

(2014) 02 AHC CK 0166

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 66598 of 2013

Dr. Abhishek Chandra and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-02-2014

Acts Referred:

Banaras Hindu University Act, 1915 — Section 17(2)

Citation : (2014) 4 ADJ 28 : (2014) 4 AWC 3451 : (2014) 2 ESC 1214 : (2014) 2 UPLBEC 1069

Hon'ble Judges : Arvind Kumar Mishra-I, J; Arun Tandon, J

Bench : Division Bench

Advocate : Ashok Khare and Siddharth Khare, Advocate for the Appellant; Ajit Kumar Singh and Ravi Kant, Advocate for the Respondent

Final Decision : Allowed

Judgement

1. Heard learned counsel for the parties. Petitioners, who are five in number, seek quashing of the advertisement dated 14.2.2013 issued by the Banaras Hindu University, Varanasi for appointment against the vacant teaching posts of Professor, Associate Professor and Assistant Professor in the Department of Anatomy, Department of Ophthalmology and Department of Orthopaedic in the Institution of Medical Sciences.

2. It is the case of the petitioners that the qualifications, which have been disclosed in the advertisement published by the Banaras Hindu University for the posts mentioned above, are contrary to the Regulations framed by the Medical Council of India, as amended on 3.11.2010. They, therefore, submit that the process of selection, initiated on the basis of incorrect qualifications mentioned in the advertisement, is liable to be quashed and a direction be issued to the Banaras Hindu University to re-advertise the vacancies in accordance with the qualifications prescribed under the Medical Council of India Regulations, 1998 as amended on 3.11.2010.

3. It is the case of the petitioners that the advertisement was published on 14.2.2013 while the last date for submission of the application was 31.3.2013. Therefore, both on the date of publication of the advertisement as well as on the cut of date for making of the applications the Medical Council of India Regulations as amended in 2010 were applicable.

4. A counter-affidavit has been filed on behalf of the Banaras Hindu University and it has been submitted that the Medical Council of India Regulations, as amended on 3.11.2010, only provide for the minimum qualifications to be possessed by a candidate to be appointed on faculty post in various medical institutes. It is always open to the University like Banaras Hindu University to prescribe higher qualifications in addition to those prescribed by the Medical Council of India. In the facts of the case the Banaras Hindu University has taken a decision to provide for higher qualifications as per the advertisement. If the petitioners do not satisfy these higher qualifications then it cannot be said that the advertisement is bad.

5. So far as the individual petitioners are concerned, it is pointed out:

6. Petitioner No. 1 does not have two published work during his tenure as Assistant Professor and does not have 5 years experience as Assistant Professor. Similar is the objection with regard to the petitioner No. 2. So far as petitioner No. 3 is concerned, it is pointed out that he has no published work in any specified journal. With regard to petitioner No. 4 it is stated that he does not have three years experience as Associate Professor and therefore does not satisfy the advertised qualification.

7. Petitioner No. 5 has not applied and according to the University he does not have any published work. He has not submitted any application in response to the advertisement.

8. It is stated that a meeting of the Executive Council of the Banaras Hindu University was held on 06 to 08th April, 1986, vide resolution No. 6 it was resolved to constitute the "Policy and Planning Committee" in each Department. This Committee was given the power to formulate the qualifications for the posts to be advertised including the specializations, if any. Copy of ECR No. 6, referred to above, is enclosed at page 71 to 73 of the supplementary counter-affidavit filed on behalf of the Banaras Hindu University.

9. It is then stated that a circular letter was issued by the Recruitment and Assessment Cell of the Banaras Hindu University to all Policy and Planning Committees of various departments to supply the proforma of draft advertisement alongwith qualifications for the purposes of making appointment against the vacant faculty posts in the concerned department. It is with reference to this circular that the Policy and Planning Committee of Department of Orthopedics vide its letter dated 27.11.2012 forwarded the proforma of the advertisement alongwith the minimum qualifications to be possessed of by the candidate concerned for being eligible for the advertised posts. Similarly, the

proforma for the vacant posts in the Department of Ophthalmology was forwarded under letter dated 19th November, 2012.

10. It is with reference to the proforma and the qualifications so forwarded by the Policy and Planning Committee of various departments that the advertisement has been published.

11. It is also stated that Statute 26 of the Statutes read with Section 17(2) of the Banaras Hindu University Act, 1915 authorises the Executive Council, the Academic Council or any Faculty to appoint boards or committees consisting of members of the authority and such other persons (if any as that authority in each case may think fit). The Board or Committee so appointed is to deal with the subjects assigned to it subject to subsequent confirmation by the authority which appointed it. It is with reference to this Statute 26 that Policy and Planning Committees have been constituted. The Policy and Planning Committees have been assigned the power to lay down the qualifications for the faculty posts. Since they had a right to deal with the subject so assigned, the higher qualifications decided upon by the Policy and Planning Committee, as advertised, cannot be said to suffer from any illegality.

12. It is, therefore, the case of the University that no interference against the process of selection is called for. The Policy and Planning Committee has exercised the delegated powers of the Executive Council as per the delegation. The order of the delegatee is to be treated as that of the Executive Council itself. Reference- Roop Chand Vs. State of Punjab, .

13. It is also pointed out by Sri Ravi Kant, Senior Advocate on behalf of the Banaras Hindu University that there is no challenge to the prescription of qualifications by the Policy and Planning Committee in the present writ petition and therefore this Court may not enter into the aforesaid aspect of the matter. Any direction to the contrary may contravene the law laid down by the Apex Court in the judgments reported in Union of India (UOI) and Others Vs. Dinesh Prasad, .

14. In rejoinder Sri Ashok Khare, Senior Advocate submits that Statute 15 defines the powers and functions of the Executive Council. Sub clause (ii) of the said Statute provides for laying down of the qualifications for faculty posts etc. However proviso to sub-clause (ii) of the said Statute 15 puts an embargo on exercise of power of laying down qualifications/enumerations by the Executive Council by providing that no action shall be taken by the Executive Council in respect of number, the qualifications and the emoluments of teachers otherwise than after consideration of the recommendation of the Academic Council.

15. He submits that if the Executive Council cannot take a decision in the matter of qualifications except after consideration of the recommendation of the Academic Council, the same would also apply to the Policy and Planning Committee, which is only a delegatee of powers conferred by the parent authority, namely Executive Council.

16. He explains that in the matter of laying down of qualifications the Policy and Planning Committee is also required to act in the same manner as is obligatory upon the Executive Council under Statute 15(ii) proviso. Therefore, in absence of any recommendation of the Academic Council the prescription of the higher qualifications by Policy and Planning Committee, as suggested by the University, is illegal.

17. We have heard Sri Ashok Khare, learned Senior Counsel assisted by Siddharth Khare, Advocate on behalf the petitioners, and Sri Ravi Kant, learned Senior Counsel assisted by Sri Ajit Kumar Singh, learned counsel on behalf of the University.

18. At the very outset, we may record that power of the Banaras Hindu University/employer to fix higher qualification than those prescribed by the University Grant Commission/Medical Council of India cannot be doubted inasmuch as the regulations themselves state that those prescribed are the minimum academic qualification/experience for being appointed on the teaching posts. Even otherwise the issue in that regards has been settled by the Apex Court in the case of State of Tamil Nadu and Another Vs. S.V. Bratheep (Minor) and Others, , wherein it has been held as follows:

If higher minimum is prescribed by the State Government than what had been prescribed by the AICTE, it cannot be said that it is in any manner adverse to the standards fixed by the AICTE or reduces the standard fixed by it.

19. Question however remains as to who is to decide as to what higher qualifications are to be prescribed in addition to the minimum prescribed under the Medical Council Regulations as amended in 2010 for the posts in question and who is to adjudge whether these additional qualifications will achieve the purpose of a better qualified teacher in the subject concerned being available.

20. In our opinion, having regard to the proviso to statute 15(ii) it is the Academic Council which has to initiate the process and to submit its recommendations in the matter of the fixation of the qualifications for the faculty posts and it is only then the Executive Council can act.

21. It would be appropriate for us to reproduce statute 15(ii) alongwith proviso of the Statutes of Banaras Hindu University which reads as follows:

15. POWERS OF THE EXECUTIVE COUNCIL

Subject to the provisions of the Act, these Statutes and the Ordinances, the Executive Council shall, in addition to any other powers vested in it, have the following powers, namely:

(i)

(ii) to fix the emoluments and define the duties and conditions of service of Professors, Readers, Lectures and other members of the teaching staff:

Provided that no action shall be taken by the Executive Council in respect of the number, the qualifications and the emoluments of teachers otherwise than after consideration of the recommendation of the Academic Council.

22. From simple reading of the aforesaid provisions, it is clear that in the matter of determination of the qualifications of the teachers, the Executive Council can act only after considering the recommendation of the Academic Council which would include the determination of additional qualification for the faculty posts. It is, therefore, apparent that qualification whether it be in the nature of essential qualification or qualification which may be prescribed for the teaching posts in addition to the minimum prescribed by the Medical Council of India can only be determined by the Executive Council on consideration of the recommendation of the Academic Council.

23. We may record that it is not the case of Banaras Hindu University that any recommendations had been made by the Academic Council in the matter of prescription of additional qualifications to those prescribed by the Medical Council of India for the posts subject-matter of advertisement under consideration.

24. The plea raised on behalf of the University with reference to statute 26 of Banaras Hindu University, and the Policy and Planning Board being authorised to deal with the subject assigned and therefore to lay down the qualifications in addition to those prescribed by Medical Council of India as per the advertisement, without any recommendation of the Academic Council does not appeal to us. The Policy and Planning Board acts as a delegatee of the Executive Council. It can determine the qualification and other matters which may have been assigned by the Executive Council to it but in the same manner as its Principal i.e. Executive Council would be obliged to act under Statute 15(ii) proviso.

25. We may, at this stage reproduce Statute 26 of the Banaras Hindu University which reads as follows:

26. BOARD AND COMMITTEES

26. The Court, the Executive Council, the Academic Council or any Faculty may appoint boards or committees consisting of members of the authority making such appointment and such other persons (if any as that authority in each case may think fit) and any such Board or Committee may deal with any subject assigned to it subject to subsequent confirmation by the authority which appointed it.

27. The constitution of the Board or Committee in the name of the Policy and Planning Board under Statute 26 to deal with the particular subject assigned to it would only mean that the Policy and Planning Board steps into the shoes of the Executive Council. It gets a power to deal with the subject assigned to it in the same manner in which Executive Council could have done. If the power of the Executive Council in the matter of the prescription of the qualification itself is

hedged with the condition that the recommendations of the Academic Council must precede in the matter, the delegatee namely Policy and Planning Board cannot follow a path different from that which had to be followed by the Principal i.e. Executive Council. If the Executive Council is bound to prescribe the qualification only after consideration of the recommendation of the Academic Council, the delegatee of the Executive Council must also act in the same manner and not otherwise. The power delegated to the Policy and Planning Board to deal with the assigned matter under the statute 26 cannot be read in a manner to oblivate the requirement of proviso to statute 15(ii) as noticed above.

28. We have no hesitation to hold that it is only after recommendations were received from the Academic Council that the Police and Planning Board could have prescribed qualification in addition to those laid down by the Medical Council of India under amendments of 2010. In absence of such recommendation of the Academic Council as contemplated by proviso to statute 15(ii), the advertisement as published on the recommendation of the Policy and Planning Board cannot be legally sustained as qualifications mentioned therein had not been provided for in accordance with the statutes applicable.

29. It is the settled principle of law that if law requires something to be done in a particular manner it has to be done in that manner or not at all. Privy Council in AIR 1936 253 (Privy Council) , laid down the dictum that when a statute requires a thing to be done in a particular manner, it must be done in that manner or not at all. The Hon''ble Apex Court has reiterated and followed the aforesaid dictum in a catena of cases and one of the recent judgment in Commissioner, Income Tax, Chandigarh v. Pearl Mechanical Engineering and Foundry Works Pvt. Ltd. A Constitution Bench of the Hon''ble Apex Court in Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala and others, reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the same itself.

30. After having arrived at the said conclusion, we find that petitioner Nos. 1 to 4 stands excluded from zone of consideration for the posts in question as per the advertisement under challenge in the present writ petition only because of the prescription of the additional qualifications by the Policy and Planning Board. Since qualifications as advertised had not been fixed in accordance with the statute applicable, exclusion of the claim of the petitioners for the posts, is therefore, rendered bad in law. Similarly we find that petitioner No. 5 could not apply because of additional qualification illegally introduced in the advertisement. He is also entitled to relief from this Court.

31. So far as the plea raised on behalf of the University qua their being no prayer in the writ petition to quash the qualification laid down by the Policy and Planning Board and therefore the Court may not enter into the said dispute, is concerned, suffice is to record that it is the specific case of the petitioners that the qualifications as mentioned in the advertisement are illegal being in excess of the

minimum prescribed by the Medical Council of India as well as the guidelines laid down by the University Grant Commission which had been adopted by Banaras Hindu University. In response to the challenge so made, Banaras Hindu University had relied upon the additional qualifications which had been fixed for the particular post by the Policy and Planning Board of the departments of Orthopedics etc. as noticed above. Therefore, the defence of the University qua such prescription by the Policy and Planning Board of qualification in addition of those prescribed by the Medical Council of India and the University Grant Commission is direct in issue in the present writ petition.

32. The judgments relied upon by the learned counsel for the respondent Jaipur Development Authority and Others Vs. Vijay Kumar Data and Another, , State of Jammu & Kashmir and Another Vs. Ajay Dogra, , Roop Chand Vs. State of Punjab, , Union of India (UOI) and others v. Dinesh Prasad, Civil Appeal No. 1961 of 2010, decided on 30.10.2012 are clearly distinguishable.

33. So far as the judgment reported in AIR 1963 SC 1503 (V 50 C 220) is concerned, we may record that there is no issue with regard to the powers to be exercised by the delegatee and there is no challenge in that regard in the present writ petition. What has been contended before us is that what applies to the Principal will equally apply to the delegatee of the power. For the reasons recorded above, the writ petition is allowed. The advertisement in so far as it pertains to the post of Associate Professors and Professors in the department of Orthopedics and Anatomy are hereby quashed. The University is directed to publish an advertisement afresh in accordance with the qualification as lawfully prescribed. Parties are at liberty to apply as and when the fresh advertisement is made.