
(2011) 03 SHI CK 0328
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 7976 of 2010

Deven Mahajan

APPELLANT

Vs

H.P. University and another

RESPONDENT

Date of Decision : 03-03-2011

Acts Referred:

Constitution of India, 1950 — Article 309
General Clauses Act, 1897 — Section 5
Himachal Pradesh University Act, 1970 — Section 40, 40(2), 40(3)

Citation : (2011) 2 ShimLC 12

Hon'ble Judges : Kurian Joseph, C.J;V.K. Ahuja, J

Bench : Division Bench

Judgement

Kurian Joseph, C.J.—Whether a subordinate legislation can be made operative before completion of the codal formalities?

(ii) Whether a subordinate legislation needs to be published before the same is made operative?

(iii) Whether a subordinate legislation is required to be published in the official gazette so as to make it operative?

(iv) Whether a prospectus, issued by a competent forum, has the status of law?

These are the four questions of law arising for consideration in this case.

Brief Facts

2. The petitioner is a post graduate in commerce. He has cleared the National Eligibility Test (NET) conducted by the U.G.C. in the year 2007. The respondent University invited applications for entrance test to Ph.D. Programme, 2010. The last date for submission of the application was 22nd September, 2010. There are nine seats in the commerce stream. It is seen from the instructions in the application form that the qualification for admission to Ph.D. Courses shall be as per Ordinance 1.4. Those who have qualified NET alongwith the award of Junior

Research Fellowship (JRF) are to be admitted without undergoing the entrance test. For the remaining seats entrance test is conducted and additional weightage is given for NET/SLET or M.Phil. The instructions, as in the application form, are extracted below:--

Eligibility and procedure

(i) Minimum qualifications prescribed for admission to Ph.D. Course in all Faculties shall be as per Ordinance 1.4.

(ii) Applications for the Ph.D. programme who have qualified NET alongwith the award of Junior Research Fellowship (JRF) shall be admitted to the programme directly without having to undergo an Entrance Test.

(iii) For the remaining seats in each department, all other applications shall have to appear for an Entrance Test. Additional weightage shall be given to the following applicants:

Sr. No.

Category

Weightage

(a)

Applicants who have qualified NET/SLET or hold an M.Phil. Degree for which initial admission was obtained through an Entrance Test.

Additional 10% of the marks obtained in the written Ph.D. Entrance Test.

(b)

Applicants who have qualified NET/SLET and hold an M.Phil. Degree for which initial admission was obtained through an Entrance Test

Additional 15% of the marks obtained in the written Ph.D. Entrance Test.

3. Ordinance 1.4 provides for the qualification for admission to Ph.D. which reads as follows:-

(a) At least 55% marks at master's level (50% in case of SC/ST). However, for those teachers working in the colleges/Universities and research institutions affiliated to H.P. University who have joined their services prior to 1996, the condition will be minimum of 50% marks at the master level (45% marks for SC/ST candidates).

(b) Ph. D. Course work from HPU/M.Phil./LL.M. except as provided under ordinance 16.12

Or

(c) Degree of Foreign University, which may be recognized as equivalent for the

purpose of Academic Council.

4. Ordinance 16.12. at the relevant time, reads as follows:--

The executive council on the recommendation of the vice-chancellor may exempt a candidate who is in the opinion of the research Degree Committee has already done considerable work (Minimum of two research paper I the referred national or international journals) in this field for doing the M.Phil.

Provided if a candidate registers for Ph.D under this provision, he/she shall not be eligible for HPU fellowship though she may have the benefit of the fellowship from other agencies and will not ordinarily be given seats in the hostel.

Provided further that a candidate who qualifies/has qualified the National Level Education Test (NET) of UGC, UGC-CSIUR Joint, GATE and such other test which may be recognized by the UGC as equivalent to the National Level Tests from time to time and shall be eligible for direct registration for Ph.D. except in the faculty of law.

Provided in case of MBA student three years executive experience will be essential for Ph.D after MBA.

5. Petitioner cleared written test, held on 10th October, 2010. However, at the time of interview for admission, held on 4.12.2010, the petitioner was not cleared on the ground that he had not passed M.Phil.

6. In the case of a candidate who had passed NET, whether M.Phil is also necessary for admission to Ph.D. in the year 2010 is the question to be considered. As can be seen from Ordinance 1.4 except in the case of those covered under Ordinance 16.12, all others should have either Ph.D. work from the University or M.Phil or LL.M. But it is fairly clear from Ordinance 16.12 second proviso that those who had cleared NET of UGC are eligible for direct registration for Ph.D.

7. However, it is the stand of the University that the University had taken steps to amend the Ordinance and as per the proposed amendment in the Ordinance mere pass in NET is not sufficient for admission to Ph.D. programme. Annexure R-1/A, is the proposed amendment which has been issued as the University Notification dated 14.7.2010. The opening paragraphs of the Notification, thus issued by the University on 14.7.2010, read as follows:--

The Executive Council vide Resolution No. 17. dated 19.6.2010 approved the following Rules/Regulations (based on UGC Regulations, 2009) to pursue, Ph.D. Course through concerned Teaching Department(s)/Institutes of the University, w.e.f. academic session 2010-2011, which shall be subject to the assent of the Hon"ble Chancellor on the proposed amendment in relevant clauses of the Chapter-XVI of the Ordinances related to these regulations.

However, the admission process for the said course shall be started by the concerned Teaching Department(s)/Institute(s) as per these regulations

approved by the Executive Council w.e.f. the ensuing academic session i.e. 2010-2011 since it may take considerable time to obtain the assent of the Chancellor in this regard. If any change/deviation in these regulations is conveyed at a later stage through the proposed amendment in the relevant clause(s) of the Ordinance, the same shall be communicated separately.

8. Paragraph 2 of the Notification deals with the procedure for admission to Ph.D. programme, which reads as follows:-

II. Procedure for admission to Ph.D. programme:

(i) Minimum Qualification prescribed for admission to Ph.D. Course in all Faculties shall be as per Ordinance

(ii) Applicants for the Ph.D. programme who have qualified NET alongwith the award of Junior Research Fellowship (JRF) shall be admitted to the programme directly without having to undergo an Entrance Test.

(iii) For the remaining seats in each department, all other applicants shall have to appear for an entrance test. Additional weightage shall be given to the following applicants:

Sr. No.

Category

Weightage

(a)

Applicants who have qualified NET/SLET or hold an M.Phil. Degree for which initial admission was obtained through an Entrance Test.

Additional 10% of the marks obtained in the written Ph.D. Entrance Test.

(b)

Applicants who have qualified NET/SLET and hold an M.Phil degree for which initial admission was obtained through an Entrance Test.

Additional 15% of the marks obtained in the written Ph.D. Entrance Test.

9. It is further contended that procedure for amendment of Ordinance 16.12 had also been completed by the Executive Council in its meeting, held on 19.6.2010 and 31.7.2010 and as per the proposed amendment, the enabling provision for NET qualified persons for registration for Ph.D. had been deleted. The amendment, as proposed by the Executive Council of the University in the meeting held on 19.6.2010 and 31.7.2010 reads as follows:--

16.12: Procedure for admission to Ph.D. Programme:

(i) Minimum qualifications prescribed for admission to Ph.D. course in all faculties shall be as per Ordinance 1.4.

(ii) Applicants for the Ph.D. programme who have qualified NET alongwith the award of Junior Research Fellowship (JRF) shall be admitted to the programme directly without having to undergo an Entrance Test.

(iii) For remaining seats in each Department, all other applicants shall have to appear for an entrance test, additional weightage shall be given to the following applicants:--

Sr. No.

Category

Weightage

(a)

Applicants who have qualified NET/SLET or hold an M.Phil. Degree for which initial admission was obtained through an Entrance Test.

Additional 10% of the marks obtained in the written Ph.D. Entrance Test.

(b)

Applicants who have qualified NET/SLET and hold an M.Phil degree for which initial admission was obtained through an Entrance Test.

Additional 15% of the marks obtained in the written Ph.D. Entrance Test.

10. In short the stand of the University is that once the procedure for amendment of the Ordinance has been completed at the level of the University, even before getting the assent of the Chancellor, subject to the assent, the amendments can be operative. Whether it is permissible under law, is the moot question.

11. The Himachal Pradesh University Act, 1970 provides for the establishment and incorporation of a University in Himachal Pradesh. Section 40 provides for framing of Ordinances. Section 40(2) clearly provides that first ordinances shall be made by the State Government and thereafter the same shall be amended, repealed or added to at any time by the Executive Council of the University in the prescribed manner. Sub Section (3) provides that the amendments or repeal to the Ordinances, thus made by the Executive Council, shall have no validity unless it is assented to by the Chancellor in consultation with the State Government. Sub-sections 40(2) and 40(3) read as follows:--

40 (2)The first Ordinances shall be made by the State Government and the Ordinances so made may be amended, repealed or added to at any time by the Executive Council in the manner prescribed by the Statutes.

(3) The amendments or the repeal of the Ordinances under subsection (2) shall have no validity unless it has been assented to by the Chancellor in consultation with the State Government.

12. Statute 26 of the First Statutes provides for the procedure of making the Ordinances. Statute 26 provides that "(1) The First Ordinances shall be made by the State Government. (2) The First Ordinances maybe amended, repealed or added to at any time by the Executive Council Provided that xxx Ordinances so amended, repealed or added to at any time by the Executive Council under Statute 26 shall have no validity unless the same has been assented to by the Chancellor in consultation with the State Government." Thus the statute clearly provides that any amendment to the Ordinances made by the Executive Council of the University shall have validity only when the same is assented to by the Governor.

13. Mr. B.C. Negi, learned Standing Counsel for the University contends that the draft Ordinances can be made operative subject to the assent by the Governor. Reliance is placed on the decision of Supreme Court in Vimal Kumari Vs. The State of Haryana and Others, It is a case where the State of Haryana had prepared draft rules in the year 1983 providing for the service conditions of group "C" in the Haryana Social Welfare and Relief Organization Service. Though the same were made in the year 1983, it was found by the Apex Court that the same was never intended to be operative since such intention was never expressed even by any executive order and the same had not been notified. While thus declining to accept the request to follow the draft rules, it was inter alia observed by the Apex Court at paragraph 6 of the judgment as follows:--

6. The Draft Rules were prepared in 1983 and since then they have not been enforced. It is, no doubt, open to the Government to regulate the service conditions of the employees for whom the Rules are made by those Rules even in their "draft stage" provided there is clear intention on the part of the Government to enforce those Rules in the near future. Recourse to such Draft Rules is permissible only for the interregnum to meet any emergent situation. But if the intention was not to enforce or notify the Rules at all, as is evident in the instant case, recourse to "Draft Rules" cannot be taken. Such Draft Rules cannot be treated to be Rules made under Article 309 of the Constitution and cannot legally exclude the operation of any existing executive or administrative instruction on the subjects covered by the Draft Rules nor can such Draft Rules exclude the jurisdiction of the Government, or for that matter, any other authority, including the appointing authority, from issuing the executive instructions for regulating the conditions of service of the employees working under them.

14. It is the contention of Mr. Negi, learned Standing Counsel, that the proposed amendment in the Ordinance was intended to be made operative by the University as per the Notification, subject to the assent by the Chancellor and such intention had been expressed in the prospectus. Prospectus is to be treated as having the force of law. We have no quarrel with the proposition that that prospectus, duly issued by a competent authority, has the force of a statute provided the same is in, consonance with the legal provisions on the point as

prescribed either in the Ordinance or in the Regulations or in the Rules or for that matter, the parent Act. This Court in *Sonia Kayastha Vs. State of H.P. and Others*, has dealt with this aspect, wherein at paragraph 10, it has been held as follows:-

10. We are also unable to agree with the learned Counsel for the petitioner in his claim that the prospectus issued by the State Government containing guidelines and instructions for regulating admissions cannot be elevated to the status of "law", and a contravention of which could be said to be a serious violation undermining the decisions arrived at in derogation of the same. We need refer the claim to reject it only, since it is covered by more than one Division Bench judgments of this Court reported in *Km. Manju and Another Vs. State*, and *Anil Nag v. State of Himachal Pradesh and Others* 1978 ILR H.P. Series 667, against the petitioner. We are in entire agreement with the reasoning of the earlier two Division Bench judgments, and this plea shall also stand rejected.

15. The situation dealt with by the Supreme Court in *Vimal Kumari's* case (*supra*) pertains to the service condition of group "C" employees. It was held by the Apex Court that at the draft stage, in case the intention on the part of the government to enforce those rules is expressed, even before Notification, the same can be made operational. It has to be seen that the government is the rule making authority and it is the government which has to express its intention clearly for enforcement of those rules in the near future and even in such a situation the implementation is permissible only to meet emergent situations. That is not the factual or legal scenario as far as the present case is concerned. The amendment is only proposed by the Executive Council of the University. It is clearly provided in the Act u/s 40 as well as in the First Statute 26 that the amendment, as made, shall have no validity unless the same has been assented to by the Chancellor. Therefore, the validity of the amendment depends upon the assent of the Governor. In other words, unless and until the assent is given by the Chancellor to an amendment made in the Ordinance, the same shall have "no force of law."

16. Incidentally, we may also refer to the question as to whether a subordinate legislation can be made operative without the same being published in the prescribed manner. Ordinarily, it is prescribed in the Parent Act itself that a subordinate legislation shall be notified in the official gazette. In case there is such a provision, that will come into operation only when that is published in accordance with the procedure, as prescribed under the parent Act or the Rules, be it official gazette or otherwise. In situations where there is no such prescription as to mode of publication of a subordinate legislation, it has to be published in a proper manner so that the people will come to know of it. As far as a plenary legislation is concerned, the same is made on the basis of debate in the open forum of either the Parliament or State Legislature. However, the subordinate legislation does not have such a pre-requirement. Such a power is delegated either to government or, as in the instant case, to the Executive Council of the University. Therefore, it is a requirement of natural justice that the

legislation, thus made, is published. That is also a mandate u/s 5 of the General Clauses Act. This aspect of the matter has been succinctly dealt with by the Apex Court in one of its earliest decisions in *Harla Vs. The State of Rajasthan*, The relevant portion at paragraph 8 reads as follows:-

8. x x x In the absence of any special law or custom, we are of the opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognizable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilized man. It shocks his conscience. In the absence, therefore, of any law, rule, regulation or custom, we hold that a law cannot come into being in this way, Promulgation or publication of some reasonable sort is essential.

17. In *State of Maharashtra Vs. Hans George*, at para 45 also this aspect was considered wherein it has been held as follows:-

45. Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in the usual form i.e. by publication within the country in such media as generally adopted to notify to all the persons concerned the making of rules.

18. In *B.K. Srinivasan and Others Vs. State of Karnataka and Others*, it has been clearly laid down that statute will take effect only from the date of publication or promulgation. It has been further held that once a mode of publication is prescribed in the statute, the publication shall be in that mode only and no other mode of publication will satisfy the statutory requirement. The Apex Court in paragraph 15 held as under:-

15. There can be no doubt about the proposition that where a law, whether Parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the "conscientious good man" seeking to abide by the law or from the standpoint

of Justice Holmes's "Unconscientious bad man" seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by Parliamentary legislation. But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customary recognized official channel, namely, the official gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient.

The similar view was followed by the Supreme Court in *I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others*,

19. In a recent judgment reported in *T. Narasimhulu and Others Vs. State of A.P. and Others*, the Apex Court at paragraph 17, has held as follows:-

17. It will be clear from the law laid down by this Court that where the law prescribes the mode of publication of the law to become operative, the law must be published in that mode only, but where the mode of publication of the law is not prescribed by the law, such law should be published in some usual or recognized mode to bring it to the knowledge of all persons concerned.

20. Thus the law is well settled that a subordinate legislation can be made operative only when it is duly notified. In case any particular mode of notification of subordinate legislation is prescribed either in the Act or Rules, the notification shall be in that manner only. In case no such manner is prescribed, the legislation comes into effect only when the same is properly and adequately published for the purpose of information of the people. It is the requirement of natural justice.

21. A subordinate legislation is valid only when the codal requirements are completely satisfied. If, as in the instant case, assent of the Chancellor or for that matter any authority is made a pre-condition for its validity, the amendment or proposed draft becomes law only when the assent is given. Assent is not an

empty formality. Dissent is within the jurisdiction of the authority. Therefore, any such subordinate legislation, be it an Ordinance or Regulation or Rule, cannot be made operational subject to the assent that is to be obtained from the prescribed authority. Until and unless the assent is obtained, the amendment or repeal for that matter in the Ordinance, Regulation or Rule has no validity and hence inoperative.

22. In the instant case, it is clear from the Notification of the University, dated 20th December, 2010 that the Chancellor of the University has given the assent to the proposed amendment in the first Ordinance (16.12) only on 6.12.2010 and that the same has been notified only on 20th December, 2010. The admission to the Ph.D. programme has been notified in September, 2010. The entrance test was conducted on 10th October, 2010. The interview for admission was conducted on 4th December, 2010. As per the provisions of the Ordinance, as existed as on those dates, pass in NET is a prescribed qualification for registration for Ph.D. The petitioner possessed the same. He has qualified in the written test. Therefore, he is entitled to be admitted to the Ph.D. programme. The petition is hence allowed with a direction to the University to admit the petitioner to the Ph.D. programme. In order to avoid any inconvenience to any student, who has already been admitted, in case there is no vacancy, it will be open to the University to provide for an additional seat so as to give effect to the directions in this judgment.

23. The writ petition is disposed of so also the pending application(s), if any.