

(1998) 12 OHC CK 0020

In the Orissa High Court

Case No : OJ.C. No's. 14269, 15077, 15003, 15001, 14748, 14927, 14863, 14877, 11345, 14404, 14507, 14802, 14888, 15245, 15203, 14323, 15136, 14931, 14402, 14711, 15360, 15319, 15694, 14926, 16178 and 16095 of 1998

Dr. Pranab Mohapatra and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-12-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : (1999) 1 OLR 292

Hon'ble Judges : S.N. Phukan, C.J.;A. Pasayat, J

Bench : Division Bench

Advocate : S.K. Dash, S.B. Jena, P.K. Misra, S. Behera, S.S. Mohapatra, A.K. Patra, B.N. Sadangi, G. Mukherjee, P. Mukherjee, J.K. Khuntia, H.K. Rout, B. Routray, B. Dash, A.K. Baral, P.K. Dash, D.K. Mohapatra, S.D. Das, L. Samantaray, A.K. Nayak, H.S. Satpathy, B. Pattnaik, B.K. Sinha, D.D. Dhar, A. Mohanty, D.R. Bhokta, B.K. Purohit, P.K. Sahoo, P. Mohapatra, K.M.H. Niamati, B. Senapati, P.S. Samantara, M.K. Panda, L.N. Ray Choudhury, S.R. Patnaik, L. Mishra, K.K. Jena, S. Mohanty, A.K. Jena, R.K. Rath, B.R. Sarangi, N.R. Rout, C.A. Rao, S.K. Behera, A. Tripathy, S. Palit, P.C. Pattnaik, A.K. Mishra, B.B. Acharya, J. Sengupta, D.K. Panda, P.R.J. Dash, C. Mohanty, G. Sinha, M.P. Kar, A.N. Ray, N. Paikray, B.P. Mohanty, N.K. Badu, A.K. Misra, G.S. Panda, R. Pati, A.R. Mohanty, J.P. Pattnaik, K.P. Misra, B.P. Ray, N. Sarkar, S.J. Pradhan, S.N. Satpathy, Manas Chand, S.K. Lenka, A.K. Baral, K. Ray, S.C. Puspaik, T.K. Sahoo, S.S. Jena, P.K. Nayak, A.N. Samantaray, S.C. Beura, G.P. Mohanty, M.K. Dash, C.R. Misra, G. Misra, T.K. Mandal, T.K. Misra, S.S. Das, S.S. Rao, B.K. Mohant, D.K. Sahoo, M.K. Mohanty, B.P. Routray, S. Samal, S.B. Das, K.C. Mohapatra, B.B. Roy, S.N. Dhal, R.B. Singh and B.S. Misra, for the Appellant; R.K. Mohanty, A.G.A., Yasobant Das, N.C. Mohanty, S. Misra (1), S.N. Misra, B. Dash, R.K. Mohapatra, D.K. Swain, S. Swain, N.K. Sahoo, A.K. Parida, B.K. Nayak, S. Mohanty, G.C. Das, K.P. Nanda, M.N. Harshabardhan and V.K. Agrawal, for the Respondent

Judgement

A. Pasayat, J.—These writ applications along with large number of others have

been filed questioning legality of the process of selection of candidates for prosecuting Post-Graduate Studies in the Government colleges of the State. As grounds of challenge and rebuttal are essentially common, they are disposed of by this judgment which shall govern each one of them.

2. For selection of candidates for Post-Graduate Courses in the Government Medical Colleges of Orissa, Prospectus was issued for 1998. Similar Prospectus simultaneously was issued for 1999. Examinations were held for both the years and petitioner in each case appeared at the examinations, but was not selected.

3. In Chandan Mishra and Ors. v. Governor, M.B.B.S./ B.D.S. Selection Board and Ors. : 77 (1994) CLT 624, one of us (Pasayat, J.) had referred to Shakespeare's classic expression in Othello "Chaos is come again". The observation was made in the context of admission to M.B.B.S./B.D.S. Courses. Year after year large number of candidates make grievance about improper questions/ model answers indicated. The problem has become chronic, and as time passes the contamination has spread to admission to Post-Graduate Courses. No wonder large number of candidates have alleged that they are victims of "examination malady and chaos", prayer is made for a declaration that the entrance examination is legally dead. The successful ones, the State of Orissa, and the Convenor of the Examination submit that notwithstanding the deficiency in questions/model answers, the results should be declared to be alive. The post-examination scrutiny has become almost a ritualistic feature. Winston Churchill has said : "..... it would be wrong not to lay the lessons of the past before the future" (The Second World War : The Gathering Stone). Unfortunately the examining body seems to be at a loss to make diagnosis of the cause for the failure of the examination system.

4. Thumb nail description of the scenario is as follows :

A prospectus approved by the Government of Orissa in the Health and Welfare Department in Government Order No. 25139/H. dated 18.7.1998 was issued for 1998 wherein it was stipulated that the Candidates taking the examination are to answer two hundred multiple choice objective type questions. Four alternative answers are indicated against each question. According to the examining body only one of them is the most appropriately correct answer. The candidate is required to give the most appropriate answer. The examining body selects the correct answer or most appropriately correct answer which is normally called "key answer" or "model answer". Similarly for 1999, prospectus was issued. In the prospectus relating to 1998-99 session, the eligibility criteria were required to be fulfilled by 31st March, 1998. For the sessions 1999-2000 also the eligibility date was 31st March, 1998. Several allegations have been levelled in respect of the correctness of the questions/model answers in addition to various other serious allegations which we shall deal with infra.

5. It would be interesting to note that the examining body thought it appropriate to consider as to whether all the questions/model answers were in order after

completion of examinations. It is to be noted that the candidates were given options to make grievance about any incorrectness within a stipulated period vide Clause 11.1.

According to the examining body, the post-examination exercise was to be undertaken because of the grievances received in earlier years, and to ensure that no candidate suffered because of defective questions and/or key answers. Fifteen questions were found not to be in order and due credit has been given to every candidate.

6. Grievance of the unsuccessful candidates so far as incorrectness of the questions/model answers is concerned can be categorised into three broad heads :

(i) Because of large number of questions which have been accepted by examining body to be either wrong or having more than one correct answer, the examination lost its vitality and there was no scope for evaluation of merit.

(ii) Many questions do not have any correct answer, or have more than one correct answer or the questions are themselves not correct, in addition to those accepted to be so by the examining body.

(iii) There are large number of errors in the questions/answers, which though claimed to be printing errors, affect the process of selection. It is relevant to mention here that the factual aspects are undisputed.

7. So far as validity of examination is concerned, the model problem which was highlighted before us by the petitioners merits careful consideration. The candidates were required to answer 200 multiple choice objective questions. At this stage it is desirable to delineate what a multiple question is. The position was illuminatingly stated by the Apex Court in *Kanpur University and Ors. v. Samir Gupta and Ors.* : AIR 1983 SC 1260, and followed by this Court in *Priyadarshini Acharya and Others Vs. State of Orissa and Others*, , and *Raghunath Pradhan and Others Vs. State of Orissa and Others*, .

An objective type question is one where alternative answers are given and the candidates have to indicate the correct answer by some signs (in the instant case by putting X marks). Objective based and objective type questions are after confused with each other. In the former, a question is framed with deliberate attention to the objective which is to be measured. In the latter, the question is designed to gauge the depth of the candidates' knowledge of the subject. Prof. Dr. B. K. Behura [one of the experts chosen by this Court in *Chandan Misra's* case (*supra*)] observed that for effective selection, the following pattern should be adopted while formulating questions :

"40% based on knowledge; 30% based on understanding of the subject; and 30% on application."

Objective type questions can be classified into (a) true-false type, (b) matching

type, (c) sentence completion type, and (d) multiple choice type. The last category is one where the question is composed in the form of a statement or a question followed by four alternative choices. The correct choice may be only correct answer type. The incorrect choices in a multiple choice question are normally called distractors. Externally the correct answer and distractors should appear similar.

8. The stand of the opposite parties and the intervenors is that in the cases of Priyadarshini Acharya and Raghunath Pradhan (*supra*) this Court had accepted that there can be more than one correct answer in respect of one question, and had granted relief, and therefore there is nothing wrong in the selection board indicating more than one correct answer in respect of certain questions. According to them, in an objective type question the possibility of there being more than one correct answer is not completely ruled out. The plea is clearly untenable. It was nowhere observed in the aforesaid two cases that an objective type question can have more than one correct answer. In these cases, correctness of alternative answers was proved to be correct, notwithstanding the stand of the examining body that the concerned question had only one correct or most appropriately correct answer. In Kanpur University's case (*supra*) the apex Court had observed that even though one answer was indicated to be the correct answer, yet when it is proved that another answer was correct and/or the key answer is incorrect, the Court can grant appropriate relief. It was nowhere held that in an objective multiple choice question, there can be more than one correct answer. Emphasis is laid on the expression "multiple choice" by the learned Addl. Government Advocate to submit that the choice is more than one. It is not in doubt that the choice is more than one, but the correct answer has to be one. Four different choices are given, out of which a candidate is required to pick up one which, according to him, is the correct or more appropriately correct one. To test merit of the candidate and his knowledge of the subject, different choices are placed before him. Each one of them appears to be correct, but only one of them has to be indicated to be correct. As indicated above, except the correct one, others are distractors, and are red herrings introduced by the examiner in order to find out whether a candidate is actually well equipped, to be selected or is just taking a chance. The object and purpose for which the objective questions are set are to find out the depth of a candidate's knowledge, and the ability to pick up a correct answer. There may be cases where per chance a candidate may pick up a correct answer. This is inevitable. But by and large, a really meritorious student can pick up the correct answers on the basis of his knowledge of the subject. Therefore, the examining body has indubitably failed to indicate 200 objective type questions, notwithstanding clear stipulation in the prospectus. The thinness between success and failure is hair-like.

9. In Kanpur University's case (*supra*) the apex Court observed that if the attention of the examining body is drawn to any defect in a key answer or any ambiguity in a question set in the examination, prompt and timely decision must be taken to declare that the suspect question will be excluded from the paper

and no marks assigned to it. Similar view was expressed in Priyadafshini's case (supra). But can such elimination be carried out to point of no return ? Merely because, such act is permissible, it cannot be done as a matter of course. The learned Addl. Government Advocate fairly stated that when the number is unusually large, the selection becomes vulnerable, but submitted that the case at hand is not that alarming.

10. Large number of questions were attacked by the petitioners on the ground that they were either incorrect questions and/or carry incorrect answers in addition to those indicated by the examining body. With the consent of parties by order dated 24.11.1998 Dr. Gopal Chandra Das, Retired Professor of S.C.B. Medical College and Hospital, Cuttack and an eminent doctor of repute and wisdom, was asked to examine the questions and model answers indicated by the examining body and the materials placed by the candidates (both successful and unsuccessful). Materials submitted by the parties were considered by Dr. G.C. Das.

An exhaustive report is received from Dr. G.C.Das. A bare reading of the report shows that the situation is grim. According to Dr. Das, following is the position :

1998	1999	1. Disputed questions received	75	60	(inclusive of those repeated by parties)	(Minus)	Repeated questions	23	10	-----	-----	52	50
		2. Correct answers	11	04			3. Ambiguous answers, wrong questions and/or inappropriate answers	41	46				

11. Though faint attempt was made by the learned counsel for the successful candidates and the State that a different view in respect of some questions is possible, and the view of Dr. G.C.Das, is that of an expert only and other experts have opined differently, we do not accept it. Dr. Das has referred to several books of international/national authors on the basis of which the conclusions have been arrived at. Dr. Das was nominated with the agreement of all the parties, who were unanimous in their submission that he is the most appropriate and correct choice. To submit that his views may not be final one is an attempt at fence-sitting, which we reject outright. It may be noted that Dr. G.C.Das has obtained the views of the Heads of Departments of S.C.B. Medical College and Hospital, Cuttack in the concerned specialised subject for the purpose of cross-verification. Their views are similar to his views. Therefore, we accept the report.

12. In the case of Asif Hameed and others Vs. State of Jammu and Kashmir and Others, , the apex Court in the case of admissions to the medical colleges, observed that the Constitution does not permit the Court to direct or advise the executive in matters of policy or to sermominise qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers. It was also observed that the procedure for selection laid down by the executive as well as the selection is, however, always open to judicial review on the ground of unreasonableness or on any other constitutional or legal infirmity. Therefore,

even if one University has adopted one set of criteria and another University adopts another set of criteria and even though it may appeal to the Court that one set of criteria is better than the other it would not be open to the Court to substitute its view for that of the authority. The only scope of judicial review would be to examine whether the criteria adopted is reasonable or unreasonable, if the criteria adopted are reasonable, the matter ends there.

13. It would be appropriate to take note that when a challenge based on Article 14 against any of the rules is brought before the Court, however, it would be worthwhile to remember that the legitimate presumption is that the rule must have been framed by the State Government in good faith and with full knowledge of the existing conditions as well as requirements and that the amendment, if any, must have made to solve difficulties manifested by experience. The State Government is required to deal with diverse problems arising out of an infinite variety of situations and it must, therefore, have the power to make provision to meet with such problems and to attain particular rational objects. Another thing which requires to be borne in mind is that in order to come within the mischief of Article 14, it is not sufficient to show merely that there is differentiation or inequality of treatment; for, differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause, to attract the operation of the said Article, it is necessary to show that the differentiation or inequality, if any, is irrational or arbitrary and that it has no rational relation to the object sought to be achieved. *Kamarunisa v. Maheboob Begum* : AIR 1953 SC 918 . Equal treatment of unequal objects, transactions or persons is also not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved. (See *Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union*,). It is also an accepted principle that if the difference in treatment is of a trivial, unsubstantial or illusory nature, then that circumstances alone is sometimes remanded as a cogent ground for holding that the action is not discriminatory at all or no inequality has, in fact, been created. (See- *The State of West Bengal Vs. Anwar Ali Sarkar*,). Mathematical nicety and perfect equality are also not required to meet the test of Article 14. What is of the essence of the matter is similarity and not identity of the treatment (*State of Bombay v. F.N.Balmara*: AIR 1951 SC 318). The formula devised with a view to attaining the given object need not be scientifically perfect or logically complete so long as it stands the test of reasonableness and it has nexus with the object sought to be achieved."(See *Ganga Ram and Others Vs. The Union of India (UOI) and Others*,). Invalidity of such formula cannot be established by merely finding fault with the scheme adopted to achieve the purpose in view [See *Jalan Trading Co's* case (supra)].

14. On the basis of report of Dr. G.C.Das, the conclusion is that in respect of 1998 examinations 41 questions/model answers are wrong, and in respect of 1999 examinations the number is 45. After having come to the above conclusion, the important question is regarding the course to be adopted. Learned counsel

for unsuccessful candidates have prayed that in view of large number of defective questions/model answers involved, the entire examination in each of the years has become a mockery and needs to be declared invalid. On the other hand, learned counsel for State submitted that it would not be proper to do so. Similar is the stand of learned counsel for successful candidates. It is pointed out by the learned counsel for State that in view of the norms laid down by the Medical Council of India (In short, "MCI") the process of selection has to be over by 01.12.1998, and time is running out. This is certainly an important factor to be taken note of. The best course according to us would be to make a fresh valuation on the basis of report submitted by Dr. Das, and a fresh list be prepared and follow up action be taken by the examining body so as to meet the date-line fixed by the MCI. This shall be done in respect of t^he Session 1998-99. So far as the Session 1999-2000 is concerned, sa ne will not be a hurdle. Considering large number of questions which have been found to be either wrong or carrying incorrect key answers, it would not be desirable to adopt the procedure to be followed in the peculiar situation for 1998-99 session. It would be wholesome to direct a fresh examination. Let the examining body take steps for conducting the examination afresh, as expeditiously as practicable. Due care and caution should be taken to make it defect-free. It does not befit an examining body for Post-Graduate candidates to present such poor state of health so far s its academic adequacy is concerned. It is to be noted here that some of the questions which were found to be wrong or to be carrying incorrect key answers in the previous years have been repeated again. That itself shows non-application of mind, to say the least. There has to be proper diagnosis to find out where the malady lies and to remove it. That would need surgical precision which is highly desirable.

15. Allegations have been made about leakage of questions. Certain factual aspects have been highlighted in this regard. One of the features highlighted is that several candidates who have bad academic placed at high places in the select list of 1998. The learned counsel for petitioners have submitted that inferentially conclusions can be arrived at about leakage of question papers and/ or key answers. Inference can be drawn from facts, presumptions can be made if a solid foundation p laid. There is no definite materials placed before us to show that there was any leakage as alleged. Suspicion however strong cannot take the place of proof. It is true, direct evidence would be hard come by in almost all cases involving leakage. In such cases, probabilities and tell-tale circumstances can be considered. "Some circumstantial evidence is very strong, a when you find a trout in the milk". (Thoreau Journal, November, 1850). But before those can be acted upon, it has to be held that they lean heavily in favour of the view "must be" and not "may be". The mind is apt to take a pleasure in adopting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely is it, considering such matters, to overreach and mislead itself, to supply same little link that is wanting, to take for

granted some fact consistent with its previous theories and necessary to render them complete. The aforesaid warning was addressed by Baron Elderson to the Jury in *R.v. Hodge* : 1838 2 LC.C. 227. The same approach was adopted by Jenkins C.J. in *Barindra v. R* : 14 C.N.I 114. When one is at the outset strongly impressed with the truth of a case as a whole, it is obviously all, the more necessary to be on one's guard against approaching with prejudice or unconscious bias the respective cases of the individuals concerned and one must be very careful not to allow conjectures or suspicion to take the place of legal proof. Suspicion though a ground for scrutiny or evidence cannot be made the foundation of a judicial decision. We, however, feel tempted to quote, Ambrose Bierce (in the *Devil's Dictionary*) "Don't steal, thou! It never thus compete; successfully in business Cheat". In the past days a candidate securing top position in the High School Certificate Examination, was securing 72% to 73% of the total marks. These days candidates securing more than 80% marks are even not getting admission in certain streams in reputed institutions of the State. Merely because a candidate with mediocre academic career has secured high percentage of marks, that cannot be basis for a conclusion of leakage of question papers/ key answers. Without any other material to establish the allegation of leakage it would be undesirable to attribute unfairness as the basis for securing high marks.

16. The desirability of holding examination of two years at a time has also been questioned. Answer of the State in this regard is that for the 1999-2000 session, the prospectus clearly stipulates as follows :

15.1. After counselling, the selected candidates will have to work for a period of one year in the tribal/backward areas notified by Government in accordance with the Resolution No. 11454-H. dated 21.3.1998 of Health and Family Welfare Department. The Convenor will allot his/her place of posting with the CDMOs strictly and serially according to the list and the candidates are to report to the concerned CDMOs. Failure to report the CDMO within 10 days, he/she will forfeit the seat.

15.2. The Direct candidates not in service will be appointed on contract basis for one year and will be paid consolidated pay as may be decided by Government. The period of their service shall not in any way count towards seniority and other service benefits later. For Direct candidates/Already in Government service as well as in-service candidates, the year's mandatory service in identified tribal/backward areas will have to be rendered, but this will be counted as part of their regular service.

15.3. On completion of one year of service, the candidate will obtain certificate from the CDMO indicating that they have rendered uninterrupted service for the period required and also indicating that they have not availed any kind of leave other than CL and Earned Leave of 30 (thirty) days at the maximum. The one year of service must be completed before the last date of admission into the P.G.course for which the candidate has been selected."

The stipulation has rationale.

17. The learned counsel for successful candidates have submitted that the unsuccessful ones are fence sitters. They took the examination knowing fully well what was the requirement. Their grievance after the examination is over cannot be accepted. In *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, , and *Dharam Pal and others Vs. State of U.P.*, , the Apex Court has observed that a candidate after taking the examination and not coming out successful cannot question correctness of the procedure adopted or the guidelines prescribed. That being the position, there is no substance in the plea that the procedure prescribed for 1999-2000 session suffers from any deficiency.

18. In OJC No. 14323 of 1998, additionally it is submitted that first information report has been lodged about leakage of question papers. That is a matter with which we are not concerned. Law will take its course. Any observation made by us about the leakage shall not stand on the way of the unravelling truth.

19. It is said "Prevention is better than cure". Before the malady becomes irremediable effective steps have to be taken. For this purpose, serious thinking is necessary to avoid multiplicity of litigation. As has been indicated above, the fact that every year the mistakes are being repeated shows that the authorities have not learnt the lesson.

20. Question arises as to whether responsibility should be fixed on those who are responsible for the chaos and the impasse. We, therefore, direct that the following steps be taken immediately.

(a) A Committee be set up by the State Government with the Chief Secretary of the State, the Secretary of the Health and Family Welfare Department as its members amongst others who are to be nominated by the State Government. The committee shall find out and fix responsibility on those persons who are involved in the process of selection and if necessary take suitable administrative action against them, if there is prima facie dereliction of duty. It shall take note of the colossal wastage of time and money involved in the litigations of present nature.

(b) The Committee shall indicate the modalities to be adopted in the process of selection including setting the questions with model answers. It may be ensured that the body entrusted with the task does not commit mistakes noticed in the present year and the past years. It would be appropriate if the persons having profound knowledge in the subject are chosen. They should be real experts and not intellectual pigmies masquerading as experts.

(c) Immediate steps should be taken to avoid hardship to all concerned, more particularly the candidates.

The writ applications are accordingly disposed of. No costs.

S.N. Phukan, C.J.

21. I agree.