
(2017) 05 DEL CK 0006

In the Delhi High Court

Case No : W.P.(C) 4519 of 2017 & CM No. 19732 of 2017

Rakesh Kumar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-05-2017

Acts Referred:

Constitution of India, 1950 — Article 137, Article 32

Citation : (2017) 05 DEL CK 0006

Hon'ble Judges : Gita Mittal, ACJ and Ms. Prathiba M. Singh, J.

Bench : Division Bench

Advocate : Balbir Singh, Sr. Adv. with Abhishek Singh Baghel, Ashish Verma and Mukesh Bhutani, Advocates, for the Petitioners; Sanjay Jain, ASG with Amit Bansal, Ms. Rajul Jain, Ms. Manish Singh and Ms. Seema, Advocates, for the Respondents R-1 and R-2.; Mohinder J.S. Rupal with Ms. Disha Malhotra, Advocates, for the University of Delhi.

Final Decision : Disposed Off

Judgement

Gita Mittal, Acting Chief Justice.—W.P.(C) 4519 of 2017

Issue notice to show cause as to why rule nisi be not issued to the respondents. Mr. Amit Bansal, Id. counsel accepts notice for respondents no.1 and 2.

2. We accept the oral prayer made by Mr. Sanjay Jain, Id. ASG and direct the impleadment of University of Delhi as party respondent no.6 in the present writ petition.

3. Mr. J.S. Rupal, Id. Standing Counsel for the University of Delhi who happens to be in court has been requested to accept notice. The served respondent shall file counter affidavits within six weeks. Rejoinder thereto, if any, be filed before the next date of hearing.

4. Subject to the petitioner taking steps, issue notice for the service of the unserved respondents.

5. List on 20th July, 2017.

CM No.19732 of 2017

6. This application is taken up for early hearing given the urgency in this matter which relates to the evaluation of the performance of students who have undertaken the Secondary School (class 10th) and the Senior Secondary School (Class 12th) Examination under the Central Board of Secondary Education ('CBSE' hereinafter), results whereof are likely to be declared any day. We have consequently heard Mr.Balbir Singh, learned Senior counsel for the petitioner and Mr.Sanjay Singh, ASG for respondents No.1 and 2.

7. The petitioners are aggrieved by the announcement made by the CBSE that for the present year i.e. 2016-17, the moderation policy, which was in vogue would not be adopted for these students. The petitioners have also made a grievance that this announcement has been revealed only from newspaper reports and that the policy change effected by the CBSE has not been announced or made available to the students nor has it been put in the public domain.

8. Mr. Sanjay Jain, learned ASG who appears for the respondent no.1 does not dispute that till the announcement of this policy, CBSE had a moderation policy for the Board Examination in place. Copy of the policy followed by the CBSE, which has been in vogue till date is placed as annexure P-1 at page 123 on record.

9. To understand the spirit, intendment and object of this policy, we extract hereunder the reasons as have been declared by the CBSE for the existing policy, which reads as follows:

"Moderation Policy of Board's Examination

Prior to declaration of results of Senior School Certificate (Class XII) and Secondary School (Class X) the Board adopts the Moderation Policy in the following manner:

- a) To compensate the candidates for the difficulties experienced in solving the question in a specified time due to misinterpretation/ambiguity of questions and errors, if any, leading to multiplicity of performance and causing constraints on consumption of time for other questions.
- b) To compensate the vagaries and to bring uniformity in the evaluation process.
- c) To bring parity on account of element of subjectivity involved in the evaluation process.
- d) To level up the mean achievements in the set-wise performance of the candidates attributable to the difference in the difficulty level of different sets of question papers in the multiple sets scheme.
- e) To maintain a near parity of pass percentage of the candidates in the current year vis-a-vis preceding years, subject-wise and overall."

10. So far as the change of policy which has been effected by the respondents is concerned, Mr. Sanjay Jain, learned ASG has handed over an office memorandum dated 10th May, 2017 which has been issued by the CBSE. This office memorandum is addressed to the following authorities :

(i) All State Education Secretaries

(ii) All Chairman, State Secondary Boards

(iii) Chairman, National Institute of Open Schooling, Noida, Uttar Pradesh

(iv) Chief Executive & Secretary, Council for the Indian School Certificate Examinations, New Delhi

(v) All Heads of Departments, CBSE

11. The office memorandum encloses the minutes of a meeting held on 24th April, 2017 of State Education Secretaries and Boards Chairman, which was held by the Secretary (School Education & Literacy) of the Ministry of Human Resource Development of the Government of India.

12. It is noteworthy that even as on 10th May, 2017, the CBSE has not thought it fit to notify the students who have actually undertaken the examination process of the decisions taken in the Minutes dated 24th April, 2017, nor has the same been published on its website.

13. The said Minutes of the meeting placed before us indicate a consensus on the modification of the policy for moderation of marks and doing away with the same in the secondary and senior secondary level board exams. We extract hereunder para 13 of these Minutes, which reflects the decisions which were taken in this meeting: "13. Based on the discussion and consensus developed, the following decisions have been taken unanimously:

a. All State Boards decided to stop awarding moderation of marks for upward revision/spiking of marks from the current year except Kerala Board and subject to amendment in the State regulations, if required. However, Kerala Board conveyed to do away with moderation from the next year.

b. All State Boards decided to continue with policy of Grace Marks for lower level performance to improve the pass percentage but the policy should be placed on Board's website for transparency. It was also decided to show grace marks distinctly in the Marks Sheet.

c. All State Boards decided to move progressively towards adopting common Core Curriculum in all major subjects upto Class XII with option to contextualize the contents in social science subject.

d. All State Boards decided to reflect the marks/grades for extra-curricular activities separately in the Marks Sheet.

e. State Boards may use NCERT books and can also translate/print them with

permission of NCERT"

f. All State Boards may indicate their requirement of NCERT Books well in advance to forward the benefit of economy of scale to students and ensure that the books are provided in time.

g. The State Boards may approach BCSE to share the question papers to bring uniformity in assessment and evaluation.

h. The State Boards decided to constitute Inter Board Working Group (IBWG) comprising of Chairman, Board of Gujarat, Jammu & Kashmir, Kerala, Telangana, Chhattisgarh, Manipur, ICSE with Chairman, CBSE as the Convener of the IBWG."

14. A perusal of the above would reveal that the unanimous decision is with respect to

? Stoppage of moderation of marks for upward revision / spiking of marks;

? Policy to continue grace marks;

? Progressive movement towards adopting common core curriculum in major subjects upto Class XII;

? Use of NCERT books;

? Uniformity in assessment and evaluation to be brought about by the State Boards approaching the CBSE and sharing question papers with the CBSE;

? Constitution of inter-board working group amongst various States.

All these decisions, together, as per the said Minutes, would lead to the avowed object of uniformity in education across the country.

15. It is to be noted that the Minutes prima facie do not suggest the consideration of the reasons which had weighed with the authorities for the moderation policy already in place, as extracted hereinabove.

16. It has been submitted by Mr. Sanjay Jain, Id. ASG that Director (IT) CBSE had made a detailed presentation in the meeting on 24th April, 2017 on the Moderation process to highlight the unfair fall-out of indiscriminate use of moderation in the results through statistical representation of senior secondary results of the past.

17. It has been contended by Mr. Balbir Singh, Id. Senior Counsel that the moderation policy is essential as it eliminates any form of arbitrariness in evaluation of answer scripts. He further submits that the decision as circulated with the letter dated 10th May, 2017 is concerned, does not reflect the consideration of any of the matters which had weighed with the respondent in formulating and implementing the moderation policy which has been in vogue. Id. Senior Counsel would submit that the difficulties which are experienced by students in solving questions within the timeline, vagaries in the evaluation

process; requirement of ensuring parity on account of the element of subjective involvement in the evaluation process, etc. would continue to subsist so long as evaluation has to be effected by examiners placed in different circumstances/situations having different academic qualifications and experience.

18. Our attention is drawn to the Draft Education Policy of 2016 which recognized that such difficulties exist and have to be ironed out. It is further submitted that in spite of the decision which may be even on consensus or that a decision may have been taken by the participants in the meeting held on 24th April, 2017, the data of students who were appearing or even appeared in Class X and Class XII under various Boards would reflect the prejudice which would result students in Delhi, if the moderation policy was not given effect to. We extract hereunder the figures as have been placed by

Mr. Balbir Singh, Id. Senior Counsel before us.

"DATA OF STUDENTS WHO APPEARED IN CLASS X & XII UNDER VARIOUS BOARDS IN 2017

Number of Class XII students

Central Board of Secondary Education (CBSE)

Tamil Nadu School Education Department

Kerala Higher Secondary Examination Board

Haryana Board of School Education

Punjab School Education Board

10,98,891

8,98,763 [Pass Percentage: 92.1%]

4,42, 434 [Pass Percentage: 83.37%]

1,03,893 [Pass Percentage: 64.50%]

3 lakhs approx. [Pass Percentage: 62.36%; Last year : 76.77% ; Reduction of minus 14%]

Number of Class X students

Central Board of Secondary Education (CBSE)

Tamil Nadu School Education Department

Kerala Higher Secondary Examination Board

Haryana Board of School Education

Punjab School Education Board

8,86,506

9.82 lakh [Pass Percentage: 94.4%; +0.8% than last year]

3,95,338 [Pass Percentage: 61.04%]

4,58,594 [Pass Percentage: 96.59%]

3.15 lakhs approx.

19. We may note the observations of the Supreme Court in the pronouncement reported at Sanjay Singh & Anr. v. U.P. Public Service Commission, Allahabad & Anr., (2007) 3 SCC 720 wherein the need for a moderation policy and the reasons thereof have been discussed. The relevant portion is extracted hereunder:-

"23. When a large number of candidates appear for an examination, it is necessary to have uniformity and consistency in valuation of the answer-scripts. Where the number of candidates taking the examination are limited and only one examiner (preferably the paper-setter himself) evaluates the answer-scripts, it is to be assumed that there will be uniformity in the valuation. But where a large number of candidates take the examination, it will not be possible to get all the answer-scripts evaluated by the same examiner. It, therefore, becomes necessary to distribute the answer-scripts among several examiners for valuation with the paper-setter (or other senior person) acting as the Head Examiner. When more than one examiners evaluate the answer-scripts relating to a subject, the subjectivity of the respective examiner will creep into the marks awarded by him to the answer-scripts allotted to him for valuation. Each examiner will apply his own yardstick to assess the answer-scripts. Inevitably therefore, even when experienced examiners receive equal batches of answer-scripts, there is difference in average marks and the range of marks awarded, thereby affecting the merit of individual candidates. This apart, there is "hawk-dove" effect. Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well-written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the excellent answer-script. In other words, there is "reduced valuation" by a strict examiner and "enhanced valuation" by a liberal examiner. This is known as "examiner variability" or "hawk-dove effect". Therefore, there is a need to evolve a procedure to ensure uniformity inter se the examiners so that the effect of "examiner subjectivity" or "examiner variability" is minimised. The procedure adopted to reduce examiner subjectivity or variability is known as moderation. The classic method of moderation is as follows:

(i) The paper-setter of the subject normally acts as the Head Examiner for the subject. He is selected from amongst senior academicians/scholars/senior civil

servants/judges. Where the case is of a large number of candidates, more than one examiner is appointed and each of them is allotted around 300 answer-scripts for valuation.

(ii) To achieve uniformity in valuation, where more than one examiner is involved, a meeting of the Head Examiner with all the examiners is held soon after the examination. They discuss thoroughly the question paper, the possible answers and the weightage to be given to various aspects of the answers. They also carry out a sample valuation in the light of their discussions. The sample valuation of scripts by each of them is reviewed by the Head Examiner and variations in assigning marks are further discussed. After such discussions, a consensus is arrived at in regard to the norms of valuation to be adopted. On that basis, the examiners are required to complete the valuation of answer-scripts. But this by itself, does not bring about uniformity of assessment inter se the examiners. In spite of the norms agreed, many examiners tend to deviate from the expected or agreed norms, as their caution is overtaken by their propensity for strictness or liberality or erraticism or carelessness during the course of valuation. Therefore, certain further corrective steps become necessary.

(iii) After the valuation is completed by the examiners, the Head Examiner conducts a random sample survey of the corrected answer-scripts to verify whether the norms evolved in the meetings of examiner have actually been followed by the examiners. The process of random sampling usually consists of scrutiny of some top level answer-scripts and some answer books selected at random from the batches of answer-scripts valued by each examiner. The top level answer books of each examiner are revalued by the Head Examiner who carries out such corrections or alterations in the award of marks as he, in his judgment, considers best, to achieve uniformity. (For this purpose, if necessary certain statistics like distribution of candidates in various marks ranges, the average percentage of marks, the highest and lowest award of marks, etc. may also be prepared in respect of the valuation of each examiner.)

(iv) After ascertaining or assessing the standards adopted by each examiner, the Head Examiner may confirm the award of marks without any change if the examiner has followed the agreed norms, or suggests upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In regard to the top level answer books revalued by the Head Examiner, his award of marks is accepted as final. As regards the other answer books below the top level, to achieve maximum measure of uniformity inter se the examiners, the awards are moderated as per the recommendations made by the Head Examiner.

(v) If in the opinion of the Head Examiner there has been erratic or careless marking by any examiner, for which it is not feasible to have any standard moderation, the answer-scripts valued by such examiner are revalued either by the Head Examiner or any other examiner who is found to have followed the agreed norms.

(vi) Where the number of candidates is very large and the examiners are numerous, it may be difficult for one Head Examiner to assess the work of all the examiners. In such a situation, one more level of examiners is introduced. For every ten or twenty examiners, there will be a Head Examiner who checks the random samples as above. The work of the Head Examiners, in turn, is checked by a Chief Examiner to ensure proper results.

The above procedure of "moderation" would bring in considerable uniformity and consistency. It should be noted that absolute uniformity or consistency in valuation is impossible to achieve where there are several examiners and the effort is only to achieve maximum uniformity.

24. In the Judicial Service Examination, the candidates were required to take the examination in respect of all the five subjects and the candidates did not have any option in regard to the subjects. In such a situation, moderation appears to be an ideal solution. But there are examinations which have a competitive situation where candidates have the option of selecting one or few among a variety of heterogeneous subjects and the number of students taking different options also vary and it becomes necessary to prepare a common merit list in respect of such candidates. Let us assume that some candidates take Mathematics as an optional subject and some take English as the optional subject. It is well recognised that marks of 70 out of 100 in Mathematics do not mean the same thing as 70 out of 100 in English. In English 70 out of 100 may indicate an outstanding student whereas in Mathematics, 70 out of 100 may merely indicate an average student. Some optional subjects may be very easy, when compared to others, resulting in wide disparity in the marks secured by equally capable students. In such a situation, candidates who have opted for the easier subjects may steal an advantage over those who opted for difficult subjects. There is another possibility. The paper-setters in regard to some optional subjects may set questions which are comparatively easier to answer when compared to some paper-setters in other subjects who set tougher questions which are difficult to answer. This may happen when for example, in Civil Service Examination, where Physics and Chemistry are optional papers, Examiner 'A' sets a paper in Physics appropriate to degree level and Examiner 'B' sets a paper in Chemistry appropriate for matriculate level. In view of these peculiarities, there is a need to bring the assessment or valuation to a common scale so that the inter se merit of candidates who have opted for different subjects, can be ascertained. The moderation procedure referred to in the earlier para will solve only the problem of examiner variability, where the examiners are many, but valuation of answer-scripts is in respect of a single subject. Moderation is no answer where the problem is to find inter se merit across several subjects, that is, where candidates take examination in different subjects. To solve the problem of inter se merit across different subjects, statistical experts have evolved a method known as scaling, that is creation of scaled score. Scaling places the scores from different tests or test forms on to a common scale. There are different methods of statistical scoring. Standard score

method, linear standard score method, normalised equipercentile method are some of the recognised methods for scaling."

(Emphasis supplied)

It is not disputed that the very circumstances noted by the Supreme Court in the above pronouncement would be prevalent especially when the examination process involves long question-answer format of examining the student, as is the practice in the CBSE examinations.

20. Even if the above circumstances were not enough to persuade us, there are certain critical dates in the present matter, which must be considered. We are informed that the process of submission of the examination forms for the X and XII CBSE board exams came to an end in November, 2016. It was extended for some reason and the last forms were submitted by the students till 5th of January 2017. In the first week of January, 2017, roll numbers were generated and the examination commenced from 9th of March 2017. Therefore, even by 24th April 2017, when the respondents commenced the changes in the Policy, many students had in fact completed their examinations. The last examination which any candidate wrote in the 2016 - 2017 session was on 29th April, 2017.

21. We are informed by Mr. K.K. Chaudhary, Controller of Examinations, CBSE who is present in court, that the marking scheme for the answer sheets also stood distributed to the evaluators on 20th March, 2017. The evaluation also commenced on or above the same date. Therefore, on all the aforementioned material dates, it was the policy of 2016 which was in vogue. The respondents themselves admittedly changed the policy not only after the students had undertaken the examination but after evaluation of their answer sheets has been effected.

22. The minutes of the meeting dated 24th April, 2017 approved by the Secretary (SE & L), Ministry of HRD only on the 4th May, 2017. So far as circulation of the policy, amongst the authorities noted above is concerned, the same was effected only under the cover of the letter dated 10th May, 2017. It needs no elaboration that rules of the game cannot be changed after the game has begun.

23. There is one more extremely distressing aspect of the matter which the respondent appear to have completely ignored. Today students are seeking admission not only to Universities and institutions in India but also abroad. Foreign Universities given conditional admissions which are posited on a certain specified publicly known manner of evaluation.

24. Mr. Balbir Singh, Id. Senior Counsel has placed before us a copy of the letter dated 8th February, 2017 issued by the University College London (UCL) which, while giving conditional admission to a Class XII student for the B.Sc. Information Management for Business Programme prescribes the following condition to be fulfilled in order to secure admission:

"Year 12/Standard 12 Indian School Certificate, with 90% or above, awarded by CISCE or CBSE. Plus pass an English Language test approved by this institution at Good Level (see www.ucl.ac.uk/ug-english-requirement)."

25. It cannot be denied that the change in the evaluation policy, that is, denial of moderation may have drastic consequences for the admission offers, which large number of Class XII students who have taken the CBSE courses and examination would suffer. Neither the said foreign universities nor the students were aware that there would be a change in the policy of the CBSE.

26. We are also informed that many students may have also made arrangement of student loans and may have effected payments of large sums to these foreign universities. Grave and irreparable financial loss would also ensure to these students and their families. If the students are unable to fulfil the conditions imposed by foreign universities owing to the changes in the moderation policy, then it would have a devastating impact on their educational prospects.

27. We are deeply concerned with the manner in which the change of policy has been effected without notice to students, Universities etc., which may completely change the course of academic future of the students, especially in Delhi where there is no State Board.

28. The tabulation submitted by the petitioner as extracted above would show that almost 11 lakh students have taken the class XII examination in the year 2017 and over 8 lakhs students have taken the Class X examination through the CBSE Board.

29. We make it clear that nothing herein contained as an expression of opinion on the merits of the case, which has to abide by the substantive challenge to be examines after counter affidavits are filed by the respondents before us.

30. The above narration would show that the petitioners have made out a prima facie case for grant of interim relief so far as the examinations in the current session is concerned, results of which are yet to be declared.

31. We are satisfied that grave and irreparable loss and damage would enure to the students if interim relief is not granted.

32. It is therefore directed that so far as evaluation of the current students who have undertaken CBSE Class X and Class XII examination in the year 2017, the respondents shall follow the declared policy of 2016 including the moderation policy which was in vogue on the date when they submitted their application forms.

Copy of this order be given dasti to learned counsel for the parties.