

SUPREME COURT OF INDIA

Sanjay Kumar Upadhyay

Vs.

Palak Dhari Yadav & Ors.

C.A.No.8068 of 2009

(Jasti Chelameswar and Abhay Manohar Sapre,J.)

03.02.2016

JUDGMENT

Abhay Manohar Sapre, J.

1. These appeals are filed against the common judgment and order dated 05.10.2006 passed by the High Court of Judicature at Allahabad in Special Appeal Nos. 728 and 729 of 1999 whereby the Division Bench of the High Court allowed both the appeals filed by respondent No.1 herein and set aside the order dated 30.07.1999 passed by the Single Judge of the High Court in C.M.W.P. No. 19091 of 1990 filed by the appellant herein and C.M.W.P. No. 6681 of 1990 filed by respondent No. 1 herein.

2. In order to appreciate the issue involved in this appeal, which lies in a narrow compass, it is necessary to set out the relevant facts in brief infra.

3. D.A.V. Kanya Uchhatar Madhyamic Vidyalaya, Mau, U.P. (hereinafter referred to as “the institution”) is an institution recognized by the State Government and receives grant-in-aid. The Institution is governed by the U.P. Intermediate Education Act, 1921 (in short “the Act”), other allied laws, Rules and Regulations framed under the Act.

4. On 20/26.06.1989, the management of the Institution gave an advertisement in VANDEVI weekly paper published from Mau, for the post of a Clerk mentioning the last date for submitting the application as 10.07.1989 and date of interview as 12.07.1989.

5. Sanjay Kumar Upadhyay-the appellant in C.A.No. 8068 of 2009 applied for the said post of Clerk. He appeared for the interview on the date and time fixed by the Management of the Institution. He was selected for the abovesaid post and was accordingly given appointment letter on 18.08.1989. Pursuant to the appointment letter, he joined the service on 01.09.1989. The said appointment was approved by the Regional Inspector of Girls Schools, Region Gorakhpur vide letter dated 07.03.1990.

6. Palak Dhari Yadav-respondent No.1, who was class IV employee of the Institution, challenged the order of approval dated 07.03.1990 by which the appellant was given appointment and filed C.M.W.P. No. 6681 of 1990 before the High Court. The challenge was on ground that as per Regulation 2(2) of Chapter-III of Regulation framed under the Act, when only one post of clerk falls vacant in the Institution then it should be filled up by way of promotion and not by direct recruitment by inviting applications from public as was done in this case.

7. The appellant also filed C.M.W.P. No. 19091 of 1990 before the High Court on the ground that despite appointment given to him and approval accorded, he was not being paid his monthly salary.

8. The Single Judge of the High Court by a common order dated 30.07.1999 allowed C.M.W.P. No. 19091 of 1990 filed by the appellant and dismissed C.M.W.P. No. 6681 of 1990 filed by respondent No.1. It was held that the appointment of the appellant on the single post of clerk by direct recruitment could be made and was thus a valid appointment in law. It was accordingly directed to the Institution that it should make the payment of salary along with its arrears within two months from the date of order to the appellant.

9. Against the order dated 30.07.1999 in C.M.W.P. No. 6681 of 1990, the respondent filed Special Appeal No. 728 of 1999 whereas against the order in C.M.W.P. No. 19091 of 1990 the respondent filed Special Appeal No. 729 of 1999 before the High Court.

10. By impugned judgment dated 05.10.2006, the Division Bench of the High Court allowed both the appeals and directed the Management of the Institute to consider filling up the post of clerk by way of promotion from the eligible Class IV employees of the Institution as per the seniority. This was held by the Division Bench by placing reliance upon a judgment of the High Court in *Jai Bhagwan Singh Vs. District Inspector of Schools & Ors^l*. As a consequence thereof, the appointment of the appellant herein made by direct recruitment on the post in question was declared invalid.

11. Challenging the said order, the appellant filed Civil Appeal No. 8068 of 2009 and the Committee of Management, D.A.V. Girls Higher Secondary School, Mau, UP filed C.A. No. 8069 of 2009.

12. On 27.11.2009, this Court granted leave to the appellant. This Court also noted that the respondent (writ petitioner) is not interested in contesting these appeals because despite service on him, he has not appeared in these appeals. This Court, therefore, stayed the operation of impugned order. As a result of the grant of stay, the appellant continued to remain on the post and has been continuously discharging the duties.

13. Shri P.N. Mishra learned Senior Counsel appearing for the appellant - (Shri Sanjay Kumar Upadhya) has urged only one submission. According to him, the first respondent (writ petitioner) retired from the service during pendency of these proceedings and, therefore, he is not now interested in prosecuting his writ petition out of which these appeals arise and

that is perhaps the reason, why he has not come forward to oppose these appeals despite service of notice on him. It is submitted that since the Single Judge dismissed the respondent's writ petition and in consequence held the appointment as legal and proper, the appellant was allowed to continue on the post uninterruptedly. It was urged that even after the impugned decision was rendered declaring the appointment of the appellant as bad in law, this Court by order 27.11.2009 has stayed the operation of the impugned order as a result of which, the appellant continued to work on the post of "Clerk" till date and this is how since last 26 years he has been continuously working and drawing regular salary.

14. Learned counsel, therefore, urged that the appellant has now hardly few years left in service and there being no employee presently available in service who can be promoted to the post which he is holding and hence the appellant may be allowed to continue on the post till his retirement and thereafter the post can be filled up by promotion from the eligible Class-IV employees, if in the meantime, no additional posts are created.

15. Since there is no one appearing for the contesting respondent (writ petitioner) to oppose these appeals, and counter the arguments of the learned counsel for the appellant mentioned above, we find some force in the submission of learned counsel for the appellant.

16. In our considered opinion, it is not necessary to go into the merits of the controversy as to whether the Division Bench was right in holding that the post in question could be filled up only by way of promotion from amongst the in service candidate and it could not be filled up by direct recruit because we feel that this appeal can be disposed of on other grounds as mentioned *infra*.

17. First, no one has appeared on behalf of the respondent (writ petitioner) to oppose these appeals and counter the aforementioned submissions of the appellant's counsel.

18. Second, admittedly the respondent (writ petitioner) has retired from the service and hence his case for promotion on the post in question cannot be now considered.

19. Third, no in-service candidate other than the respondent has come forward saying that his candidature be considered for the post by promoting him, he being eligible for the post.

20. Fourth, the appellant has been continuously working on the post for the last 26 years (approx.) on the basis of selection and then on the basis of order passed by the Single Judge upholding his appointment and lastly, on the basis of stay granted by this court on 27.11.2009.

21. Fifth, if the appellant is allowed to continue till he attains the age of retirement, no prejudice is likely to be caused to anyone because nothing adverse was brought to our notice against him in these proceedings. In addition, he was otherwise found qualified for the post in the selection process, but his appointment was cancelled on technical ground.

22. In the light of foregoing reasons, we are inclined to dispose of these appeals keeping in view the peculiar facts of the case and accordingly direct that the appellant (Mr. Sanjay Kumar Upadhaya) be allowed to continue on the post of Clerk on which he was appointed till the date of his retirement unless otherwise he is rendered himself unable to continue in service prior to the date of his retirement due to any legal reasons. It is further directed that on appellant demitting the office, the post in question be filled up by promoting the suitable in-service candidate as per the rules. If, however, in the meantime, the number of post is increased then the post be filled up as per the norms applicable for filling such posts as per rules.

23. With these directions, the impugned order stands modified to that extent. The appeals stand accordingly disposed of. No cost.

Judgment

¹2006 (4) *All. Law Journal* 438(DB)