *ad hoc* basis against an available vacancy which is already sanctioned. If the initial entry itself is unauthorized and is not against any sanctioned vacancy, question of regularizing the incumbent on such a non-existing vacancy will never survive for consideration and if any purported regularization or confirmation is given, it would be an exercise in futility.

19. In *State of Orissa & Another v. Mamta Mohanty*, reported in *(2011) 3 SCC 436*, the Hon'ble Supreme Court stated that once the order of appointment itself is bad at the time of initial appointment, it cannot be

sanctified at a later stage. Therefore, in the facts and circumstances of the case, the order of regularization dated 04.09.1999 will not confer any right upon the appellant to continue in service.

20. In view of the above discussion, we are in accord with the view taken by the learned Single Judge that the petitioner is not entitled to be reinstated in service.

21. However, we are not in agreement with the direction of the learned Single Judge to the respondent Nos. 2 to 4 for consideration of payment of salary for the period 01.01.1996 to July 2001 in the event of petitioner making a request to that effect. The respondents had not raised any plea that the petitioner did not render any service from 01.01.1996 to 02.07.2001. Rather, it is more or less an admitted position that the petitioner was prevented from signing the Attendance Register and taking classes from 03.07.2001. Therefore, to deny the petitioner salary for the aforesaid period will be wholly inequitable. Accordingly, we direct all the respondents to ensure that the petitioner is paid salary for the period from 01.01.1996 to 02.07.2001 within a period of 4 (four) month from today.

22. The writ petition is, accordingly, partly allowed by modifying the order of the learned Single Judge as indicated above.

23. No cost.

Sd/-
(Arup Kumar Goswami)
Chief Justice

Sd/-
(Goutam Bhaduri)
Judge