

(2010) 09 DEL CK 0137

In the Delhi High Court

Case No : Writ Petition (C) No. 5744 of 2010

Siddharth Tomar and Others

APPELLANT

Vs

Guru Gobind Singh Indraprastha University

RESPONDENT

Date of Decision : 14-09-2010

Acts Referred:

Guru Gobind Singh Indraprastha University Act, 1998 — Section 18(1), 26(1), 26(2), 27(2), 42(1)

Citation : (2010) 172 DLT 82 : (2010) 6 SLR 372

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Geeta Luthra, Sanjeev Sahay and Abhishek Agrawal, in WP C No. 5744/2010 R.K. Singh, in WP C No. 5934/2010, for the Appellant; Mukul Talwar and Sradhananda Mohapatra, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The petitioners (107 in WP(C) No. 5744/2010 & 4 in WP(C) No. 5934/2010) in both these petitions are students of Colleges/Institutes belonging to or affiliated to the respondent University. All of them were admitted in the academic year 2009-10 and have completed first year of their respective courses. All of them have been denied promotion from the first to the second year of their respective courses owing to the amendment in the Ordinances 10, 11, 21, 25, 27 & 29 of the respondent University relating to "Conduct & Evaluation of Examinations". The said amendment was approved by the Board of Management of the respondent University in its 41st meeting held on 29th June, 2009 and published in the Delhi Gazette of 20th October, 2009. The counsel for the respondent University admits that but for the said amendment, the petitioners were/are entitled to be so promoted to the second year. The petitioners impugn the said amendment as illegal, arbitrary, unconstitutional and contrary to the Ordinances that are sought to be amended thereby. The petitioners alternatively also contend that the said amendment, even if valid cannot be applied to them and such application of the amendment amounts to giving retrospective effect to the amendment.

2. The petitions came up first before this Court on 26th August, 2010 and 1st September, 2010 respectively when notice of the petitions were issued. The counsel for the respondent University appearing on advance notice on 26th August, 2010 stated that in case the petitions are allowed, the respondent University shall accept the fee from the petitioners. It was also informed that the class tests for internal assessment and which ultimately have a bearing on the final marks of the next year to which petitioners are seeking promotion are scheduled to be held in various Colleges/Institutes from 13th September, 2010 to 18th September, 2010. In view of the said urgency and not finding any factual controversy requiring counter affidavit of the respondent University, the counsels were heard.

3. The crux of the amendment to the Ordinances is that it requires students to obtain minimum 50% of the total credits for the ensuing academic year from which promotion to the next academic year is sought. Prior to the said amendment, there was no such requirement and the only limitation was with respect to maximum number of attempts in which the exam could be cleared. The respondent University refused to promote the petitioners for the reason of having not obtained 50% of the total credits in the first year. The senior counsel for the petitioners in WP(C) No. 5744/2010 has contended that some of the petitioners secure in the knowledge that they were not required to secure 50% of the credits, did not even take the examination. It is also mentioned in the petition in WP(C) No. 5744/2010 that besides the 107 petitioners, approximately 3500 students of the respondent University have been refused promotion owing to the said amendment.

4. The senior counsel confined the submissions to the applicability of the amendment to the Ordinances qua the petitioners. It was stated that if the petitioners succeed in the same, they do not feel the need to impugn the validity/vires of the amendment. I am also of the opinion that the Court should, if possible, refrain from interfering with such decision of the experts in the field of education. If the said experts have resolved that the students, to be entitled to promotion must obtain 50% of the credits, the Court should be slow in striking down the said criteria. In any case the question of vires of the amendment to the Ordinances shall have to be considered by the Division Bench. The counsel for the respondent University also informs that the vires of the said amendment were challenged by some other students by filing WP(C) No. 4839/2010 which was dismissed as withdrawn on 21st July, 2010 after the counsel for the petitioners therein failed to satisfy the Court. I will therefore proceed to consider whether the amendment aforesaid can be applied to the petitioners and whether such application amounts to giving retrospective effect thereto and whether the same is permissible.

5. The contention of the petitioners is that the prospectus for admissions in the academic year 2009-10 in which the petitioners were admitted to the respondent University was published in February, 2009 i.e. much prior to the said

amendment; naturally the prospectus pursuant to which the petitioners sought admission and were admitted to the respondent University did not inform that the students so admitted, for promotion from the first to the second year would be required to obtain 50% credits. In view of the admission of the respondent University that but for the said amendment the petitioners would have been so promoted, need is not felt to refer to the provisions of the prospectus for admission to the academic year 2009-10. It may however be mentioned that in the prospectus published for admissions in the academic year 2010-11 the applicants are informed of the requirement to obtain 50% credits for promotion from the first to the second year.

6. The petitioners contend that the respondent University uploaded the aforesaid amendment on its website first only on 11th November, 2009. They contend that prior thereto the class tests for internal assessment and which marks as aforesaid have a bearing on the final result, had been conducted in the months of September & October, 2009. It is urged that had the petitioners known that they were required to obtain minimum 50% credits for promotion to the next year, they would have taken the said class tests seriously. The argument is that since the petitioners knew that they had no compulsion to clear the exams in the first attempt and were secure in the knowledge that they would be promoted to the next year only with the obligation to clear the examinations of the first year in the maximum number of attempts provided therefor, the petitioners either did not put in their best in the exams or some of them even chose to skip the exams.

7. It is also urged that the last date for submission of applications for admission in the academic year 2009-10 was 6th April, 2009, the admissions/entrance tests were held in June, 2009 i.e. of before the approval of the amendment aforesaid in the meeting of the Board of Management of the respondent University held on 29th June, 2009, though the counselling for admission took place in July/August, 2009 and the semester began from 3rd August, 2009. It is also informed that in some of the Institutes/courses the marks for internal assessment pursuant to the tests in September/October, 2009 were as high as 40% of the total marks.

8. The counsel for the respondent University contends that the amendment aforesaid came into force on 29th June, 2009 when the same was approved by the Board of Management of the respondent University. Reference in this regard is also made to the notification dated 20th October, 2009 at the foot whereof also, it is mentioned that the amendment has come into force with effect from the date of approval by the Board of Management. Per contra, the senior counsel for the petitioners contends that the amendment aforesaid would come into force only with effect from 11th November, 2009 when it was uploaded on the website and prior thereto no one had knowledge of the same. It is further contended that even thereafter there was much confusion as to whether the amendment would apply to the first year students admitted in the academic year 2009 or not. It is contended that though several representations in this regard were made but the same remained un-replied. It is pleaded that the petitioners learnt of the

application of the said amendment to themselves only when on 30th July, 2010 the tentative promotion list was declared by the respondent University and the name of the petitioners did not figure in the same.

9. Another fact which has been admitted is that though the respondent University has applied the aforesaid amendment to the students admitted to the first year in the academic year 2009 but has not applied the said amendment to the students admitted in the year 2008 or earlier. The reason thereof was enquired from the counsel for the respondent University. The counsel could only state that the same was on the basis of legal opinion and perhaps for the reason of those admitted in 2008 or earlier as it is having lesser time to clear the exams of various years/semester.

10. The respondent University has been established vide Guru Gobind Singh Indraprastha University Act, 1998 ; vide Section 18(1) of the Act, the Board of Management is the principal executive body of the University. Section 26(2) empowers the Board of Management to from time to time make new or additional Statutes or amend or repeal the first Statutes made u/s 26(1) of the Act. We are however concerned with Ordinances. u/s 27(2), first Ordinances are to be made by the Vice-Chancellor with the prior approval of the Government and the Board of Management has been empowered to, from time to time amend, repeal or add to the said Ordinances in such manner as may be prescribed. Section 42(1) provides for the publication in the Official Gazette of every Statute and Ordinance made under the Act. It also provides for laying of every Statute and Ordinance after it is made, before the House of the Legislative Assembly of Delhi while it is in session for a total period of 30 days.

11. The question which arises for consideration is, when did the aforesaid amendment come into force, whether on 29th June, 2009 when the same was approved by the Board of Management or on 20th October, 2009 when the same was notified in the Gazette or on 11th November, 2009 when the same was uploaded on the website of the respondent University. If the amendment came into force on 29th June, 2009, it is in force from before the petitioners were admitted to the University and then their argument of its retrospective operation will disappear. However, if it came into force on 20th October, 2009, by then one class test had been held. If it came into force on 11th November, 2009, by then both the class tests had been held.

12. The counsel for the respondent University has contended that even if the amendment had come into force upon notification in the Official Gazette on 20th October, 2009, only class tests of not more than 5 to 10% of weightage in the aggregate marks had been held till then and application thereof to the petitioners would not tantamount to applying the same retrospectively. It is contended that the respondent University had informed all its Colleges/affiliate Institutes of the amendment and if the said Colleges/affiliate Institutes failed to bring it to the notice of the students, the students have the Colleges/affiliate Institutes only to blame and cannot aver that the amendment is being retrospectively applied

merely because they came to know of it later. It is contended that merely because the class tests of 10 marks were held before the notification of the amendment in the Gazette would not so prejudice the petitioners as to persuade this Court to hold in favour of the petitioners.

13. The senior counsel for the petitioners has relied on:

(i) Vinayaka Mission's Kirupananda Variyar Medical College Vs. The Tamil Nadu Dr. MGR Medical University and Another, where a Single Judge of the Madras High Court concluded that the amendment approved by the Academic Board on 16th December, 2003 could not be applied to students admitted in May-June, 2003.

(ii) Puja Lal Vs. University of Delhi, where a Single Judge of this Court held that where the Bulletin for admission is silent about minimum marks, the same could not be applied to the student.

(iii) Kanishka Aggarwal Vs. University of Delhi and others, but which is on the aspect of estoppel and which is not found relevant for the present case.

(iv) Amar Vasudeva Kamath Vs. Registrar, University of Bombay and Others, holding in the context of the Bombay University Act, 1974 that the Ordinances cannot be retrospective. The facts of this case are quite similar to the controversy in these petitions.

(v) Sudhir Hunge and Satish Pise and Others Vs. The State of Maharashtra, The Rashtrasant Tukdoji Maharaj, Nagpur University and The Chintamani College of Science and Others where a Division Bench of the Bombay High Court held that subsequent insertions of qualification after advertisements of eligibility were published and after the cut-off date for applying, could be only prospective.

(vi) Hukam Chand etc. Vs. Union of India (UOI) and Others, laying down that in the absence of express or implied power to make rules with retrospective effect, no such effect could be given. It was also held that the fact that the rules have to be laid before each House of Parliament would not confer validity, if not in conformity with the Act.

14. The counsel for the respondent University invites attention to:

(i) Vishnu Dutt Vyas Vs. State of Rajasthan and Others, where a Division Bench of the Rajasthan High Court held that in academic matters it is always permissible to change the conditions unilaterally and no one can claim a right or privilege to be governed under the old rules if they are replaced by new rules.

(ii) The Vidhyarthi Sanrakshan Samiti Vs. University of Jodhpur and Another, where another Single Judge of the Rajasthan High Court decided on the basis of law laid down in Punjab University Vs. Subash Chander and Another, the Regulation cannot be said to have retrospective operation merely because though introduced in 1970, it was applied to a candidate who appeared for final examination in 1974 after he had joined the course earlier in 1965 - no promise

was made or could be deemed to have been made to him at the time of admission in 1965 that there will be no alteration of the Rule or Regulation in regard to percentage of marks required for passing any examination and that Rules in force at the time of admission would continue to be applied until he finished the whole course.

15. The senior counsel for the petitioners in rejoinder also referred to Collector of Central Excise Vs. New Tobacco Co. Etc. Etc., but which I find was expressly overruled in Union of India v. Ganesh Das Bhojraj (mentioned below).

16. In State of Maharashtra Vs. Hans George, a modification effected by the RBI in exercise of powers under the Foreign Exchange Regulation Act, 1947 was notified only on 24th November, 1962. The Supreme Court held that the effective date was the date of publication of the notification in the Official Gazette. It was further held that publication in the official Gazette is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned.

17. The Supreme Court in I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, held that the object of publication in the Gazette is not merely to give information to the public; Official Gazette, as the very name indicates, is an official document - it is published under the authority of the Government. Publication of an order or rule in the Gazette is the official confirmation of making of such an order or rule. The version as printed in the Gazette is final. If a question arises when was a particular order or rule made, it is the date of Gazette publication that is relevant and not the date of publication in a newspaper or in the media. The publication in the Official Gazette was held to be the official irrefutable affirmation of the order or rule having been made on a particular date. The same view was recently reiterated in T. Narasimhulu and Others Vs. State of A.P. and Others, Also, recently in Rajendra Agricultural University Vs. Ashok Kumar Prasad and Others, in a case entailing similar facts as herein, the Supreme Court held that it is not possible to accept the contention that the Statute contained in the notification dated 4th September, 1991 (in that case) came into effect or became enforceable even in the absence of publication in the Official Gazette.

18. In M/s. Pankaj Jain Agencies Vs. Union of India and others, the argument that notwithstanding publication in the official Gazette, the notification should be held to have become effective only on the date made available to the persons affected thereby was negated. Reliance was placed inter alia on B.K. Srinivasan and Others Vs. State of Karnataka and Others, where it was held that once the prescribed mode of publication is complied with, it was immaterial whether the notification was actually made known to the persons affected by it. The judgment in M/s. Pankaj Jain Agencies (supra) was approved as the correct exposition of law on the subject in Union of India and Others Vs. M/s. Ganesh Das Bhojraj,

19. The amendment to the University ordinances, in the present case cannot be said to have come into force prior to the notification thereof in the Delhi Gazette,

notwithstanding the same providing that it shall come into force from the date of approval by the Board of Management. The Act makes the approval of the amendment by the Board of Management subject to modification by the Legislative Assembly of Delhi. It is only when it has gone through the said procedure, is it required to be notified in the Official Gazette. Prior to the said notification, it cannot be said that the amendment would come into force. When a procedure is prescribed for achieving a particular objective, till such procedure is completed, it cannot be said that the objective has been achieved. The amendment therefore came into force only on 20th October, 2009. Once the mode of publication is prescribed, the petitioners cannot be heard to contend that they were not aware or became aware only on uploading on website on 11th November, 2009.

20. The next question which arises is even if the aforesaid amendment has come into force on 20th October, 2009, whether the same can be applied to the petitioners. The amendment is concerned with promotion to the next academic year. The question of promotion of the petitioners came up only as aforesaid in July, 2010 i.e. after the coming into force of the amendment. However, the said promotion was dependent upon the examinations and of which the first one even if for 10% of the marks was held in September, 2010 i.e. prior to the coming into force of the amendment. In my view that factor alone is enough. The rules of the game cannot be changed after the game has commenced. The students of the first year, when the said class tests were being held had no inkling of the change/amendment underway. There is justification in the contention of the petitioners that at the time when the said class tests were held they were not aware that they were required to obtain 50% credits. They were thus entitled either not to take the said class tests or not to take the same with best efforts in the belief that their poor performance therein would not come in the way of their being promoted. Thus, I find merit in the contentions of the petitioners that the amendment aforesaid cannot be applied to them.

21. The Supreme Court in *Sri Vijayalakshmi Rice Mills, New Contractors Co. and Others Vs. State of Andhra Pradesh*, held that it is a well recognized rule of interpretation that in the absence of express words or appropriate language from which retrospectivity may be inferred, a notification takes effect from the date it is issued and not from any prior date. It was further observed that the principle is also well settled that statutes should not be construed so as to create new disabilities or obligations or impose new duties in respect of transaction which were complete at the time the amending Act came into force. I also find that the Act aforesaid does not empower the Board of Management to issue an Ordinance with retrospective effect. The Board of Management on 29th June, 2009 while approving the amendment aforesaid knew that notwithstanding their approval, the Ordinances would have to be laid before the Legislative Assembly of Delhi and required to be published in the Official Gazette. Thus merely by observing that the same shall come into force with effect from 29th June, 2009, they could not make it effective from the said date. For instance, there could have been

delay in the subsequent steps as aforesaid. The said delay could very well have been till after the holding of the exams for the first year. In such situation, could the respondent University aver that it would still not promote the students from the first year to the second year because the Board of Management had observed that the amendment would come into force from the date of their approval, notwithstanding the time consumed in subsequent steps. The counsel for the respondent University has urged that Section 42(1) itself provides that any modification or annulment by the Legislative Assembly shall not affect the validity of anything previously done under the Ordinance. From the same, it is argued that the Ordinance thus comes into force even prior thereto. However, the said contention has no force since the requirement of publication in the Official Gazette remains. Without such publication which is mandatory, it could not have come into force.

22. I also do not find any justification whatsoever for the respondent University applying the amendment aforesaid to the students admitted in the year 2009 and not applying it to those admitted in the earlier years. There is no basis for such classification.

23. The petition therefore succeeds. The amendment to the ordinances 10, 11, 21, 25, 27 & 29 notified on 20th October, 2009 is held to be inapplicable to the petitioners for promotion from first to second year. I may however clarify that the amendment has been held inapplicable only for the reason of the examination having begun. Else, as held in *Punjab University v. Subhash Chander* (supra), the said amendment shall apply to all future examinations/promotion exams whereof are to be held/commenced after 20th October, 2009 irrespective of the year of admission. It being the admitted position but for the said amendment, the petitioners are entitled to be promoted, the respondent University is directed to either itself or by instructing to its Colleges/affiliate Institutes ensure that the petitioners are promoted to the second year of their respective courses, as also undertaken by the respondent University in order dated 26th August, 2010 aforesaid.

24. During the hearing, it was informed that the session for the second year has already commenced in August, 2010. The first class tests were also scheduled from 13th September, 2010; owing to the University having wrongly applied the amendment to the petitioners, the petitioners have till now not been permitted to attend the classes of the second year and thus have not been able to take the class tests scheduled from 13th September, 2010 also. The petitioners having been prevented from attending classes would have issues of attendance also. For the reason aforesaid, while allowing the petitions following directions are issued:

- (i) The respondent University while computing the attendance of the petitioners shall not take into consideration the classes held till three days hereafter. The petitioners are expected to join and start attending their classes after three days.
- (ii) The petitioners shall have an option, if ready to take the class tests scheduled

from 13th September, 2010, to take such of the class tests as are remaining. Else the respondent University is directed to ensure that after a reasonable interval of time an opportunity is given to the petitioners to take class tests which they have missed out. However, if any of the petitioners chooses to take the class tests now, he/she shall not be entitled to take the same again to improve his/her marks therein.

25. The petition is disposed of. No order as to costs.

Dasti under the signature of the Court Master.