
(2009) 09 AHC CK 0053
In the Allahabad High Court

Dr. (Smt.) Anshu Agrawal

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 04-09-2009

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 12
Constitution of India, 1950 — Article 226

Citation : (2010) 2 AWC 1544

Hon'ble Judges : Ashok Bhushan, J;Arun Tandon, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Arun Tandon, J.—Heard Sri Ashok Khare, senior advocate, assisted by Sri Aditya Kumar Singh, learned Counsel for the petitioner, Sri P.S. Baghel, senior advocate, assisted by Sri Shiv Sagar Singh, learned Counsel for respondent No. 4, Smt. Archana Singh, learned Counsel for U.P. Higher Education Service Commission and Sri Mahesh Chandra Chaturvedi, learned chief standing counsel assisted by learned standing counsel for State-respondents.

2. U.P. Higher Education Service Commission, Allahabad (here-inafter referred to as the "Commission") published advertisement No. 32 inviting applications for appointment against teaching posts in various degree colleges affiliated to the various State Universities covered by the provisions of U.P. State Universities Act.

3. The present writ petition is with reference to the post of Lecturer in Chemistry as was subject-matter of advertisement No. 32. The advertisement mentioned that there were 80 posts of Lecturer in Chemistry, available without any further specification. Along with application forms, a list of institutions was made available qua 80 posts of Lecturer in Chemistry, which were subject-matter of advertisement. Some of the posts so specified were further disclosed to be earmarked for specialization in Organic, Inorganic and Physical Chemistry. The post, which is subject-matter of dispute pertains to Teeka Ram Kanya Mahavidyalaya, Aligarh, which as per the list was earmarked for Inorganic

Chemistry.

4. Petitioner, namely, Anshu Agrawal, as well as respondent No. 4, namely, Vinit Gupta applied in response to the aforesaid advertisement No. 32. A select list was published on 8.7.2005. In the select panel so published, the name of the petitioner, who is possessed of a degree of M.Sc. in Inorganic Chemistry finds mention at serial No. 2 within the general category candidates, while the name of respondent No. 4, who is possessed of a degree of M.Sc. in Organic Chemistry, is at serial No. 25 within the same category. Petitioner, who stood higher in merit than the respondent No. 4 is stated to have opted for Teeka Ram Kanya Mahavidyalaya, Aligarh, as her first preference.

5. The Director of Higher Education, U.P., Allahabad, by means of his order dated 10.2.2006 recommended the name of the petitioner for appointment against the vacancy, which was available in N.R.E.C. College, Khurja, Bulandshahr, while respondent No. 4 was recommended for appointment on the post of Lecturer Chemistry in Teeka Ram Kanya Mahavidyalaya. The placement order dated 10.2.2006 qua the petitioner has been brought on record as Annexure-5 to the writ petition, while the placement order qua respondent No. 4 has been brought on record as Annexure-CA 8 to the counter-affidavit. Placement orders so issued are being questioned before this Court on behalf of the petitioner on the plea that having regard to the merit secured by the petitioner, vis-a-vts option exercised by her as her first choice, she was entitled to be empanelled for the post in Teeka Ram Degree College. Reliance has been placed upon the Full Bench judgment of this Court in the case of Vinay Kumar (Dr.) v. Director of Education (Higher), Allahabad and Ors. (2006) 1 UPLBEC 334, wherein it has been clarified that merit of candidate is the pivotal factor for empanellment against a particular vacancy.

6. The case so set up on behalf of the petitioner has been opposed on behalf of respondent No. 4, U.P. Higher Education Service Commission as well as on behalf of State-respondents on the allegations that in Teeka Ram Kanya Degree College, which is the Post Graduate Degree College, the subject of Chemistry is recognised only upto under graduate level. There are three sanctioned posts of Lecturers in Chemistry. In all three papers are taught at Graduation level in the subject of Chemistry, namely, Organic, Inorganic and Physical Chemistry. In the best interest of the students, it will be proper that the three posts are filled from teachers having specialization in particular three branches. It has been stated on behalf of the respondents that one Dr. Tayyaba Shamsuddin, Lecturer Chemistry (Organic) retired in the year 2000. The vacancy so caused was intimated to the Commission vide letter of the Teeka Ram Degree College dated 2.6.2001. In the said letter against the post of Lecturer Chemistry, specialization in Organic Chemistry was specifically mentioned. Reference has also been made to various letters on record written by the Teeka Ram Kanya Degree College dated 2.6.2001, dated 17.1.2002, dated 3.11.2002, dated 9.3.2005 and lastly dated 6.10.2005 suggesting therein that the college was in need of a teacher in the

subject of Chemistry having specialization in Organic Chemistry. Due to mistake in the list of colleges forwarded along with application forms, the word "inorganic" was mentioned against post of Lecturer Chemistry available in the Teeka Ram Kanya Degree College. It is stated that the mistake was only a clerical mistake and therefore, after the mistake was deducted, the Director of Higher Education has rightly directed placement of respondent No. 4, who is lower in merit but is admittedly M.Sc. in Organic Chemistry, against the post advertised for Teeka Ram Kanya Degree College. It has been highlighted that placement of the respondent No. 4 in the facts of the present case having regard to the requirement of teacher with specialisation in Organic Chemistry is in the best interest of the students of the college and cannot be termed as arbitrary or illegal. Nor any interference by this Court under Article 226 of the Constitution of India is warranted. It has been further stated that placement has been done in terms of the Government order dated 30.1.2006, which has not been challenged by means of the present writ petition, therefore consequential action taken in pursuance thereof cannot be questioned. In support thereof, reliance has been placed upon the Division Bench judgment of this Court in the case of Abhay Narain Singh v. State of U.P. and Ors. 2007 (2) ADJ 281 (DB).

7. In view of the aforesaid factual background, we may first clarify the legal position.

8. Appointment on the post of teachers against duly created posts of Lecturers in affiliated degree colleges is required to be made under the Uttar Pradesh Higher Education Services Commission Act, 1980 (hereinafter referred to as the "Act, 1980") on the recommendation of the U.P. Higher Education Services Commission.

9. Section 12(2)(3) of Ac, 1980 relevant for our all purposes, reads as follows :

12. Procedure for appointment of teachers.--(1)....

(2) The management shall intimate the existing vacancies and the vacancies, likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation.--The expression "academic year" means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed a subject-wise consolidated list of vacancies intimated to him from all colleges.

....

10. Section 12(2) provides for the intimation of the vacancies by the Management of the institution to the Director in the manner prescribed. u/s 12(3) the Director in turn is to be intimated the vacancies in the manner prescribed subject-wise.

11. No procedure under the Act, 1980 for intimation of vacancies has been provided. However, same has been prescribed by statutory rules framed in exercise of powers u/s 32 of Act, 1980. The Rules have been notified on 10.6.1981 and are known as Uttar Pradesh Higher Education Services Commission Rules, 1981 (hereinafter referred to as the Rules, 1981"). Rule 7 of Rules, 1981 lays down the manner for intimation of vacancies by the Management and it is provided that the same shall be in Form I. Rule 7 of Rules, 1981 reads as follows :

7. Intimation of vacancies (Section 32).--The management of the college shall so far as practicable determine and intimate to the Commission in Form I, the number of vacancies to be filled in by recruitment during the course of the year by May 31, each year.

For our all purposes, Form-1 is relevant, and is quoted below :

"APPENDIX Form I (See Rule 7) Intimation of Vacancy To, The Secretary, The Uttar Pradesh Higher Education Services Commission.

From

The ManagerCollege. (Address)

1. Requisition for recruitment to the post(s) of

2. Brief particulars of the posts-- Designation.....Pay scale.....

3. (a) Number of vacancies for which this requisition is being sent. Permanent temporary total

(b) How have the vacancies arisen?

(c) If a vacancy is permanent, whether it is to be filled on a permanent or temporary basis.

(d) If the vacancy is temporary how long it is expected to last irrespective of the period for which it has been sanctioned.

4. Period of probation, if any.

5. Where is/are the selected candidate(s) required to join.

6. Qualifications as laid down in the Statutes/Ordinances of the University to which the college is affiliated or associated.

7. Any other requirements or conditions not covered by the above columns.

It is certified that all vacancies for the academic year to which recruitment has to be made by the Commission have been included in this requisition.

Place.....

Dated..... Signature of the Manager"

12. From the aforesaid it is apparently clear that vacancies are required to be intimated in the prescribed Form I while columns 1 to 6 of Form 1 deal with various informations concerning the vacancies. Column 7 of Form 1 provides for furnishing requirements not covered by Clauses 1 to 6. From the aforesaid Form 1 it would be apparent that all relevant factors pertaining to the vacancies are taken care of under Columns 1 to 6. Column 7 provides for something, which is not there, in columns 1 to 6, but is otherwise required to be intimated to the Commission.

13. Division Bench of this Court in the case of Kumari Alka Rani Gupta Vs. Director of Education (Higher) and Another, has laid down as follows :

9. Thus, the legal position which emerges from the above provisions in the Act and Regulations is as follows :

(1) Where a large number of candidates are selected for various institutions by the Commission, the Commission has to prepare a select list in accordance with the merit determined by the Commission.

(2) The candidate who is on the top of the select list will be given his first preference.

(3) Then the candidate who is at serial position No. 2 in the select list will be considered by the Director. If his first choice has already been filled by the candidate at the top of the select list then the candidate will be given his second choice, otherwise he will get his first choice.

(4) Then we come to the candidate who is on the third position in the select list. If the choice of his first preference has not been already allotted to a candidate higher than him in the select list he will be given that institution, otherwise he will be given his second choice, unless that too has been allotted to the candidate above him, in which case he will be allotted the institution of his third choice. In this way the Director will do the placement.

10. In our 4th opinion, this is the only logical and reasonable method for making placement of a candidate selected by the Commission, and if this is not followed there is bound to be chaos, corruption, arbitrariness, casteism etc. There shall be only one exception to the above method and procedure for making placement, namely, that if there is an ad hoc Principal already working in the College, or Lecturer working in the said College who has been selected by the Commission for the post of Principal, then the ad hoc Principal/Lecturer should be given placement in the same College as Principal provided that the Management has no objection.

14. The Full Bench of this Court in the case of Vinay Kumar (Dr.) (supra) in paragraph 43 has laid down as follows :

43. In this view of the matter we abide by what was said in paragraphs 9 and 10 (first sentence only) of Dr. Alka Rani's case (supra) and respectfully disapprove what was said in that case in paragraphs 10 (rest) and 11. We make it clear that we approve of the first sentence in paragraph 10 of Dr. Alka Rani's case (supra) but disapprove only of the latter part of that paragraph where the exception is said to be spelt out.

15. Meaning thereby that paragraph 9 and first sentence of Para 10 (italicised portion) of Dr. Alka Rani's case (supra) stands approved by the Full Bench of this Court under its judgment in the case of Vinay Kumar (Dr.) (supra). As a matter of fact, in the case of Vinay Kumar (Dr.) (supra), in paragraphs 34 to 40 it has been laid down as follows :

34. We are of the opinion that the Director cannot give any weight at all to the preference of the management in the selection of a particular candidate as their Principal or their Teacher.

35. The Education Act of U.P. and the Rules and Regulations thereunder have been framed for various purposes, one of which is to see it that the management does not staff its college only in the manner it likes, that the staff is selected with a view to proper education of the students and the children and the best possible available candidates are put in the teaching jobs. The tendency of the management to favour its own candidates for extraneous reasons is negated by the manner and procedure of the selection, which is given in these educational schemes and Acts. We find that in Section 13 there are only two factors for grading or selecting a candidate for a particular college. The first gradation is made as per Section 13(1), on the basis of interview with or without examination and this gradation is called the merit list.

36. This merit list is not the only list. Though the management has no say in the matter, the employee, i.e., the prospective Principal or the prospective teacher has a say of his own. He can make a preference for a College.

37. In our opinion, the Director at the time of making intimation is to take into account only two things, in regard to every candidate, namely, the candidate's merit position as determined u/s 13(1), and the preferential list of colleges or institutions given by the candidate himself.

38. How the Director is to allot the candidates to the different colleges on the basis of these two items and these two items only are, with respect, correctly laid down by the Division Bench in paragraph 9 in Alka Rani's case (supra) and we agree with that paragraph in toto.

39. In our opinion the Director does not use a discretionary power in making intimations under Sub-section (3) of Section 13. Instead of the Director, any other person with an equally logical mind as the Director will also be able to

perform the same act but the Director has been given the authority, so as to carry conviction and to make it safe for the colleges to follow the recommendations and intimations coming under his signature.

40. The wordings of Subsection (3) of Section 13 show that Director's action is compulsory prescribed by the said subsection. Although the said Sub-section does not refer to the merit list at all yet as laid down in paragraph 9 of Dr. Alka Rani's case (supra) the merit list must be considered by the Director and in this regard the Director cannot disregard sub-Section (1) of Section 13 and the exercise performed under that Sub-section. The exercise by the Director is performed thereafter and must be preformed thereon.

16. In the wordings of the Full Bench judgment in the case of Vinay Kumar (Dr.) (supra), it may be recorded as "the staff is selected with a view to proper education of all the students and the children and the best possible available candidate are put in teaching post". The merit of a candidate is pivotal factor against particular vacancy and reference given by a candidate has to be given effect to as far as possible.

17. It is in the aforesaid background that we have no hesitation to hold that if two selected candidates opt for same institution as their first preference then the candidate, who is higher in merit vis-a-vis a candidate, who is lower in merit, has to be offered the institution of his choice first. The choice exercised by candidate higher in merit has to take preference to the choice of the candidate lower in merit.

18. Judged in the aforesaid settled legal position, initially we were of the opinion that since the vacancy as per the list of colleges supplied in question was within the specified category of "Inorganic Chemistry", it must be offered to the petitioner in preference to respondent No. 4. However, since a stand was taken on behalf of private respondent, U.P. Higher Education Service Commission as well as on behalf of State respondents to the effect that the word "Inorganic Chemistry" was wrongly mentioned in the list so supplied because of a mistake, a serious attempt was made by us to examine the original records. After summoning the same from the office of the Director of Higher Education, U.P. Higher Education Service Commission as well as after obtaining the facts from the State-respondents, we passed an order on 24.4.2009, which is quoted hereinbelow :

The dispute in the present writ petition is confined to the issue as to whether in Teekaram Kanya Mahavidyalaya, Aligarh, vacancy on the post of Lecturer (Chemistry), which was caused due to retirement of Zuaib Saba Uddin was required to be filled by a teacher, who is to be qualified for teaching Organic Chemistry or Inorganic Chemistry. Since the original documents pertaining to the requisition are not available in the office of the Director of Education, this Court has to examine as to whether at the time when the vacancy was caused, the other two teachers working were possessed of a Degree of M.Sc. in which

particular sub-subject of Chemistry.

Accordingly let a supplementary-affidavit be filed by the respondent No. 4 disclosing the exact qualification possessed by all the three teachers prior to the date of retirement of Zuaib Saba Uddin. Standing counsel may also obtain instructions in that regard.

List on 4.5.2009.

19. Supplementary-affidavits have been filed and after examining the matter in detail, we are of the considered opinion that it cannot be said that in the facts of the present case, any interpolation has been made. We are not in a position to record a finding as suggested by the learned Counsel for the petitioner to the effect that for the purposes of adjustment of respondent No. 4, respondents have altered the nature of the specialization required. We are of the opinion that there appears to be genuine mistake in mentioning of the word "Inorganic" in the list of colleges supplied qua the vacancy against which appointment had to be made, in Teeka Ram Kanya Degree College. The college was in need of Lecturer Chemistry with specialization in Organic, as other two teachers working in the college had specialization in Inorganic and Physical Chemistry respectively.

20. At this stage of the proceedings, it was vehemently argued by the learned Counsel for the petitioner that at graduate level there is no separate specialization prescribed for appointment of teachers for the subject of Chemistry at under graduate level.

21. The fact that examination in the subject of chemistry at under graduate level comprises of three papers, namely, Organic, Inorganic and Physical chemistry has not been disputed. The requirement at under graduate level of three teachers with specialization in the concerned paper, namely, M.Sc. in Organic Chemistry, M.Sc. in Inorganic Chemistry, and M.Sc. in Physical Chemistry cannot be termed as arbitrary or fanciful. Three teachers with specialization in these papers taught would be in the best interest of the students, which should be the priority factor qua appointment of teachers.

22. The issue raised before us may not detain us for long. The Full Bench of this Court in the case of Vinay Kumar (Dr.) (supra) in paragraph 35 categorically recorded that staff is selected with a view to provide proper education to the students, and the best possible available candidates must be put in the teaching jobs. In paragraph 39 the Full Bench has therefore, clarified that the Director has been given the authority, so as to carry conviction and to make it safe for the colleges to follow the recommendations and intimations coming under his signature.

23. The exercise of preference in respect of the college has to be judged in the aforesaid background and therefore, if in a particular college, there is need of a teacher for teaching in the special Branch in the facts of the present case Organic Chemistry, preference exercised to by the candidates based on merit must give

away to the larger interest of the students. The issue that the Statutes and the Ordinances framed under the State Universities Act do not lay down any such demarcation qua appointment as Lecturer in Chemistry, cannot in any way dilute the position, which is admitted to the parties that at B.Sc. level there are three separate papers, namely, Organic, Inorganic and Physical Chemistry. If the Management having regard to the fact that two teachers, who are available in the institution in the subject of Chemistry, have specialization in Physical and Inorganic Chemistry, requests for a teacher in Chemistry subject having specialization in Organic Chemistry to the Commission it cannot be said to have acted illegally or to have made an arbitrary request.

24. The aforesaid also follows from a reading of column 7 of Form 1, which as detailed above provides for additional informations being supplied by the Committee of Management with reference to the vacancies requisitioned, not referred to under any of the columns 1 to 6. Column 7 has been included in the form so that the Committee of Management may specify its particular requirement qua a subject teacher. From bare reading of the aforesaid Form 1 with reference to column 7, this Court has no hesitation to hold that the Committee of Management can while submitting requisition ask for a particular category of teachers in the subject concerned with a specialization in particular branch, as may be warranted in the best interest of the students.

25. Such requests of the management do not interfere with the merit or the preference to be exercised by the candidate concerned. It does not in any way run contrary to the provisions of Sections 12, 13 and 14 of the Commission's Act, inasmuch as the candidate/teacher having specific qualification having regard to his merit and option exercised shall be allotted to the institution as per specialization required. Such request would be in the interest of institution and its students. Request of the Management would be with reference to the special qualification required and not with reference to any particular person concerned, which has been turned down by the Full Bench of this Court in the case of Vinay Kumar (Dr.) (*supra*). We are of the considered opinion that such request be normally accepted by the authority concerned specifically when such request has been made prior to the publication of the select panel.

26. In the facts of the present case from the records, we find that a Lecturer in Chemistry having specialisation in Organic Chemistry was requested by the institution much prior to the date of publication of the select list. The contention raised on behalf of the petitioner to the effect that the alteration made from Organic to Inorganic Chemistry had taken place mala fide cannot be accepted by this Court nor is borne out from the records.

27. Reference may be had to the Division Bench judgment of this Court in the case of Rama Shankar Rai v. State of U.P. and Anr. 2008 (4) ESC 2491 (All) (DB), wherein it has been held that no person has a vested right to be appointed in any particular college. For ready reference relevant paragraphs 10 and 12 of the said judgment reads as follows:

10. We do not find that the petitioner has any vested right to be appointed as Principal of any particular college. The scheme provides for giving options. The petitioner had exercised his option at the time of filling up the form. He was allowed to change the option as the number of colleges could have increased or decreased. The number of colleges actually increased from 69 to 81 at the time of interviews. With 12 more colleges included in the selections, it was appropriate to allow the candidates to make fresh preferences at the time of interviews.

12. Ordinarily the scheme of the Act and the Regulations give discretion in placement to the Director of Higher Education. The change of option at every stage, however, causes uncertainty in the placements. For the reasons, which we had disclosed in our orders and by which we called for a clear and transparent policy from the Director of Education, we are not inclined to accept that choices may be allowed to be kept open, in order of merit at every step in the process of placement.

28. Use of word "preference" and the discretion conferred upon the Director qua placement of teachers having regard to merit also leads to the same conclusion. We have no hesitation to repeat that it is the interest of institution and those of the students, which is supreme in the matter of placement of teachers. In the aforesaid background, the principles laid down by the Full Bench of this Court in the case of Vinay Kumar (Dr.) (supra) with regard to placement of teachers after selection by the Commission has to be strictly adhered to.

29. In order to obliterate such complications in future, we strongly recommend that the Commission while making advertisement shall mention the specialization, as and when required, as per the Form I submitted by the Committee of Management. If any mistake in advertisement is noticed vis-a-vis the Form I submitted, the mistake must be corrected and notified before the select panel is prepared.

30. In the facts of the present case, we therefore, hold that there is no illegality or infirmity in the placement of respondent No. 4 to Teeka Ram Kanya Mahavidyalaya, Aligarh. Therefore, the order passed by the Director impugned in the present writ petition cannot be faulted with.

The writ petition lacks merit and is accordingly dismissed.