
(1960) 04 MP CK 0021

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 79 of 1960

Purshottam Das Dulichand Zargar and Another

APPELLANT

Vs

Board of Secondary Education Wright Town and Others

RESPONDENT

Date of Decision : 30-04-1960

Acts Referred:

Constitution of India, 1950 — Article 226

Madhya Pradesh Secondary Education Board Regulations, 1959 — Regulation 5, 8, 9

Citation : AIR 1962 MP 3 : (1960) ILR (MP) 417

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : A.P. Sen and Y.S. Dharmadhikari, for the Appellant; H.L. Khaskalam, Asst. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dixit, C.J.—In this petition under Article 226 of the Constitution of India the applicant Purshottam-das seeks a writ of mandamus directing the opponents to permit him to appear for the examination conducted by the Board of Secondary Education for the Higher Secondary School Certificate (hereinafter referred to as Pre-University Examination) this year.

2. This petition was filed a few days before the commencement of the examination. We were anxious that the petition should be heard and disposed of before the examination began. But as the respondents were not prepared to address arguments within the short time at their disposal, they rightly agreed to allow the applicant to appear for the examination on the condition that the result of his performance in the examination would not be disclosed in the event of this petition failing. The examination has now been held, and the question for determination is whether the opponents' refusal to permit the applicant to appear for the examination was justified.

3. The petitioner's case is that he passed the Matriculation Examination conducted by the Board in 1958. In 1959 he appeared for the Pre-University

Examination of the Board but failed in it. Thereafter he was trying to secure admission in any of the colleges teaching Science but was unable to secure admission till the end of September, 1959. In October, 1959 he secured admission in the Navin Vidya Bhavan and pursued in that institution the Pre-University course. He sent his application for examination in due course and was allowed to take practical examinations in Physics and Chemistry held by the Board on 18th and 19th March, 1960. On 10th March, 1960 he was orally informed by the Principal of the Navin Vidya Bhavan that the Board had decided not to permit him to appear for the theory examinations as he had not attended, the minimum number of lectures delivered in his subjects for qualifying himself for the examination and that under the rules in force the deficiency in his attendance could not be condoned.

4. The applicant contends that having already attended seventy-five per cent of the lectures delivered before he appeared for the Pre-University examination in 1959 it was not necessary for him to fulfil again the requirement about seventy-five per cent attendance; that the Board was wrong in calculating the attendance on the basis of the number of lectures delivered only in one academical year 1959-60 at the Navin Vidya Bhavan; that under Regulation 5 of Chapter XXIII of the regulations framed by the Board in 1959 the attendance had to be calculated on the basis of the lectures delivered during two academical years in classes X and XI that under the regulations the Board had the power to condone any deficiency in the attendance; and that even if the attendance fell short of the minimum required, the Board having allotted him a roll number for the examination and allowed him to appear for the practical examinations in Physics and Chemistry had already exercised its discretion in the matter of condoning the deficiency in attendance and was therefore precluded from reversing the decision already taken in exercise of its discretion.

5. The reply of the opponent is that the petitioner's late admission in Navin Vidya Bhavan did not ipso facto make him as of right eligible to the admission or entitle him to a condonation of the deficiency in his attendance; that under regulations 5 and 8 of the Regulations contained in Chapter XXIII the attendance had to be calculated for one academic session during which the school was open; that the power to condone deficiency in the prescribed percentage of the attendance was vested in the Chairman of the Board and he could condone the deficiency If it was within the permissible limits in exceptional cases on the recommendation of the Head of the Institution under regulation 13 of Chapter; that the applicant's deficiency in attendance exceeded the deficiency which the Chairman was empowered to condone; and that, therefore, he was not eligible to appear at the examination.

It has been further averred in the return that allocation of roll numbers to the candidates for admission to the examination is done a long before the examination starts to facilitate the printing of lists of examinees and that the allotment of roll number does not by itself entitle a candidate to appear at the

examination. It is not denied that the applicant was allowed to take practical examinations. The opponents further submitted that the dates for the practical examinations are fixed long before the theory examinations starts and that as a matter of course all candidates who have sent application forms for examination are allowed to appear for the practical examination and they take practical examinations before their application forms are scrutinised and are finally admitted for examination. According to the respondents, the fact that the applicant was allowed to appear for the practical examination did not, therefore, preclude them from determining the eligibility of the applicant for the examination.

6. There was considerable discussion at the bar on the question whether a candidate who has pursued a regular course of study and has appeared for examination once and has failed thereat is again required to follow a regular course of study if he wishes to re-appear for the examination. Regulation 13 of Chapter XVI, however, lays down that a candidate who has failed in an examination may present himself for one or more subsequent examinations, provided that he shall on each and every such occasion satisfy the Board that he has fulfilled the condition laid down in the Regulations for the admission of candidates to the Board's examination. It would, therefore, appear that a failed candidate can appear for the subsequent examination if he pursues again a regular course of study. It does not, however, seem to be necessary for us to decide this question conclusively or the question whether the attendance has to be calculated in accordance with regulation 5 contained in Chapter XXIII on the basis of attendance in two academical years or, as contended by the opponents, in one academical year under regulation 8. Regulation 8 has prima facie no applicability. "Regulation 5 does not give a clear indication whether the required attendance should be in the two academical years immediately preceding the examination.

7. The petition can, however, be disposed of on the short ground that it was in the discretion of the Chairman to condone the deficiency in attendance of any candidate and that discretion having been already exercised in favour of the petitioner by permitting him to appear at the practical examinations, it was not open to the Board to disallow him from taking examinations in theory subjects. Under the Regulations the Chairman is under an obligation to exercise one way or the other his discretion in the matter of condonation of the attendance when moved to do so. When in the exercise of his discretion he has taken a decision in the matter of condonation of deficiency in attendance, then the Chairman is under an obligation to act according to the decision taken by him. The exercise of discretion in a particular manner in the matter of condonation of deficiency in attendance is complete when it has been exercised once. After having exercised the discretion once, the Chairman does not retain the liberty to alter the decision taken by him by exercising his discretion a second time. The matter of exercise of discretion is analogous to the exercise of election.

Now, as pointed out by Lord Blackburn in *Scarf v. Jardine* (1882) 7 AC 345, when a party who has an option of following one of two remedies writes down that he will choose one particular remedy, that alone will not bind him; but as soon as he has not only decided to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not if he has done an unequivocal act, which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way, and that is election. He is not bound to elect. But if he did elect he is concluded by it and is bound by it.

The principle laid down in this case would apply with greater force here. In the case of an election of two remedies, the party's choice is not fettered. Where an authority is required to take a decision in exercise of its discretion, the discretion has to be exercised reasonably and discreetly and not arbitrarily. The vesting of discretionary power pre-supposes that the person to whom it is given is discreet. Again in the case of election, a person is not bound to elect. Here the Chairman was under an obligation to exercise his discretion one way Or the other. He could not just refuse to act at all. When, therefore, the Chairman has taken a decision in exercise of his discretionary powers, his discretion in relation to that particular matter is exhausted and he cannot again claim to revise his decision already taken by exercising his discretion a second time.

8. Now, here it must be taken that when the opponents permitted the petitioner to take practical examination they condoned the deficiency in attendance of the applicant, if there was any, and found him eligible for the examination. The argument that all candidates applying for examination are as a matter of course allowed to appear at the practical examinations and the scrutiny of their application forms is done subsequently cannot be accepted for the reason that regulation 9 of Chapter XVI expressly lays down that the Secretary shall, after satisfying himself that a candidate has complied with all the requirements for admission to an examination, furnish him with a card of admission and on presentation of that card the candidate shall be permitted to sit for the examination.

It is clear from regulation 9 that a candidate cannot be allowed to sit for the examination unless the Secretary has satisfied himself that he has fulfilled all the requirements for admission to the examination. There is thus no justification for the practice, if any be such existing, of permitting candidates to take practical examination as a matter of course. Such a wrong practice cannot displace the legal effect of regulation 9 which is that if a candidate has been allowed to appear in any subject in the examination, it must be taken that he has fulfilled all the requirements for admission to the examination. In the present case, the applicant was not only allowed to appear in the practical examination but he was also allotted a roll number for the examination. It is difficult to see how a roll number could have been allotted to him if the Secretary had not satisfied himself

with regard to the points mentioned in regulation 9- The filling in of admission cards and their actual issue to the candidate is merely a formality after the allotment of roll numbers.

9. Much was made by the opponents of the fact that the applicant was governed by new regulations which came into force on 1st November 1959 and not by the old regulations, and that under the new regulations the power of the Chairman to condone the deficiency in attendance was limited up to a particular period and the deficiency in the applicant's attendance far exceeded the limit which could be condoned. It is immaterial whether the applicant was governed by the new regulations or by the old ones. The fact that the applicant was allowed to appear for practical examination and was allotted a roll number must be taken as having the necessary implication that the deficiency in the petitioner's attendance was such which could be condoned and Was condoned under the regulations which were applicable to him. Therefore, if the new regulations applied to him, then it must be taken that the deficiency in the applicant's attendance was such which was within the power of the Chairman to condone.

10. For all these reasons, we are of the opinion that the opponents were under an obligation to permit the petitioner to take theory examination when they had allowed him to appear for the practical examinations in Physics and Chemistry and when he had been allotted a roll number. It is no doubt true that mandamus does not lie where the duty is clearly discretionary and when the party upon whom the duty rests has exercised the discretion reasonably and within his jurisdiction. But the present case is not one where the applicant seeks mandamus to compel the opponents to exercise their discretion in a particular manner. The mandatory direction that is sought is for compelling the opponents to act according to the decision they have already taken in exercise of their discretion. There is good authority in support of the proposition that where a discretion is abused so as to work injustice it can be controlled by mandamus.

11. In the result, this petition is accepted and a writ directing the opponents to permit the petitioner Purushottam Das to take the examination is issued. The applicant shall have costs of this petition. Counsel's fee is fixed at Rs. 75/-. The outstanding amount of security deposit shall be refunded to the petitioners.