
(2005) 05 KL CK 0007
In the High Court Of Kerala
Case No : W.A. No. 3252 of 2001

Dr. Ing. Pyarilal, S.K.

APPELLANT

Vs

Cochin University of Science and Technology and Others

RESPONDENT

Date of Decision : 24-05-2005

Acts Referred:

Constitution of India, 1950 — Article 142

Citation : (2005) 05 KL CK 0007

Hon'ble Judges : K.T. Sankaran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : P. Sankarankutty Nair, T.V. Ajaya Kumar and K. Sandesh Raja, for the Appellant; S. Gopalakrishnan Nair for Cochin University for Respondent 2, for the Respondent

Judgement

J.B. Koshy, J.—Appellant/Petitioner, while working as Lecturer in Naval Architecture and teaching the subject of Ship Design/Computer Aided Design (for short "CAD") in the Cochin University of Science and Technology (for short "the CUSAT"), applied for the post of Reader as per Ext. P-1 notification. The educational qualifications required as per Ext. P-1 notification are as follows:

3. Qualifications;

Reader.--A good academic record with a Doctor's Degree in a relevant field. About 5 years experience of teaching and/or research and development:

Provided further that candidates not possessing Ph.D. may be considered if they have to their credit equivalent research published work or design/development work of a high order either in an institution or industry. In the case of persons to be recruited from industry or professional fields, candidate should possess good academic record with recognised professional work of about 7 years which should include innovation and/or research and development.

It is the contention of the Appellant that he was the only qualified person who applied for the post. But, third Respondent who was in the Selection Committee

was inimical towards him as earlier he has pointed out certain irregularities of the third Respondent with respect to his conduct of National Seminar held under the auspices of the Department of Ship Technology on 11th and 12th July, 1989 and therefore by giving more marks in the interview the second Respondent who was not qualified on the relevant date was appointed to the above post. Third Respondent though received notice did not file any counter to deny the above allegations. Without losing any time the Petitioner challenged Ext. P-3 appointment order appointing the second Respondent and claimed that he should be appointed in the post.

2. As held by the Supreme Court in *Ashok Kumar Sharma and Others Vs. Chander Shekhar and Another*, it is settled law that the applicant should be qualified on the last date fixed for filing the applications and it is not enough that the person acquires qualification subsequently. Recruitment in diversion of the published qualifications would amount to arbitrary exercise of power and will be hit by articles 16 of the Constitution of India. It is true that in exercise of the powers of judicial review, this Court will not evaluate the comparative merits of the candidates, but, it is limited to whether the appointment had contravened any statutory or binding rule as held by the Apex Court in *Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others*. Here, the only contention was that the selected candidate was not qualified to be considered as per the notification. In view of the nature of contentions, mark sheet and file relating to selection were also called for. The learned Single Judge has considered the qualifications and mark sheet in paragraphs 8 and 9 of the judgment which we quote below:

8. In the circumstances, it has to be considered whether the Petitioner and the 2nd Respondent or both of them were qualified for the post. It is admitted that the 2nd Respondent did not have the Doctor's Degree in the relevant subject or for that matter in any other subject as on the date for receipt of the applications. He takes refuge under the proviso which specifies that candidates not possessing Ph.D. may be considered if they have to their credit equivalent research published work or design/development work of a high order either in an institution or in an industry. Even going by the said criterion, it can be seen that the 2nd Respondent was not qualified enough. He did not have to his credit published work or design/development work of a high order. His contention that he had prepared a thesis in connection with his Master's Degree and that was available in the University concerned for reference by successor students cannot be accepted. Keeping a thesis in the Library is not the publication of research work contemplated in Clause 3 of Ext. P-1. These clearly show that the 2nd Respondent was unqualified to be considered for the post.

9. A perusal of the mark sheet prepared by the Selection Committee also shows that the 2nd Respondent was granted only 19 marks out of 25 with regard to his qualifications and another 17 marks for experience, whereas the marks given under these categories to the Petitioner were 25 and 21 respectively. It was actually the grant of 13 marks for publications of the 2nd Respondent and 20

marks at the interview to him as against 6 and 14 respectively under these heads for the Petitioner that tilted the balance...

Admittedly, the Petitioner had a Doctor's Degree in Ship Hydro Dynamics and he was teaching students in Ship Design/CAD for seven years in the same University. The Selection Committee considered that he was fully qualified and was granted the full mark of 25 on that head. Admittedly, the second Respondent was not having Ph.D. Apart from the thesis submitted for the Master's Degree he had no published works as on the relevant date. No mark was awarded to him by the Selection Committee on the ground of design/development work of a high order. According to the second Respondent, he was fully qualified. We have gone through Ext P-1 notification and the qualifications mentioned in paragraph 4 of the counter statement as well as in the writ appeal memorandum. We are of the opinion that as per Ext. P-1 second Respondent was not qualified and we fully agree with the observations of the learned Single Judge with respect to his lack of qualifications. It may be true that subsequent to the relevant date he had two published works and subsequent to the appointment he also obtained a Doctor's Degree. Despite the fact that second Respondent was not qualified as on the relevant date as per Ext. P-1 notification and the Petitioner was fully qualified, the Petitioner was not selected. The second Respondent was given the permanent job, whereas the Petitioner was given a temporary job for a specific period. Ext. P-3 is dated 8th April, 1991. The writ Petition was filed in April, 1991 itself.

3. Even though the learned Single Judge found that the second Respondent was not qualified as per Ext. P-1 and the Petitioner was qualified, he was not ordered to be appointed only because the second Respondent was continuing in service from 1991 onwards and he was discharging his functions. The learned Counsel for the second Respondent submitted that in various instances the Supreme Court has granted similar relief and pointed out the decision of the Supreme Court in *Munindra Kumar and others Vs. Rajiv Govil and others*, . There, three writ Petitioners challenged the selection to the State Electricity Board. They were not selected because as per the Rules 40 marks were allocated for interview and 40 marks for group discussion and they did not get required marks in the interview. The Supreme Court found that the above rule fixing 40 marks each for interview and group discussion was arbitrary. However, since persons selected and appointed were working for a number of years, their appointments were not disturbed. But, at the same time, direction was issued to the Board to create three more posts to accommodate the Petitioners and it was suggested that in future the marks for interview and group discussion shall not be kept exceeding 10% and 5% of the total marks. In those cases, selection was made as per the rules existing at the time of selection and selected persons were qualified as per the rules.

4. Another decision cited is the decision of a Division Bench of this Court in *Ajeth Kumar v. K.V. Sunil Kumar* ILR 1993 (2) Ker 765. In that case, learned Single

Judge found that there were some irregularities in the appointment. Division Bench noticed the submission of the University that the Petitioners can be accommodated and hence directed that the persons who were already selected shall not be disturbed. In *M.S. Mudhol and Another Vs. S.D. Halegkar and Others*, the Supreme Court found that the Principal who was selected was not fully qualified as he was not having a Master's degree. But, he was allowed to continue because his appointment was challenged before the court after a long period of nine years and when the case came up for hearing 13 years have elapsed. Whereas in this case immediately in the same month the appointment was challenged. Another decision cited was the decision of the Supreme Court in *H.C. Puttaswamy and others Vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and others*, . There, appointments were made without consulting the Public Service Commission. The Supreme Court found that the appointments were not proper, but, appointees were directed to be treated as regularly appointed on humanitarian ground. The Supreme Court also found that the persons selected were qualified and on the promise that the writ Petitioners also will be appointed, the Supreme Court refused to interfere in the appointments already made on humanitarian consideration. The Supreme Court at paragraph 16 of the above decision observed as follows:

16. The precedents apart, the circumstances of this case justify an humanitarian approach and indeed, the Appellants seem to deserve justice ruled by mercy. We also take note of the fact that the writ Petitioners also would be appointed in the High Court as stated by learned Advocate General of the State.

5. In *Gujarat State Dy. Executive Engineers" Association Vs. State of Gujarat and Others*, , candidates in the waiting list were appointed after the period of operation of the list. The Supreme Court found that the above appointments were illegal. But, taking into account the fact that quota rules were not violated and selected candidates were also qualified and also considering the long tenure of employment, the appointment of the candidates already joined duty were not disturbed.

6. Learned Counsel for the second Respondent also submitted that in the decision of the Supreme Court in *Buddhi Nath Chaudhary and Others Etc. Vs. Abahi Kumar and Others*, the Supreme Court found that selected candidates even though educationally qualified were not having the required experience. But, considering the fact that selected candidates though not having the required experience at the time of notification, after working for a long period appointments made pursuant to a selection need not be disturbed on equitable consideration. The above decision specifically says that it was decided on the peculiar facts of that case only. The power to grant a relief under Article 142 of the Constitution of India is exclusively vests in the Supreme Court and the High Court does not have such a power.

7. First Respondent is the University. This Court ordinarily will not interfere with the internal management of the University which is an autonomous institution

unless compelling circumstances exist. University cannot appoint teachers who are not qualified according to the norms fixed by the University itself. Arbitrary and discriminatory action or favouritism in appointment cannot be practised by such institution as held by the Apex Court in *Dr. J.P. Kulshreshtha and Others Vs. Chancellor, Allahabad University and Others*, . It was held by the Apex Court in *K. Shekar Vs. V. Indiramma and Others*, as follows:

21...It is also true that generally speaking Courts have been reluctant to interfere with the running of educational institutions. But there can be "no islands of insubordination to the rule of law". The actions of educational institutions, however highly reputed, are not immune from judicial scrutiny. Indeed to preserve the high reputation, there is a greater need to avoid even the semblance of arbitrariness or extraneous considerations colouring the institution's actions.

Again it was observed as follows:

24. The clause, far from allowing NIMHANS the power to dispense with the advertisement of any lower post as a pre-condition to appointment indicates that only eligible persons could be considered for selection. Once the barrier of eligibility was crossed, the Selection Committee could consider the suitability of the candidate for the post advertised. It follows that the Appellant should not have been called for interview at all. His application clearly showed that he did not fulfil the requisite eligibility criteria for the post he had applied for, because he lacked any post-doctorate experience at all. The power in the Selection Committee to relax the eligibility criteria cannot be read as including the power to do away with the criteria altogether.

With the above observations, illegal selection was set aside by the Apex Court despite the fact that 11 years have passed after the appointment and candidate acquired the qualification subsequently and also observed that to get rid of the weed, root has to be eliminated. Apex Court recently in *Secretary, A.P. Public Service Commission v. B. Swapna and Ors.* 2005 S.C.C. 452 held as follows:

...Although the Court must look with respect upon the performance of duties by experts in the respective fields, it cannot abdicate its functions of ushering in a society based on rule of law. Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the entire process of selection so far as the selected candidate is concerned gets vitiated...

In *P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others*, it was held that appointments made against the norms prescribed in the advertisement is illegal and is liable to be set aside. We also refer to a decision of the Supreme Court in *Suman Verma Vs. Union of India (UOI) and Others*, . There, after finding that the selection was illegal, the Apex Court did not grant any equitable relief to the selected candidate even though he continued in the post for a long time. At the same time, the person so appointed since working for several years was

directed to be accommodated if possible. At paragraph 19 of the above decision the Apex Court observed as follows:

19. No doubt relying on Rekha Chaturvedi the learned Counsel for the Appellant submitted that in that case this Court after holding the selection process unlawful, did not interfere with the action and refused to set aside illegal appointment on the ground that the case was heard after eight years. In the case on hand, however, Respondent 6 had approached the Tribunal immediately, the Tribunal considered the facts and circumstances of the case and granted relief to Respondent 6 and also made suitable observations so that the present Appellant may be accommodated, if possible. Moreover that order was confirmed by the High Court. We, therefore, see no reason to disturb that direction.

In this case, as found clearly by the learned Single Judge, Petitioner was qualified to hold the post. He was second in the selection. The second Respondent was not qualified as per Ext. P-1 on the prescribed date, i.e. on the last date fixed for filing the applications. Therefore, his appointment is illegal. Statement filed by the University and selection papers show that the Petitioner was eligible as per Ext. P-1 notification and he was rank No. 2. Since only one post was advertised, only one appointment was made in the permanent cadre by appointing an unqualified candidate who was assigned rank No. 1. To pacify the Petitioner, he was given appointment to a similar post, but only on contract basis for a specific period. Glaring illegality cannot be perpetuated on the ground of equitable consideration. University has got a duty to act fairly and has to observe high standard. The Petitioner has challenged the illegal appointment immediately without losing any time. Delay in disposal of the case is not his fault. It is true that service matters take time for disposal due to heavy load of cases. But, no one shall suffer by an act of the court--"Actus curiae neminem gravabit" See South Eastern Coalfields Ltd. Vs. State of M.P. and Others, . Because of the delay in disposal of cases, illegality cannot be perpetuated. In this case, equitable consideration should be invoked not in favour of the unqualified professional candidate who was illegally appointed, but in favour of the eligible candidate for whom appointment was unjustly denied for no fault of his. Hence, Ext. P-3 is set aside and we hold that the Petitioner is entitled to be appointed in the post with effect from 8th April, 1991, the date of Ext. P-3. He should be appointed within three months from today. However, considering the long lapse of time, it is for the University to consider whether second Respondent also can be accommodated as he was later promoted and working for long years. Since the Petitioner was not working in the post, he is not entitled to salary, but, he is entitled to get only notional service benefits with effect from the date of Ext. P-3 as if he was appointed on that date. Since the second Respondent was drawing salary after doing the work, salary drawn by him till today shall not be recovered.

The writ appeal is disposed of accordingly.