
(2009) 02 AHC CK 0152
In the Allahabad High Court

Nishit Sharma

APPELLANT

Vs

Vice-Chancellor, Aligarh Muslim University and Others

RESPONDENT

Date of Decision : 06-02-2009

Acts Referred:

Constitution of India, 1950 — Article 136

Citation : (2009) 2 AWC 1715

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rakesh Tiwari, J.—Heard Sri Divakar Rai Sharma, learned Counsel for the petitioner and Smt. Sunita Agarwal, learned Counsel for respondent Nos. 1 to 5. Perused the record.

2. The petitioner passed his High School from Delhi Public School, Aligarh in 2008 and obtained 92% marks. He appeared in combined entrance examination for class XIth and Diploma in Engineering on 2.6.2008 opting Physics, Chemistry and Biology as his first choice. The petitioner had applied under two categories for admission in the University, i.e., under the special categories of S.M. category which is for outstanding sportsman and under C.A. category which is for children of alumni or old students of the University and as such the petitioner was not admitted by the University in either of the aforesaid two categories of S.M. and C.A. His name did not find place in the list of selected candidates. On receipt of an unconfirmed information that cut-off mark of the last student admitted in the aforesaid category of alumni/old students was lower than the petitioner. Whether an application dated 1.10.2008 was moved by the father of the petitioner, who was alumni of the Aligarh Muslim University.

3. An application was moved by the father of the petitioner on 24.9.2008 under the Right to Information Act regarding percentage of marks obtained by him in entrance examination. He was informed that the petitioner had obtained 39%

marks in the combined entrance examination and that the last candidate, who had been granted admission in general category had secured 47.75 marks.

4. He also moved an application dated 6.10.2008 to the authority under the Right to Information Act for being provided with complete details about the admissions made in class XI in all the categories including waiting list and list of candidates selected in different categories.

5. The respondent University vide their letter dated 3.11.2008 replied that details of percentage of last candidates admitted under the category of children of alumni/old boys cannot be provided to him and instead of giving details of all selected candidates in class XI the respondents rejected the claim of the petitioner on the ground that the case of the petitioner does not relate to life and liberty.

6. The petitioner claims that he has been discriminated and though he has brought all the relevant facts to the notice of the authorities of the University including the cases of Sri Tayyab Ali and Sri Faisal Qureshi, who had been admitted on lower marks than the petitioner yet no action was taken by the authorities to remove the discrepancies.

7. Sri Tayyab Ali, was given admission in class XI in Physics, Chemistry and Biology stream on the ground that cut off merit for the aforesaid subjects was 20.5 and he had obtained 26.25% marks securing 134 rank.

8. As regards Sri Faisal Qureshi who was initially not selected in class XI but was subsequently given admission on the ground that he had obtained 22 % marks in (P.C.B.) Science.

9. It is averred in the writ petition that the aforesaid name of all selected candidate published in the merit but names of Tayyab Ali and Faisal Qureshi was not in the list of selected candidates and if their admission was fair and transparent their names ought to have been in the merit list of the successful candidates for admission if they had qualified the admission; but they have been admitted later on though they were not qualified for admission.

10. It is further averred that an application dated 10.11.2008 was moved by one Tariq Islam with the same grievance as that of the petitioner the University informed him that it could not display the entire list of candidates, who had appeared in combined entrance test due to technical difficulty. This decision was taken by Admission Committee in January 10, 2009 but till date the petitioners have not provided with complete details of % of cut-off marks obtained by them and the list of the candidates selected inspite of repeated request by the petitioner.

11. In the aforesaid backdrop the present writ petition has been filed for following reliefs:

(i) Issue a writ, order or direction in the nature of mandamus commanding the

respondents to admit the petitioner in class XIth (10+2) in Physics, Chemistry and Biology "(P.C.B.)" stream.

(ii) Issue such other and further writ, order or direction as this Hon"ble Court may deem fit and proper in the circumstances of the present case.

(iii) Award the cost of the writ petition to the petitioner.

12. Initially, the Court on 1.12.2008 granted one week's time for filing counter-affidavit to the respondents and thereafter two days' time for filing rejoinder-affidavit to the petitioner was granted directing the case to be listed on 11.12.2008. The case was thereafter listed on 21.1.2009 when the learned Counsel for the respondents informed that the rejoinder-affidavit has been served upon her on that date and she wanted to go through the same and seek instructions in the matter. She also filed supplementary counter-affidavit on 1.2.2009. The case was then listed on 2.2.2009 and on that date Smt. Sunita Agarwal, learned Counsel for the respondents wanted to address the Court that exercise of discretion does not require any reason and denial of admission to the petitioner cannot be said to be arbitrary on these grounds.

13. It is submitted by Smt. Sunita Agarwal, learned Counsel for the respondents that the petitioner had failed in the trial of sports game and as such he could not be recommended for admission under that category. As regards the list of 49 candidates who had applied against the special category "C.A.", i.e., children of alumni, she urged that the said list was placed before the Vice-Chancellor for nomination of candidates for admission on 22.6.2008, which has been annexed as Annexure-CA-3 to the counter-affidavit filed on behalf of the University; that the Vice-Chancellor in his discretion did not nominate the petitioner and that the discretion exercised by him was in reasonable and without basis.

14. She has lastly urged that in view of the averments made in the paragraphs 11B and 13 of the counter-affidavit that the Vice-Chancellor had not exercised the discretion conferred upon him by the Academic Council for nomination of 20% of total intake students vide resolution dated 31.1.92 in arbitrary manner as alleged by the petitioner.

15. In rebuttal, learned Counsel for the petitioner relying upon the averments made in the rejoinder-affidavit and supplementary rejoinder-affidavit to the replies of the averments made in the counter and supplementary counter-affidavit submitted that there is no such arbitrary discretion vested in the Vice-Chancellor, even if he had been authorized by the Academic Council to nominate any candidate irrespective of inter se merit or any positive criteria laid down in this regard.

16. The question as to whether exercise of powers by the Vice-Chancellor pursuant to resolution dated 31.1.92 vested in him with unfettered discretion to admit any candidate requires consideration.

17. The word "discretion" has been considered by the Apex Court in paragraphs

26 to 35 of the judgment in the case of Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, which for ready reference are extracted below.

26. While exercising the discretion, certain parameters are to be followed:

"Discretion", said Lord Mansfield in *R.V. Wilkes*, "when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful but legal and regular". (See *Craies on Statute Law*, 6th Edn., P. 273 and *Ramji Dayawala and Sons (P.) Ltd. v. Invest Import*, SCC p. 96, para 20).

27. "Discretion" undoubtedly means judicial discretion and not whim, caprice or fancy of a Judge. (See *Dhurandhar Prasad Singh v. Jai Prakash University*.) Lord Halsbury in *Susannah Sharpe v. Wakefield* considered the word "discretion" with reference to its exercise and held : (All ER p. 653 F-G)

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28. "Discretion" when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful but legal and regular.

29. Though the word, "discretion" literally means and denotes an uncontrolled power of disposal yet in law, the meaning given to this word appears to be a power to decide within the limits allowed by positive rules of law as to the punishments, remedies or costs. This would mean that even if a person has a discretion to do something the said discretion has to be exercised within the limit allowed by positive rules of law. The literal (sic legal) meaning of the word "discretion" therefore, unmistakably avoids untrammelled or uncontrolled choice and more positively points out at there being a positive control of some judicial principles.

30. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection: deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretenses, and not to do according to the will and private affections of. persons.

31. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care, therefore, where the Legislature concedes discretion it also imposes a heavy responsibility.

32. The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable, said Lord Camden, L.C.J., in *Hindson and Kersey*.

33. If a certain latitude or liberty accorded by statute or rules to a Judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

34. Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent Judges in somewhat different forms of words but with substantial identity. When a statute gives a Judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (Per Willes J. in *Lee v. Bude Railway Co.* and in *Morgan v. Morgan*).

35. In *Advanced Law Lexicon* by P. Ramanatha Aiyar, it has been stated as follows:

"Discretion".-Power of the Court or arbitrators to decide as they think fit.

The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. [Corpus Juris Secundum, Vol. 27, page 289 as referred in *Aero Traders Pvt. Ltd. v. Ravindra Kumar Suri*, SCC p. 31, para 6: SLT at p. 430 para 6]

"A discretion", said Lord WRENBURY, "does not empower a man to do what he likes merely because he is minded to do so, he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason dictates." (*Roberts v. Hopwood*). This approach to construction has two consequences : the statutory discretion must be truly exercised, and when exercised it must be exercised reasonably. (MAXWELL)

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"Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion : *Rookes case* according to law, and not humour. It is to be not arbitrary, Vague and fanciful, but legal and

regular. Lord HALSBURY L.C. in *Susannah Sharp v. Wakefield* at p. 179, referred to in *Siben Kumar Mondal v. Hindustan Petroleum*

Corporation Ltd. (AIR 333 pp. 35). (See also *Aero Traders Pvt. Ltd. v. Ravindra Kumar Sun* SCC (3) p. 311, para 6 : SLT at p. 430, para 6; *Man Mal Sharma v. Bikaner Bhasin v. Union of India* AIR at p. 322.

"Discretion" Lord MANSFIELD stated in classic terms in, *John Wilkes* case, must be a sound one governed by law and guided by rule, not by humour; Lord DENNING put it eloquently in *Breem v. Amalgamated Engineering Union*, that in a Government of Laws "there is nothing like unfettered discretion immune from judicial reviewability". Courts stand between the executive and the subject alert, to see that discretionary power is not exceeded or misused. Discretion is a science of understanding to discern between right or wrong, between shadow and substance, between equity and colourable glosses and pretences and not to do according to one's wills and private affections. Lord BRIGHTMAN elegantly observed in *Chief Constable of North Wales Police v. Evans*, that:

Judicial review, as the words imply is not an appeal from a decision, but a review of the matter in which the decision was made."

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains. NENJAMIN CARDOZO in the *Nature of Judicial Process*.

....

The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care, therefore, where the Legislature concedes discretion it also imposes a heavy responsibility. (See *National Insurance Confidential Ltd. v. Keshav Bahadur* SCC p. 375 para 10; AIR at p. 1584, para 10).

The power to decide within the limits allowed by positive rules of law as to punishments, remedies or costs and generally to regulate matters of procedure and administration; discretion of what is right and proper. (See Article 136(1), Constitution)

DISCRETION is governed by rule and it must not be arbitrary, vague and fanciful. (See *Jaisinghani v. Union of India* AIR at p. 1434).

When any thing is left to any person, Judge or Magistrate to be done according

to his discretion, the law intends it must be done with sound discretion, and according to law, (Tomlin). In its ordinary meaning, the word signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment . But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore whoever hath power to act at discretion, is bound by the rule of reason and law.

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There (may) be several degrees of Discretion, *discretio generalis*, *discretio legalis*, *discretio specialis*, -*Discretio generalis* is required of every one in everything that he is to do, or attempt;

"*Legalis discretio*", is that which Sir E Coke meaneth and setteth forth in *Rookes* and *Keighleys* cases and this is merely to administer justice according to the prescribed rules of the law.

"The third discretion is where the laws have given no certain rule...and herein discretion is the absolute judge of the cause, and gives the rule." (*Callis*. 112 and 113).

18. This principle laid down by the Apex Court in the aforesaid judgment have to be kept in mind while deciding whether the Vice-Chancellor of the University having been delegated power by resolution dated 31.1.92 could have exercised any unchannelized or unfettered discretion in the matter of admission of the students on his whims and fancy. The counsel for the respondent University could not show application of any judicious mind in "pick and choose" method adopted by him thus rendering the discretion exercised by the Vice-Chancellor unregulated and absolutely capricious and lacks reason.

19. Furthermore, a perusal of Annexure-1 to the supplementary rejoinder-affidavit, which is an information supplied by the Assistant Controller/CPIO, (Admission) under the Right to Information Act regarding percentage in examination of last admission under Alumni/Old Boys category was given cut-off marks of 35 % whereas the percentage in examination of class XI (Science) of the petitioner was 39%. This shows unregulated hindrance of the Vice-Chancellor in exercise of his said discretion. The aforesaid letter dated 2.2.2009 is extracted below:

Office of the Controller of Examinations (Admission Section)

A.M.U., Aligarh Ext. D. No. 601/Adms.

Dated 2.2.2009

Prabhat Sharma

1/14 Tar Ka Nagla,
Gurudwara Road,
Aligarh-U.P.

Subject : Seeking information Under the Right to Information Act, 2005.

Reference to Decision No. CIC/SG/A/2008/00155/1315 dated 28.2.2009 received from the Information Commissioner on the Appeal No. CIC/SG/A/2008/00155 dated 1.10.2008 filed by you regarding percentage in examination of last admission under the Alumni/Old Boys category.

The reply is as under:

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Question		Reply
-----	1.	Percentage
in examination of class XI 39.00 (Science) of Master Nishit Sharma Roll No. 299406		(P.C.B.)
-----	2.	Percentage
in examination of last candidate 47.75 selected in general category in the same		
-----	3.	Percentage
in examination of last admission 35.00 under Alumni/Old Boys category		
-----	4.	Cut-off
percentage of B.Sc. (Biochemistry) in Abdullah College. Internal :		77.25%
External :		83.50%

Sign. Eligible (Wajid Ali) Assistant Controller/C.P.I.O.

(Admission)

20. Considering all the aforesaid aspects of the matter I am of the considered view that the petitioner has been discriminated by the Vice-Chancellor, who has exercised the powers delegated upon him by the Academic Council vide its resolution dated 31.1.92. The petitioner having obtained 39% marks under the category of ward of children of Alumni was entitled to be admitted in the University particularly when the last candidate admitted in the aforesaid category had obtained 35% marks in the entrance test.

21. It is directed that the Vice-Chancellor shall grant admission to the petitioner irrespective of any other consideration in class XI Science ("P.C.B."), stream forthwith within a period of one week from the date of production of a certified copy of this order. The petitioner will complete all formalities such as payment of fee etc. before taking admission. He shall not be denied permission to appear in the final examination of class XI by the University and any shortage of attendance would be deemed to be condoned as it is attributable directly to the arbitrary decision of the Vice-Chancellor denying admission to the petitioner for which the petitioner cannot be penalized. However, as the petitioner has not

been able to appear in the sessionals due to non grant of admission in the circumstances aforesaid, it would be desirable that he undergoes a sessional examination of 25% marks in the course completed.

22. In the last but not the least, the Court hopes and trusts that the University will not harbour any reservation in the cause of furtherance of justice against the petitioner for approaching the Court in the matter.

The writ petition is accordingly, allowed. No order as to costs.