

(2008) 08 DEL CK 0194

In the Delhi High Court

Case No : LPA No. 389 of 2006 and CM No. 11883/06

Dr. (Mrs.) Kusum Nehra

APPELLANT

Vs

Dr. B.R. Ambedkar College and Others

RESPONDENT

Date of Decision : 08-08-2008

Acts Referred:

Delhi University Ordinances — Ordinance 12

Citation : (2008) 153 DLT 162 : (2008) 106 DRJ 16

Hon'ble Judges : A.P. Shah, C.J.; Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : Rakesh K. Khanna, I.B. Gaur, S.S. Nehra, Faizy Ahmad Syed and Swati, for the Appellant; Amit Bansal, for R-1, Anurag Mathur, for R-3, Arvind Nayar and Vikas Kumar for R-4/GNCT, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This appeal is directed against the judgment dated 9th January 2006 passed by the Learned Single Judge dismissing the appellant's Writ Petition (C) No. 4497 of 2004 whereby she had challenged the appointments of the 5th and 6th respondent to the post of Lecturer (Hindi) in the Dr. Bhim Ambedkar College (1st Respondent) which is affiliated to the University of Delhi (3rd Respondent).

2. On 30th June 2001 the Respondent No. 3 notified vacancies in the post of Lecturer in various subjects including Hindi and invited applications from eligible candidates. One of the requirements was that the candidate should have qualified the National Eligibility Test ("NET") for Lecturers conducted by the University Grants Commission (UGC)/Centre for Scientific and Industrial Research or similar test accredited by the UGC. In a note appended to the paragraph concerning qualifications it was clarified that "the candidates who have completed M. Phil degree or have submitted Ph.D thesis in the concerned subject up to 31st December 1993 are exempted from qualifying NET."

3. In her writ petition, the appellant challenged the appointment of Respondent No. 5 on two grounds. The first was that he had not submitted his application before the deadline i.e. 15th July 2001. The second was that he did not possess the NET qualification as on the last date for the submission of the application. He also did not submit his Ph.D thesis before 31st December 1993.

4. The stand taken by the College was that although the Respondent No. 5 did not possess the NET qualification, he had been awarded Ph.D in March 2001, i.e. prior to the date of the advertisement which was 31st June 2001. The College also relied on a notification dated 31st July 2002 issued by the UGC whereby the criterion concerning submission of Ph.D. thesis was modified and those who had submitted Ph.D. thesis on or before 31st December 2002 were also made eligible for being considered. The interviews for the post took place thereafter and by that time the UGC notification had been issued. It was accordingly contended that there was no invalidity attaching to the selection of Respondent No. 5.

5.1 The learned Single Judge did not consider the issue concerning the failure of Respondent No. 5 to submit his application form in time. As regards the his not possessing the NET qualification, the learned Single Judge in para 17 of the impugned judgment held:

17. ...The argument of the petitioner seen in the perspective of the above principle has considerable force. The 5th respondent undoubtedly did not possess NET qualification. He also had not submitted the Ph.D. thesis on or before 31.12.1993. On a straight-forward application of the principles evolved by the Supreme Court the petitioner would have (been) entitled to relief.

5.2 However, the learned Single Judge sought to balance equities and invoke the logic of the UGC notification which was to ensure that "candidates with uniform acceptable, minimum academic standard are selected and appointed to the post of Lecturers." Thereafter the learned Single Judge concluded:

If one considers the logic of this requirement, along with the objective for extension of the date of submission, to 31.12.2002, arising by virtue of the notification of the UGC, it becomes apparent that the 5th respondent had the necessary qualification of the minimum standard, as on the date of the notification. While there is and cannot of controversy that on plain interpretation of the advertisement, the 5th respondent had not submitted his thesis before 31.12.1993, yet judged from the larger requirement of having to possess the uniform standard, he was eligible as on the date of his application by virtue of the subsequent UGC notification dated 31.7.2002.

5.3 The learned Single Judge noted that during the pendency of the petition, the appellant herein had secured appointment in another institution as a Lecturer (Hindi). Also, even before the appellant approached this Court, another advertisement had been issued in 2003 for filling up two vacancies in the college and therefore, "it would not be a sound exercise of jurisdiction to quash the appointments of the said respondent."

6. At one stage of the present appeal, this Court was informed that the College wanted to offer permanent appointment to both the appellant as well as Respondent No. 5. At the hearing on 8th May 2008, the appellant through her Counsel conveyed her willingness to accept the appointment, not object to the appointment of Respondent No. 5 and forgo the arrears of salary subject to her being given seniority from the date on which the Respondent No. 5 was appointed. Learned Counsel for the College then sought time for obtaining instructions. Thereafter this Court was informed by the Counsel for the College at the hearing on 27th May 2008 that there were no vacancies and therefore the offer made earlier was no longer open.

7. Mr. Rakesh Khanna, learned Senior Counsel appearing for the Appellant reiterated the grounds of challenge raised by the appellant before the learned Single Judge. As regards the failure of Respondent No. 5 to submit his application within time, he drew attention to the averment in the writ petition and to the fact that there was no denial thereof in the reply of the Respondent No. 5. He pointed out that the College had appointed a Committee chaired by Mr. Anil Nauriya to enquire into the matter. The Committee after examining the records found that the Respondent No. 5 had in fact not submitted his application in time. The Committee had further recommended that the Appellant should have been offered permanent appointment as Lecturer (Hindi) from the very day in December 2002 on which the Respondent No. 5 had been appointed.

8. Mr. Khanna further submitted that although the Appellant was working in another college at present she had not given up her claim to the post of Lecturer (Hindi) in the Respondent No. 1 College. The learned Single Judge having arrived at a factual finding that the Respondent No. 5 did not possess the NET qualification as on 15th July 2001 and had not submitted the Ph.D. thesis on or before 31st December 1993, there was no alternative but quash the illegal appointment of Respondent No. 5. Mr. Khanna submitted that the notification dated 31st July 2002 issued by the UGC was prospective. He relied upon the judgments of the Supreme Court in *N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others*, *P. Mahendran and others Vs. State of Karnataka and others*, *Gopal Krushna Rath Vs. M.A.A. Baig (Dead) by Lrs. and Others*, and *Secretary, A.P. Public Service Commission Vs. B. Swapna and Others*, to contend that the eligibility criteria could not be changed retrospectively and after the last date for the submission of applications.

9. Mr. Khanna finally submitted that as on the date of issuing the further advertisement for further vacancies, the Appellant's name was still on the select list of candidates prepared pursuant to the interviews held for the post. Therefore, the Appellant could have easily been appointed against those vacancies with effect from the date on which the Respondent No. 5 was appointed.

10. On behalf of the Respondent No. 1 College it is submitted by Mr. Amit Bansal, learned Counsel, that as per the records of the College the application submitted

by Respondent No. 5 was undated. However in the written submission it is sought to be contended that even the Appellant's application was undated. Nevertheless, it is not denied that the Respondent No. 5 did not submit his application before the deadline whereas there is no such averment is made in respect of the Appellant.

11. It was then contended by Mr. Bansal that the UGC notification was brought into force "with immediate effect." Since the interviews for the three vacancies were held in December 2002, by which time the said notification had issued, the Respondent No. 5 was extended the benefit of such notification. There were only three vacancies for which a select list of five candidates was prepared. In terms of Ordinance 12 of Delhi University Ordinances, the select list was valid only while the vacancies existed. Therefore, the select list could not have been kept alive for filling up vacancies which occurred thereafter. In any event, irrespective of non-expiry of the validity period of the select list, if the vacancies were filled up the list stood exhausted. He placed reliance upon the judgment in *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, and *Prem Singh and Others Vs. Haryana State Electricity Board and Others*, . Finally it is contended that the Respondent No. 5 had been regularly employed and continued to function as a Lecturer in the College since 29th December 2002. The Appellant was regularly appointed as a Lecturer in another College under the Delhi University since November 2004. Therefore, it would not be equitable to remove the Respondent No. 5 from service at this stage. It is contended that the Appellant challenged the appointment made in December 2002 belatedly in the year 2004 and that if the equities were to be balanced no interference with the impugned judgment of the learned Single Judge was called for.

12. On behalf of the Respondent No. 5 it is submitted that by a letter dated 27th April 2007 the College had informed its Advocate that the Respondent No. 5 had submitted his application before the last date i.e. 15th July 2001 and his name had appeared at Sl. No. 35 in the synopsis showing that 84 candidates which were sent to the University for scrutiny. Therefore, there was no merit in the contention that the Respondent No. 5 had submitted his application form beyond the deadline. The eligibility criterion was usually determined only with reference to the date of the interview and as per the prevalent practice the UGC notification would apply. As regards the recommendation of Nauriya Committee, it is submitted that Respondent No. 5 was not heard by the Committee and therefore its recommendations would not bind him.

13. The first issue concerns the date of submission of the application for the post by Respondent No. 5. A specific averment was made by the Petitioner in para 4 (c) of the writ petition that "Respondent No. 5 did not apply in response to the advertisement dated 30th June 2001 because he was not qualified on 15th July 2001 which was the last date for submitting the applications." In the counter affidavit before the learned Single Judge the College did not deny this averment at all. In reply to para 4 (c) it was stated as under:

4(c) In reply to para (c) it is submitted that the advertisement appeared on 30.6.2001. As per application from dated NIL available on the record of the college, Dr. M.P. Singh had been awarded/conferred Ph.D. degree on 1.3.2001 i.e. 4 months before the issue of advertisement. Photo copy of the Ph.D. degree is attached marked as Annexure "A". However, the qualification of NET is not required for candidates with Ph.D. degree before December 2002 which exemption was applicable in the case of Dr. M.P. Singh, so respondent No. 5 was qualified for the post. Before the college processed for interview, all the applications received were sent to the Head of Department of Hindi for scrutiny and after having their recommendations/ approval vide University letter dated 9th December 2002 interview letters were sent to all eligible candidates including reserved category by adhering strictly to the modified and amended ordinance of UGC referred to in the aforesaid letter.

14. In the reply of the Respondent No. 5 (filed in the present appeal), it is stated as under:

5. The contents of para 3 (c) are wrong and denied. It is wrong to say that the answering Respondent No. 5 did not apply in response to the advertisement dated 30.6.2001 whereas the fact remains the answering Respondent No. 5 had applied as he had already appeared in various NET/SLET exams. As regards the averments that the answering Respondent submitted an application without date after the last date and on 22.11.2002, the same is also wrong and denied, whereas from the perusal of the representation as available at Annexure A-2, it is clear that the answering Respondent had applied against the advertisement and further informed the College authorities about the eligibility as the answering respondent had acquired the Degree prior to 31.12.2002.

15. As can be seen from the above replies, there has been no categorical denial of the averment made by the Petitioner that the Respondent No. 5 had not submitted application form before the deadline. Mr. Bansal, Learned Counsel for the College was asked to examine the records and inform this Court of the correct factual position. In the written submission, he stated that out of 84 application forms received in response to the advertisement, "57 application forms, including that of the Appellant and Respondent No5, did not indicate a date thereon." However, there is no categorical statement as to when the application form of Respondent No. 5 was received by the College. In fact there is no denial that the said application form was not received before the deadline. What is now sought to be contended that the Appellant's form was also undated and therefore the Appellant and the Respondent No. 5 were no differently placed. This submission is untenable. It was never the case of anybody before the learned Single Judge or before this Court that the Appellant had not submitted her application form within time. It is unfortunate that the College has not been able to give a clear picture in this regard to the Court despite several opportunities.

16. On a consideration of the above pleadings the only conclusion possible is that

there is no factual denial of the submission made by the Petitioner that the Respondent No. 5 did not submit his application before the deadline. However, in the considered view of this Court, the issue of the validity of the appointment of Respondent No. 5 need not be decided on this ground alone.

17. The effect of the UGC notification dated 31st July 2002 which is relied upon by both the College and Respondent No. 5 to explain his not possessing a NET qualification and not submitting his Ph.D thesis before 31st December 1993 is to be considered next. The UGC notification as extracted in the impugned order of the learned Single Judge itself indicates that the Amendment Regulation "shall come into force with immediate effect." In the circumstances there is no question of the notification being retrospectively applicable from any earlier date. Where, as in the instant case, when the advertisement inviting applications does not mention any cut-off date with reference to which the eligibility of the candidate is to be determined, it has to be taken to be the last date for submitting the application. Further, an eligibility criteria which might undergo a change after the last date of submission of applications, cannot obviously be given retrospective effect since that would be to the disadvantage of those who might have applied had they been aware of such a contemplated change. The inevitable conclusion is that, as far as the present case is concerned, the eligibility condition concerning the submission of Ph.D thesis was that which was in force on the last date of Respondent No. 5 having to submit the application for the post.

18. The law in this regard has been explained by the Supreme Court in several decisions. In *Secretary, A.P. Public Service Commission* (supra) it was held:

16. The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by Learned Counsel for the applicant-respondent No. 1 it was un-amended rule which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criteria e.g. minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the Statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only. (See *P. Mahendran and others Vs. State of Karnataka and others*, and *Gopal Krushna Rath Vs. M.A.A. Baig (Dead)* by Lrs. and Others,

(emphasis supplied)

19. This Court is, therefore, unable to agree with the conclusion arrived at by the

learned Single Judge that the benefit of the UGC notification dated 31st July 2002 could have been extended to validate the appointment of Respondent No. 5.

20. This Court is not impressed by the submission of the respondents that the writ petition of the Appellant was barred by laches. The records show that the Appellant had been making representations soon after coming to know of the appointment of the Respondent No. 5 to the post. Therefore, this is not a ground on which the challenge to the validity of the appointment of Respondent No. 5 by the Appellant can be negated.

21. In the circumstances, this Court holds that the appointment of Respondent No. 5 to the post of Lecturer (Hindi) was not valid. The consequence would be that the post would be treated as continuing to remain unfilled as on the date Respondent No. 5 was appointed. The College will now proceed on this basis and if the next candidate in the list who is willing to accept the post is the appellant, then it should appoint her to the post. Consequently, there is no need to examine the question whether de hors the appointment of Respondent No. 5 the appellant could be offered the post on the basis that the select list in which her name figures could be operated for future vacancies.

22. On the question of balancing equities, this Court is of the view that in matters concerning eligibility and appointment to educational institutions, the Court should refrain from permitting a lowering of standards only because it has been presented with a fait accompli. The very nature of judicial proceedings is such that with the passage of time, parties may have continued in the position they were when the litigation commenced. Respondent No. 5 knew throughout that his appointment would be subject the result of this litigation. In fact the learned Single Judge had even at an early stage of the writ petition directed, by an order dated 24th March 2004, that any appointment to the post of Lecturer (Hindi) would be subject to further orders. Therefore merely because the Respondent No. 5 has been working from December 2002 onwards cannot create any equity in his favour. Also, the appellant appears to be still interested in the post. In the circumstances, it would be unfair to deny her the consequential relief when she has succeeded in demonstrating that the appointment of Respondent No. 5 to the post was illegal and invalid. Therefore, even on this aspect we are unable to concur with impugned order of the learned Single Judge.

23. The impugned judgment of the learned Single Judge is accordingly set aside and it is hereby declared that the appointment of Respondent No. 5 to the post of Lecturer (Hindi) was invalid. The Respondent No. 1 College will within a period of four weeks from today take consequential action in the manner explained in para 21 above. If none of the eligible candidates in the list is willing to accept the appointment for any reason within a period of four weeks from being informed by the College, then the post will be advertised and a fresh appointment made in terms of the prevalent rules. As regards Respondent No. 5, while he will cease to remain as Lecturer (Hindi) forthwith, the service already rendered by him in the post will not count for any benefit whatsoever. However, the salary paid to

Respondent No. 5 while he was working as Lecturer (Hindi) will not be recovered. Also, subject to his fulfilling all criteria as per the prevalent rules, it will be open to Respondent No. 5 to apply afresh for the post, if it is advertised for being filled up.

24. The appeal is, accordingly, allowed with costs of Rs. 10,000/- each which will be paid by the Respondent No. 1 College and Respondent No. 5 to the Appellant within a period of four weeks from today.

25. The appeal and the pending application stand disposed of.