

A.F.R.
JUDGMENT RESERVED ON 12.12.2024
JUDGEMENT DELIVERED ON 11.03.2025
Neutral Citation No. - 2025:AHC:34893

Court No. - 7

Case :- WRIT - A No. - 6586 of 2024

Petitioner :- Shafique Ahmad

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Gaurav Gautam, Krishna Kant

Vishwakarma, Rajesh Kumar Singh

Counsel for Respondent :- C.S.C., Pranav Mishra

Hon'ble Prakash Padia, J.

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent Nos.1 & 3 and Sri Pranav Mishra, learned counsel for respondent No.2.

2. With the consent of learned counsel for the parties, the present petition is being decided at the admission stage itself.

3. The petitioner has preferred the present petition with the following prayers:-

(I) issue a writ, order of direction in the nature of certiorri quashing the impugned order dated 28.03.2024 passed by respondent Registrar/Inspector (contained in Annexure No.1 to writ petition);

(II) issue a writ, order of direction in the nature of mandamus directing the respondents to continue to pay month to month salary to petitioner for the post of Assistant Teacher Fauquania Madarsa Jamia Alia Arabia Alianagar, Mau;

(III) issue a writ, order of direction in the nature of mandamus directing the respondents for payment of arrears of difference of salary of the post of Assistant Teacher Tahtania and Assistant Teacher Fauquania alongwith adequate interest;

4. Facts in brief as contained in the writ petition are that the Madarsa Jamia Alia Arabia Alinagar, Mau (hereinafter referred to "Madarsa") is a non-government aided minority Institution imparting education up to Class Fazil (graduation Level). The Madarsa run and managed by a society namely Jamila Alia Arabia, Mau bearing Registration No.645/1982-83 dated 14.09.1982 and the same has been renewed on 14.09.2019 for further period

of five years. The affair of the Madarsa in U.P. including the services of teaching and non-teaching staff are being governed by U.P. Non-Government Arabic and Persian Madarsa Recognition Rules, 1987 which was later on amended in the year 2016.

5. The Assistant Director of Education (Basic) forwarded the list dated 29.11.1990, stating that there is 1 post of Principal, 6 posts of Assistant Teacher Alia (Matric), 1 post of Headmaster Fauquania (Class 6 to 8), 3 posts of Assistant Teacher Fauquania, 1 post of Headmaster Tahtania (Class 1 to 5), 11 posts of Assistant Teacher Tahtania I.e. 22 posts of teaching staff and 5 non teaching staff, total 27 posts were approved and working and getting their salary.

6. In view of increased strength of students, respondent/Committee of Management proceeded with requested of sanctioning more teaching staff. Considering the bonafide need of the institution Director Urdu/Western Language Uttar Pradesh Lucknow vide letter dated 28.9.1995 asked District Basic Education Officer Mau to inquire into the matter and submit report. In compliance of the aforesaid directions, the District Basic Education Officer, Mau inquired the matter through Educational Superintendent Urban Area, Mau, who after proper proceeding/initiatives recommended 7 posts of Assistant Teacher Alia and 14 posts of Assistant Teacher Tahtania in madarsa. District Basic Education Officer, Mau vide letter dated 20.2.1996 sent its recommendation to the Director Urdu/Western Language, U.P. Lucknow for necessary action.

7. Insofar as the present petitioner is concerned, he was working in the Institution in question on the post of Assistant Teacher Tahtania since 1988 and after the posts were sanctioned, he started getting his salary from the State Exchequer on the post of Assistant Teacher Tahtania with effect from 1995. The Deputy Director (Urdu), on behalf of Director (Urdu) Lucknow vide order dated 1.3.1996 directed the Basic Education Officer to do the needful for payment of salary of 13 teachers of Tahtania. In the said list, the name of the petitioner is also included. It is further stated in paragraph 14 of the writ petition that though the petitioner was performing teaching work in

the Madarsa as Assistant Teacher in Tahtania with effect from 1998 but he started getting his salary from the State Exchequer in December, 1995.

8. It so happened one Imtiyaz Ahmad Assistant Teacher Fauquania had retired on 31.3.2021 on attaining the age of superannuation. In order to fill up the aforesaid post, proceedings for promotion were initiated.

9. The petitioner being fully qualified for his promotion on the post of Assistant Teacher, Faukania, the Committee of Management promoted the petitioner on the post of Assistant Teacher Faukania and the petitioner joined his promoted post on 20.06.2021. The papers and documents of promotion on the post of Assistant Teacher Faukania as well as the appointment of Shameem Anwar on the post of Assistant Teacher Tahtania was forwarded by the Manager of the Institution in question before the District Minority Welfare Officer, Mau/respondent No.3 vide letter dated 08.09.2021. The respondent No.3 forwarded the aforesaid papers and documents before the respondent No.2/ Registrar/Inspector, U.P. Madarsa Education Board, Lucknow for financial approval vide letter dated 13.09.2021. The respondent No.2 vide order dated 27.09.2021 granted financial approval in respect of the promotion of the petitioner on the post of Assistant Teacher Faukania and the appointment of Shameem Anwar on the post of Assistant Teacher Tahtania from their date of joining. The relevant portion of the aforesaid order reads as follows:-

"अतः उपरोक्त स०अ० फौकानिया के पद पर की गई पदोन्नति एवं स०अ० तहतानिया के पद पर की गई नियुक्ति को सारिणी में अंकित विवरण के अनुसार उनके कार्यभार ग्रहण करने की तिथि से वेतन भुगतान की सहमति निम्नलिखित शर्तों प्रतिबन्धों के अधीन प्रदान की जाती है"

10. It is argued by learned counsel for the petitioner that in spite of the aforesaid order, neither the petitioner was paid his salary for the post of Assistant Teacher Faukania nor Shameem Anwar was paid his salary on the post of Assistant Teacher Tahtania.

11. Aggrieved by the inaction on the part of the respondents, Shameem Anwar approached this Court by filing Writ A No.6429 of 2022 (Shameem Anwar Vs. State of U.P. and others). The aforesaid writ petition was disposed of by this Court vide judgement and order dated 18.07.2022

directing the respondent No.2 to take a final decision in the matter within three months from the date of production of certified copy of this order. Since the aforesaid order was not complied with, Contempt Application (Civil) No.6323 of 2023 was filed by Shameem Anwar which was disposed of by this Court vide its order dated 13.09.2023 granting one more opportunity to the respondent No.2 to comply with the order dated 17.08.2022. Since the aforesaid order was also not complied with, Shameem Anwar filed another Contempt Application (Civil) No.278 of 2024.

12. After the order was passed by this Court in the aforesaid contempt application, the respondent No.2 passed the order dated 02.02.2024 recalling his earlier order dated 27.09.2021. By the aforesaid order, financial approval granted in favour of the petitioner and Shameem Anwar was recalled. Aggrieved against the order dated 02.02.2024, Shameem Anwar filed Writ A No.2745 of 2024. The said writ petition was duly entertained and the effect and operation of the order dated 02.02.2024 passed by the respondent No.2 has been stayed by this Court vide order dated 23.02.2024.

13. Pursuant to the aforesaid order, an order was passed by the respondent No.2 on 06.3.2023 directing the respondent No.3 to comply with the order dated 23.02.2024 passed by this Court. Despite the aforesaid order, the salary was not paid, this Court passed an order dated 14.03.2024 directing the respondent No.3 to appear before this Court. The respondent No.3/District Minority Welfare Officer, Mau appeared before the Court on 20.03.2025 and submitted his explanation. The order dated 20.03.2024 passed by this Court reads as follows:-

1. The District Minority Welfare Officer, Mr. Sahitya Nikash Singh has appeared in person before this Court today in compliance of order of the Court passed on 14.03.2024 along with an application seeking exemption from appearance supported by his personal affidavit.

2. In the affidavit it is stated that the Assistant Teacher, Tahtaniya namely Shafiq Ahmad though was promoted as Assistant Teacher, Faukaniya (Junior High School) and approval was also granted but he was not paid salary of promotional post, rather he continued to received salary of Assistant Teacher, Tahtaniya and the question of promotion of

Mr. Shafiq Ahmad and his continuance upon a post earlier as Assistant Teacher Tahtaniya is a matter of adjudication pending before UP Madarsa Education Board in which 22nd March, 2024 has been fixed and it is expected that some final orders would be passed by the Board.

3. Plea taken is that so long as Sri Shafiq Ahmad, Assistant Teacher, Faukaniya is getting salary only as Assistant Teacher, Tahtaniya though has been granted financial approval as Assistant Teacher, Faukaniya but petitioner cannot be paid salary as two teachers cannot be permitted to draw salary against one post. The salary bill has been placed before this Court of the institution in which Sri Shafiq Ahmad is shown to have been drawing salary as Assistant Teacher, Tahtaniya.

4. Counsel for petitioner has sought to dispute the pleadings raised in the compliance affidavit on the ground that unless and until an appointment is set aside even Sri Shafiq Ahmad was entitled to receive salary of Assistant Teacher, Faukaniya and if the respondent authorities have failed to pay him salary and continued to pay him salary as Assistant Teacher, Tahtaniya, petitioner cannot be made to suffer.

5. Sri Rahul Malviya, learned Standing Counsel, at this stage, submits that it would be in the fitness of things and appropriate also that question of payment of salary is taken up again after 22.03.2024 on which date, the District Minority Welfare Officer will be in a better position to apprise the Court about status of payment salary to the two teachers.

6. Let this matter be posted on Board again on 16.04.2024 on which date proper compliance affidavit shall be filed in light of above observations.

7. It is made clear that if by the next date fixed, the Board fails to take any decision, the salary of the petitioner will not be held up any further whether Mr. Shafiq Ahmad is paid salary of the post of Assistant Teacher, Tahtaniya or Faukaniya, may be in the discretion of the District Minority Welfare Officer but certainly there will be no discretion vested with the District Minority Welfare Officer to withhold payment of salary of the petitioner.

8. Personal appearance of District Minority Welfare Officer is dispensed with subject to his filing of compliance affidavit in the given facts and circumstances and the observations made hereinabove.

14. After the aforesaid order was passed by this Court, the respondent no. 2 passed the order impugned on 28.3.2024 by which he held that the appointment of the petitioner as Assistant Teacher Tahtania was not against the sanctioned post, as such, the financial approval granted to the petitioner

for the post of Assistant Teacher Tahtania is withdrawn with immediate effect. It is further ordered that the initial appointment of the petitioner as Assistant Teacher Tahtania was against the rules, as such, the financial approval granted to the petitioner for the post of Assistant Teacher Fauquania is also withdrawn.

15. It is argued that the respondent no. 2 has not recorded any findings as to how the appointment of the petitioner as Assistant Teacher Tahtania was against non- sanctioned post. It is also argued that the District Minority Welfare Officer in his statement has clearly stated that the post was created in the Madarsa in the year 1996, but at the time when the post was created, there was a government order dated 29.1.1996, by which it was provided that for creation of post, permission of the State Government is required. The learned counsel for the petitioner submitted that the petitioner has no role in creation of post in the institution. There is no allegation that either the petitioner or the Committee of Management has played any fraud and has appointed the petitioner against a non-sanctioned post. The only basis for passing the impugned order is that the post was not created with prior permission of the State Government.

16. The learned counsel for the petitioner has relied upon a judgment of Apex Court passed in the case of ***Radhey Shyam Yadav & another Vs. State of U.P. & others reported in A.I.R. 2024 SC 260***. Relying on the aforesaid judgment, the learned counsel for the petitioner submits that as the appointment of the petitioner was approved and he was getting salary from December 1996 till February 2024 and financial approval to the appointment of the petitioner was granted, as such, after working for more than 30 years, the State is stopped in law from withdrawing the approval of appointment of the petitioner.

17. A counter affidavit has been filed by the respondent nos. 2 & 3. Based on the aforesaid counter affidavit, the learned counsel for the respondents submit that the State Government has issued a government order dated 29.1.1996. In paragraph no. 8 of the aforesaid government order, it is clearly mentioned that the permission for creation and posts will be made at the

level of the Government. The recommendation of District Basic Education Officer dated 20.2.1996 has been admitted by the respondents in the counter affidavit. In paragraph 8 of the counter affidavit it is also admitted that after given approval on 13 posts of Assistant Teacher Tahtania, the petitioner has started getting salary. The submission of documents for promotion of the petitioner is also admitted, however, in paragraph no. 15, it is stated that the approval to the promotion of the petitioner on 27.9.2021 was granted with a condition that before making payment of salary, it be confirmed that the salary to only those number of persons are being paid, who are working against sanctioned post.

18. Heard learned counsel for the parties. From perusal of the entire record, it is established that the petitioner's appointment as Assistant Teacher Tahtania was approved and he was being paid his salary from December 1996 till February 2024. The letter of Director, Urdu, U.P. Lucknow dated 1.3.1996 is not being disputed by the respondents. It is not the case of the respondents that the petitioner was appointed against sanctioned number of post. The only contention of the respondent is regarding the power to create post, that the post can be created only with approval of the State Government, whereas in the present case, the post was created by the Director Urdu, U.P. Lucknow without prior permission of the State Government.

19. Thus, it is clear that neither the Committee of Management nor the petitioner has played any fraud in creation of post. The post was created and payment of salary to the petitioner and other Assistant Teachers was being made from State exchequer since December 1995 till February 2024. In the impugned order, the District Minority Welfare Officer has raised only objection that the post was created by the Director Urdu without prior permission of the State Government. In the impugned order, the only conclusion has been recorded by the Registrar, respondent no. 2 that the appointment of the petitioner as Assistant Teacher Tahtania was not against the post created by the State Government. There is no whisper regarding any fraud or misrepresentation being made either by the petitioner or by the

Committee of Management in creation of post. The Apex Court in case of Radhey Shyam (supra) has affirmed the judgment of ***Shivanandan C.T. & others Vs. High Court Kerala & others reported in (2023) SCC Online SC 994***, wherein it was held that even if the appointment of more than advertised vacancy, after lapse of two decades, the same should be protected. Relevant paragraph 29 of the judgment is as under:

29. More recently, this Court in Vivek Kaisth (supra), following the judgment of the Constitution Bench in Sivanandan C.T. and Others v. High Court of Kerala and Ors., (2023) SCC OnLine SC 994 protected the appointments of the appellants even after finding that their appointments were in excess of the advertised vacancies. This Court held as under:-

"32..... Today, when we are delivering this judgment the two appellants have already served as Judicial Officers for nearly 10 years. Meanwhile, they have also been promoted to the next higher post of Civil Judge (Senior Division). In this process of their selection and appointment (which has obviously benefitted them), nothing has been brought to our notice which may suggest any favouritism, nepotism or so-called blame as to the conduct of these two appellants, in securing these appointments. The High Court in fact notes this factor. While placing the blame on the State Commission it records that "..... there is nothing on record suggestive of the fact that any mala fides were behind the selection of respondents Nos.4 and 6....."

"34. The appellants were not entitled for any equitable relief in view of the High Court as they were the beneficiaries of an illegality committed by the Selection/appointing authority. But then it failed to take this question further, which in our opinion, it ought to have done. What the High Court never answered was as to how much of this blame of "illegal" selection and appointment would rest on the High Court (on its administrative side). Undoubtedly, with all intentions of timely filling of the vacancies, the High Court still cannot escape the blame....."

"36. What is also important for our consideration at this stage is that the appellants in the present case have been working as Judicial Officers now for nearly 10 years. They are now Civil Judge (Senior Division). These judicial officers now have a rich experience of 10 years of judicial service behind them. Therefore, unseating the present appellants from their posts would not be in public interest. Ordinarily, these factors as we have referred above, would not matter, once the very appointment is held to be wrong. But we also cannot fail to

consider that the appellants were appointed from the list of candidates who had successfully passed the written examination and viva voce and they were in the merit list. Secondly, it is nobody's case that the appellants have been appointed by way of favouritism, nepotism or due to any act which can even remotely be called as "blameworthy". Finally, they have now been working as judges for ten years. There is hence a special equity which leans in favour of the appellants. In a recent Constitution Bench decision of this Court in Sivanandan C.T. and Ors. v. High Court of Kerala and t Ors. (2023) SCC OnLine SC 994 though the finding arrived at by this Court was that the Rules of the game were changed by the High Court of Kerala by prescribing minimum marks for the viva voce, which were not existing in the Rules and therefore in essence the appointment itself was in violation of the Rules, yet considering that those persons who had secured appointments under this selec- tion have now been working for more than 6 years it was held that it would not be in pubdlic interest to unseat them." (emphasis supplied)

20. The Hon'ble Apex Court, further held that when the appellants were not party of post creation, they cannot be blamed and suffer. Relevant paragraph 30 is as under:

30. The situation of the appellants in the present case is no different from the individuals whose appointments were protected in the cases cited hereinabove. They had no blameworthy conduct. They were bona fide - applicants from the open market. The alleged mischief, even according to the State, was at the end of the School and its Manager. It will be a travesty of justice if relief is denied to the appellants. Enormous prejudice would also occur to them.

21. In the present case, the petitioner was selected and appointed as Assistant Teacher Tahtania against a post, which was created in the institution. The post was created by the Competent Authority or by an incompetent person, the petitioner or the Committee of Management of the institution has no role in the said creation of post or competence of the person of the authorities, sanctioning the post. Relying upon the documents of sanction of post, the State Authorities have granted financial approval and have made payment of salary to the petitioner from December 1995. For last about 30 years, there was no dispute or any allegation that the petitioner was paid salary against non-sanctioned post. It was open to the Competent Authority, who granted financial approval and started making payment of salary to the petitioner

from the State exchequer to deny the financial approval or payment of salary to the petitioner in the year 1996 itself. The authorities being fully satisfied that the appointment of the petitioner is against the sanctioned post, he had been continuously getting his salary. Thus, the petitioner was not at all in fault. There is no mention of fraud or malpractice against the petitioner, who had served for about 30 years.

22. The Honble Apex Court in case of ***Rajesh Kumar & others Vs. State of Bihar & others, reported in (2013) 4 SCC 690*** has held that innocent party, even if in revaluation do not make the grade, still the appointments ought to be protected. Relevant paragraph 21 is as under:

21. There is considerable merit in the sub- mission of Mr Rao. It goes without saying that the appellants were innocent parties who have not, in any manner, contributed to the prepa- ration of the erroneous key or the distorted result. There is no mention of any fraud or malpractice against the appellants who have served the State for nearly seven years now. In the circumstances, while inter se merit po- sition may be relevant for the appellants, the ouster of the latter need not be an inevitable and inexorable consequence of such a re- evaluation. The re-evaluation process may additionally benefit those who have lost the hope of an appointment on the basis of a wrong key applied for evaluating the answer scripts. Such of those candidates as may be ultimately found to be entitled to issue of appointment letters on the basis of their merit shall benefit by such re-evaluation and shall pick up their appointments on that basis according to their inter se position on the merit list.

23. Thus, in view of the facts stated above, the order impugned dated 28.3.2024 is illegal. The approval granted 30 years ago, cannot be withdrawn on the ground that the post was not created by the Competent Authority.

24. The order impugned dated 28.3.2024 is hereby quashed. The petitioner is entitled for all consequential benefits.

Order Date :- 11.03.2025
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