
(1991) 12 CAL CK 0010
In the Calcutta High Court

Prof. Ratan Khasnobish

APPELLANT

Vs

The Calcutta University and Others

RESPONDENT

Date of Decision : 06-12-1991

Acts Referred:

Calcutta University Act, 1979 — Section 41, 9(3)
Constitution of India, 1950 — Article 226

Citation : (1992) 2 CALLT 22

Hon'ble Judges : Khwaja Mohammad Yusuf, J

Bench : Single Bench

Advocate : Asoke Ganguly and J. Gupta, for the Appellant; Pratap Chatterjee and P.K. Chattopadhyay, for the Respondent

Final Decision : Dismissed

Judgement

Khwaja Mohammad Yusuf, J.—The petitioner is a Professor in the Department of Business Management, University of Calcutta, and is an ex-officio Member of the Faculty Council for Post-Graduate Studies in Commerce, Social Welfare and Business Management (hereinafter referred to as "the said Faculty Council"). The petitioner is very much interested in the election of the member of the said Faculty Council to the Council of Under-Graduate Studies and also in the election of the Dean of the said Faculty Council. The composition of the Faculty Councils for Post Graduate Studies is specified in Section 23 of the Calcutta University Act, 1979 which gives the list of such Faculties and the composition thereof. According to Section 23(2) (vi) of the Act each Faculty Council of Post-Graduate Studies shall consist of ten teachers of whom five shall be from constituent colleges or professional Colleges nominated by the Vice-Chancellor and five shall be the teachers of the University other than the Professors elected by the teachers from amongst themselves. According to the petitioner, in this case five teachers were elected as required but five teachers who were to be nominated by the Vice-Chancellor have not been so nominated and only one teacher has been nominated by the Vice-Chancellor. In this way due to inaction on the part of the Vice-Chancellor the nomination of full five teacher did not take place and the said

Faculty Council remains incomplete. The contention of the petitioner is that the non-exercise of power of nomination by the Vice-Chancellor virtually amounts to improper constitution of the statutory body leading to chain reaction in respect of constitution of other bodies. The Vice-Chancellor is to exercise his power under the provisions of the statute and it is at the discretion of the Vice-Chancellor to nominate but the Vice-Chancellor cannot refuse to exercise such power of nomination or not exercise such power. The action of the Vice-Chancellor in not exercising statutory duty leads to defect in its composition and shall also lead to further complication. The contention of the petitioner is that without properly constituting the said Faculty Council no election of some categories of Members for the Council of Under-Graduate Studies can take place u/s 25 of the Act and as such no Dean can be elected because of the faulty constitution of the said Faculty Council. It is further contended by the petitioner that according to Notice dated 4th November, 1991 the last date of submission for nomination paper was fixed on 18th November, 1991. As the High Court was closed on 15th, 16th and 17th November, 1991 the petitioner could not come earlier and the matter was of immediate urgency and therefore it was moved on the 18th November, 1991 as unlisted motion. The petitioner repeated once again that because of the improper and incomplete constitution of the said Faculty Council there cannot be any election of the Dean of the Faculty Council for Post-Graduate Studies in Commerce, Social Welfare and Business Management. The petitioner prayed for the cancellation of the Notification dated 4th November, 1991 so far it relates to election of the Members of the Council for Under-Graduate Studies by the said Faculty Council, a direction commanding the Vice-Chancellor to exercise his power of nomination of five teachers and to complete the constitution of the said Faculty Council and order of injunction restraining the University from holding election of the Council for Under-Graduate Studies by the Faculty Councils for Post-Graduate Studies without completing the constitution of the said Faculty Council.

2. When the matter was moved on 18th November, 1991 it was submitted by Dr. Debi Pal that as the time for filing the nomination expires at 5 P.M. on that date his client would be deprived from filing the nomination paper. Though there was no such statement in the writ petition that the petitioner was interested in filing the nomination paper and contesting the election still the Court gave liberty to the petitioner till 6 P.M. on 18th November, 1991 to file the nomination paper and extended the filing period for the petitioner by one hour. The learned junior Advocate for the University, Mr. Pranab Chattopadhyay, assured the Court that he himself would be in the Chamber of the Registrar at the University till 6 P.M. so that the Court's order was carried out. But the Court refused to grant any interim order of injunction withholding the election of the Dean of the said Faculty Council. The petitioner did not attend the Registrar's office as was allowed by the Court to file the nomination.

3. On behalf of the University of Calcutta the Registrar has filed the Affidavit-in-Opposition. His first contention is that the writ petition is not maintainable

because the petitioner is not in any way aggrieved or effected nor he has any legal or constitutional right. As the Notification for the election has already been issued by the Returning Officer, the election must be protected and should not be postponed. The Affidavit further contends the statement by the Registrar that this dispute should be referred to the Chancellor u/s 42 of the Calcutta University Act, 1979. It is denied that the petitioner is interested in the election of the Members of the Council for Under-Graduate Studies. The inaction on the part of the Vice-Chancellor in not nominating five teachers of the Faculty Council of Post-Graduate Studies does not in any way render the said Faculty Council incomplete. The Affidavit states that the Vice-Chancellor is entitled to exercise the power of nomination within the prescribed limit and the same has not yet been expired, and the Vice-Chancellor has already nominated one member. It is also stated that further appointments would be made soon as suitability of the candidates is decided upon. It is very emphatically stated in the Affidavit that the exercise of power of nomination is the Vice-Chancellor's sole prerogative and he is empowered to exercise such power within the prescribed time limit. The Vice-Chancellor has not refused to discharge his statutory duties and obligations and the statutory body would not suffer for any defect of composition. In the Affidavit it is referred that the Supreme Court has observed that the election should be concluded as early as possible and all controversial matters and disputes arising out of election should be postponed till after the election so that the election proceedings might not be unduly retarded or protracted. The Affidavit denied of any illegality and dubbed the writ application as mala fide and liable to be dismissed.

4. In the Affidavit-in-Reply the petitioner explained why he could not file the nomination paper within 6 P.M. of 18th November, 1991. The petitioner repeated his earlier stand on the points of law and retreated that without the proper constitution of the said Faculty Council the Dean could not be elected and it would lead to further complications and that it was wholly wrong on the part of the Vice-Chancellor to keep a body unrepresented in full for such a long period. The allegation of delay of issuing Notice by the Registrar and the Returning Officer dated 4th November, 1991 is also reiterated. It has been pointed out in the Reply that the Supreme Court's reference to the General Elections of Assembly and Lok Sabha must not be confused with the election of University bodies.

5. So far as the question of maintainability of the writ petition is concerned, it must be stated that the petitioner is an ex-officio Member of the Faculty Council for Post-Graduate Studies in Commerce, Social Welfare and Business Management and the said Faculty Council is to elect one Member to the Council for Post-Graduate Studies. As such as a Member of the said Faculty Council the petitioner must be interested in the election of a member in the Council for Under-Graduate Studies and he has locus standi to move a writ petition in case according to him some wrong is going to happen or there is some irregularity in the constitution of the said Faculty Council for Post-Graduate Studies in

Commerce, Social Welfare and Business Management which will ultimately lead to the election to the Councils for Under-Graduate Studies. I hold that the writ petition is maintainable.

6. The main allegation against the Vice-Chancellor of Calcutta University is that he has not fully constituted the said Faculty Council for Post-Graduate Studies in Commerce, Social Welfare and Business Management, by nominating five teachers participating in Post-Graduate teaching in the subject or subjects concerned from constituent colleges or from professional colleges as required u/s 23(2)(vi) of the Calcutta University Act, 1979. Section 9 of the Act describes the power and duties of the Vice-Chancellor and sub-section (3) thereof reads as follows :-

"It shall be the duty of the Vice-Chancellor to ensure that the provisions of this Act, and the Statutes, the Ordinances and the Regulations, are faithfully observed, and to take such action as may be necessary for this purpose."

7. Section (3) of the Act as quoted above enjoins upon the Vice-Chancellor to faithfully discharge the duties as contained in the Act, the Statutes, the Ordinances and the Regulations and is mandatory in nature and not merely directory. Section 17 of the Calcutta University Act, 1979 describes the authorities of the University which includes the Faculty Councils for Post-Graduate Studies and the Councils for Under-Graduate Studies. Section 23 (b) mentions the Faculty Council for Post-Graduate Studies in Commerce, Social Welfare and Business Management and sub-section (2)(vi) of the said section relates, as mentioned above, regarding five nominations by the Vice-Chancellor which is not a "prerogative" as claimed by the University but a duty of the Vice-Chancellor under the Act. Section 25 gives details of the Councils for Under-Graduate Studies and sub-section (2)(vi) specifies that one. Member from the said Faculty Council of Post-Graduate Studies in Commerce, Social Welfare and Business Management shall be elected in the manner provided in the Statutes to the Council of Under-Graduate Studies. On the basis of a decision by the House of Lords in the case of *Julius v. Lord Bishop of Oxford* reported in 5 AC 214 Lord Penzance observed that the power conferred was intended by the Legislature to be exercised and although the Statute in terms had only conferred a power, the circumstances as such create a duty. The Supreme Court in the case of *State (Delhi Admn.) Vs. I.K. Nangia and Another*, relying on the decision of *Julius v. Bishop* said that Section 17(2) of the Prevention of Food Adulteration Act, 1954, although in terms permissive, imposes a duty to nominate a person to different establishment or branches or units; there can be no doubt that this implies the performance of a public duty, as otherwise, the scheme underlying the section would be unworkable. In *Maxwell's Interpretation of Statutes* (11th Edn., p. 231) the principle is stated as under : "the Statutes which authorise person to do acts for the benefit of others, or, as it is some time said for the public good or the advancement of justice have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory.....a Statute appears to

use the language of mere permission but it has been so often decided as to have become an axiom that in such cases such expressions may have-to say the least-a compulsory force, and so would seem to be modified by judicial exposition." The 7-Judge Bench led by Chief Justice Chandrachud also decided the case of Tara Prasad Singh and Others Vs. Union of India (UOI) and Others, on the principle laid down by *Julius v. Bishop*. The decision of the Supreme Court in *Ambica Quarry Works v. State of Gujarat*, reported in (1987) 1 SCC 2113 on the basis of the principle laid down in *Julius v. Bishop* decided that when a public authority is vested with power, the expression "may" has been constituted as "shall" because power, if the conditions for the exercise are fulfilled, is coupled with duty. Here Section 23(2) makes clear that each Faculty Council for Post-Graduate Studies shall consist of as indicated thereunder. This means that it is the bounden duty of the Vice-Chancellor to nominate five teachers from constituent colleges or professional colleges in the Faculty Council under question.

8. The decision in the case of *Lakshmi Charan Sen and Ors. v. A. K. M. Hassan Uzzaman and Ors.* reported in AIR 1985 SC 1233 has been cited by Mr. Chatterjee appearing on behalf of the Calcutta University. But this case relates to Representation of Peoples Act, 1950 and Registration of Electors Rules, 1960 and is purely devoted to the postponement of election to the State Assembly and as such I do not think there is any scope to apply the principle of this case in the instant case. I have already given my opinion as regard to the maintainability of the writ petition. The contention of Mr. Chatterjee that the petitioner is not aggrieved and his voting right is not effected, nor he has any legal or statutory right to move the writ petition is not convincing. The further contention of the learned Advocate for the University is that because of the non-nomination by the Vice-Chancellor to the said Faculty Council of four persons, the election is not going to be defective and in law will continue to be effective and legal. In this connection the learned Advocate has referred to Section 40(2) of the Calcutta University Act, 1979 which says that any vacancy among the nominated members of any authority or body of the University shall be filled within such time as may be prescribed, by nomination by the person or authority that nominated the member whose seat has become vacant. I do not think that sub-clause (2) of Section 40 of the Act comes to the rescue of the University because here is no question of any seat becoming vacant but of four seats not being filled up at all by the Vice-Chancellor. Similarly Section 42 of the Act also does not apply in the instant case at all because the questions of the Chancellor's interference to decide any question does not arise in the instant case. This is a case of non-performance of a duty imposed by the Statute upon the Vice-Chancellor and he has failed to perform the duty as such. The University did not point out to the Court at any time during the hearing that there is a prescribe time limit for nominating members to the said Faculty Council as referred to in Section 40(2).

9. The petitioner's case is strong enough to establish that the Vice-Chancellor has failed to perform his duty as is enjoined upon him by the Act of 1979

particularly Section 9(3) and the contention of the petitioner in this way deserves to be upheld but there is a "big if". Section 41 of the Act shields the Vice-Chancellor in this way : "No Act or proceedings of the University or of any authority or body of the University shall be deemed to be invalid merely by reason of the existence of a vacancy or vacancies among its members or the invalidity of the election of any of the members." This section also contains an explanation. Section 41 mars and demolishes the entire spirit and intention of the statute by giving undue protection to the Vice-Chancellor. All the sections discussed hereinbefore become practically paralysed in the face of Section 41 in spite of Section 9(3) of the Act. The Vice-Chancellor may do or undo any act as he may think fit and proper. Unfortunately, the petitioner has not challenged the vires of Section 41 of Calcutta University Act, 1979 otherwise the verdict might have been different. Section 41 goes to protect the loopholes committed by the chief executive of the University of Calcutta. I am sorry I am not in a position to give any relief to the petitioner in spite of a good case.

10. The writ application is accordingly dismissed without costs.

11. Let xerox copy of the Judgment be made available to the parties on usual undertaking and upon compliance of necessary formalities.