
(1986) 10 BOM CK 0005
In the Bombay High Court
Case No : Appeal No. 790 of 1980

Sunil Kumar Sharma and others	Vs	APPELLANT
University of Bombay and another		RESPONDENT

Date of Decision : 04-10-1986

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1987) MhLj 124

Hon'ble Judges : M.H. Kania, C.J.; Sujata Manohar, J

Bench : Division Bench

Advocate : G.R. Hegde, for the Appellant; J.M. Bafna, for the Respondent

Final Decision : Allowed

Judgement

M.H. Kania, C.J.—This is an appeal against the judgment and order of a learned Single Judge of this Court in Writ Petition No. 768 of 1986 filed by the appellants dismissing the said Writ Petition.

2. The relevant facts which are uncontroverted are as follows : -

The petitioners are all students who appeared for the III LL.B. Examination conducted by respondent No. 1, the University of Bombay in October, 1985. Petitioners Nos. 1 to 3 are students of the Government Law College and petitioners Nos. 4 to 6 are students of the K. C. Law College, both the said Colleges being affiliated to the respondent No. 1 University. There are six papers of 100 marks each in the III LL.B. Examination. The first of these papers is relating to the Code of Civil Procedure, 1908. In all 729 students appeared in the III LL.B. Examination for the paper on the Code of Civil Procedure. Answer papers given by the said students were examined by three examiners under the Central Assessment Project adopted by the respondent No. 1 University. These answer books were not sent to the examiners but were examined by the examiners at the University premises and one Assistant Registrar of the University was present during the time when the answer papers were examined.

The work of examination of the answer papers and assessment of the answer papers commenced on 16th October, 1985 and continued till 1st November, 1985. Out of the said 729 answer papers, 22 were examined by an examiner, whose name has not been given to us and whom we shall refer to as "Professor X". Prof. X attended only for 5 days in this work and examined the answers of only 22 of the candidates. He failed all these candidates and gave them marks which varied between 4% to 19%. In short, he failed them hopelessly. The other two examiners appear to have been kinder to the students whose papers they examined because we find that only 8.7% of the students who appeared for the CPC failed so that the percentage of students passing in this paper was 91.3% in spite of the 22 students failed by Prof. X. We may mention that the total number of students who failed in the paper on the CPC was 64 and these included 22 students failed by Prof. X. The percentage required in this examination for passing in each individual subject was 40% and it was further required that to be declared successful in the examination the candidate had to obtain 50% of the total number of marks allotted in respect of all the papers together. The results of the said III LL.B. Examination were declared on 10th December, 1985 and mark sheets were available on 16th December, 1985. The petitioners found from the mark-sheets that they had failed only in the paper on the Code of Civil Procedure. The petitioners made inquiries with the Officer on Special Duty (Examinations) of respondent No. 1 and tried to find out whether they could have their papers revalued. They were informed by the Officer on Special Duty that they were not entitled to have their answer papers in the CPC revalued in view of Ordinance No. 237A whereby revaluation was permitted only in respect of those candidates who had secured at least 50% of the minimum marks required for passing in the subject in which they sought re-valuation, that is, who had secured 20 out of 100 marks in that subject. We shall come to this Ordinance a little later. Representations made by the petitioners were rejected. However, the answer papers of the 22 candidates, who had been failed by Prof. X were scrutinised by a high-powered committee. We need not dilate much on that because it was fairly admitted by Mr. Bafna that all that this committee did was to check whether all the answers given by the students concerned had been assessed by the examiner concerned and the committee did not go into the question whether the assessment was proper or not. Finally, the petitioners, having failed to obtain any redress, filed the aforesaid Writ Petition.

The Writ Petition filed by the appellants was heard by R. A. Jahagirdar, J. on 1st August, 1986. Before him the challenge made by the appellants-petitioners was confined only to Ordinance 237A framed by the University of Bombay, after its amendment effective from October, 1985. It was urged on behalf of the petitioners that the said Ordinance was unreasonable and arbitrary in character, as it provides that applications for re-valuation can be made only by students who had secured at least 50% of the minimum marks required for passing in the subjects/heads of passing in which they desire re-valuation; whereas there was no such restriction under Ordinance 237A, as it stood prior to October, 1985. The

learned Judge rejected this contention on the ground that it was open to the University to restrict re-valuation to cases of border-line failures and not to allow re-valuation to students who had failed out and out in the subject in which they sought re-valuation. It was observed by him that "If a student obtaining zero marks passes after re-valuation, the pendulum of hazard or chance could go to the other extreme." In view of this conclusion, the learned Judge dismissed the petition. It is against this judgment and order that the present appeal has been preferred.

3. The first contention urged by Mr. Hegde before us is that the said Ordinance No. 237, as it stands after its amendment in October, 1985, is unreasonable, arbitrary and capricious and hence is liable to be struck down. Before examining this contention, we may note certain relevant provisions of law. The Bombay University Act, 1974 was enacted by the State Legislature to consolidate and amend the law relating to the University of Bombay. u/s 19 of the Act the Senate, the Executive Council and the Academic Council are authorities of the University. There are several sections in the said Act dealing with powers to make Ordinances for the various purposes referred to in the said sections. Sub-section (1) of section 24 confers on the Executive Council, inter alia, the power to make, amend or repeal Ordinances and also to appoint examiners and moderators, remove them, fix their emoluments and so on. Section 26 prescribes powers and duties of the Academic Council and subsection (1) of this section, inter alia, provides that the Academic Council shall have the control and general regulation of, and be responsible for, the maintenance of the standards of teaching, research and examinations in the University. Section 39 confers power on the Executive Council of the University to make Ordinances and Clause (vi) thereof provides that such power extends to making Ordinances for the conduct of examinations and the manner in which the candidates may be assessed or examined by the examiners. A perusal of the documents at Exhibit "1" shows that in 1978 an Ordinance being Ordinance No. 237A was made by the Executive Council providing for re-valuation. Under this Ordinance a general provision was made enabling students to apply for re-valuation, and the procedure and fees for revaluation were prescribed. Suffice it to say that there was nothing in this Ordinance to provide that an application for re-valuation could be made only by students who had obtained a particular percentage of marks in the subject in which they sought to have their answer paper revalued. Clause (iv) of this Ordinance provided that the marks, after revaluation, had to be accepted by the University only provided there was a variation of 10 per cent or more of the maximum marks assigned to the paper between the marks given on original assignment and the marks given on re-valuation, in which case the marks obtained originally by the candidate would be treated as null and void and marks obtained on re-valuation would prevail. That Ordinance was amended in October, 1985. The portion of the amended Ordinance relevant for our purpose runs as follows : -

"...provided, however that only such of the candidates as have failed in one or

more subjects or heads of passing, but not exceeding if of the total number of subjects or heads of passing, as the case may be, prescribed for theory papers at a University Examination, shall be held eligible to apply for revaluation in those subjects/heads of passing, if they have secured at least 50 per cent of the marks required for passing in a subject/head of passing..."

This is the only part of the Ordinance which is material for our purpose and an analysis of the same shows that in order to be eligible for revaluation the student concerned must have failed in one or more subjects or heads of passing, but not exceeding half of the total number of subjects or heads of passing and, secondly, that before being entitled to apply for re-valuation in any subject, the student concerned must have obtained at least one-half of the minimum marks required for passing in that subject, which, in the present case, come to 20%.

4. It was urged before us by Mr. Hegde that after its amendment, Ordinance 237A suffers from the vice of arbitrariness because it arbitrarily restricts the right of the students to have their papers re-valued to those students who have obtained at least one-half of the minimum marks required for passing in that subject. In the present case, it would restrict the right of the students in respect of re-valuation to only such of the students as had obtained at least 20% of the maximum marks in the subject. We are afraid that we are unable to accept this argument. If there is a proper system of initial assessment, in our view, there is nothing wrong in limiting the right of re-valuating to cases of marginal failures, as has been done by the amendment to Ordinance 237A. The fact that even students who have obtained only half of the minimum number of marks required for passing in the subject concerned are entitled to apply for re-valuation would show that the restriction imposed by the Ordinance is not unduly harsh but is a reasonable restriction in the absence of which revaluation would lead to many students passing by the sheer chance of luck in the event of a significantly more liberal standard being applied for revaluation then at the time of original assessment. That such a possibility existed is clearly beyond doubt because there seems to be nothing to provide that the standard applied for re-valuation should be comparable to the standard of assessment applied at the time of initial assessment of answer papers.

5. It is pointed out by Mr. Hegde that enforcement of this Ordinance has brought about a very unjust result in the present case. That is undoubtedly true. As we have pointed out, the answer-books of the 729 students who appeared in the paper in the CPC were examined by three examiners, out of whom the one to whom we have referred to as Prof. X examined only 22 and failed all these students so badly that they could not apply for re-valuation. The other two examiners apparently applied a very lenient and benign standard. As pointed out by Mr. Hegde, it is apparent that they have passed well over 90% of the students, whose papers in the CPC they examined. Prof. X, on the other hand, seems to have approached his task with the wrath of an avenger determined to fail hopelessly all students who fell short of his unusually high standard.

However, the fact that the application of the said Ordinance in a very unusual case might lead to unjust results cannot lead to the conclusion that the Ordinance itself is arbitrary and unreasonable. All that it shows is that there is something inherently wrong with the system where papers in the same subject are examined by different examiners without any rule or guide-line as to standard of assessment and without a system of moderation by which injustice of this sort could be avoided.

6. The matter, however, does not rest here. After arguments commenced, pursuant to certain discussion in Court, Mr. Hegde applied for leave to amend the petition, and on his application, which was not opposed by Mr. Bafna, the petition was amended on 25th September, 1986. Under the amendment, it was submitted that the respondents, namely the University and the Acting Vice-Chancellor had not laid down any guide-line setting out the mode of assessing the answer-books not provided for moderation of the assessment of the answer-books and this was bound to lead to discrimination. It is contended in the amended petition that such a system is inherently bad and discriminatory and hence violative of Article 14 of the Constitution of India. As a result of this system being bad in law, the original assessments are bad in law and are liable to be set aside. No application was made on behalf of the respondents to file a supplemental affidavit in reply denying the aforesaid allegations. We find substance in this contention of Mr. Hegde. It is obvious that, when papers in a single subject are given to different examiners, each one of them may examine them with a varying standard and, although such a situation may not arise very often, it can happen, as it happened in this case, that some of the examiners may apply a very liberal standard and the others may apply a strict and harsh standard. A system of examination and assessment under which such unjust discrimination must necessarily arise on occasions must be held to be discriminatory and bad in law. In the present case, as we have already pointed out, out of 729 papers only 22 papers were assigned to Prof. X, who failed hopelessly all the students in the subject of Code of Civil Procedure. Other papers in CPC were examined by two examiners who applied a very lenient standard. There is no averment in the affidavits filed on behalf of the respondents to show that any guidance was given to the examiners as to the standard by which the answer papers should be assessed, either by way of any general guideline or by way of any model assessment. Nor is it shown that there was any meeting at which the examiners discussed the matter and arrived at the standard of assessment to be applied to the answer-books or that there was any provision for moderation of the results. It was pointed out by Mr. Bafna, learned counsel for the respondents, that in the affidavit of V. D. Shinde, Deputy Registrar (Exams) dated 12th September, 1986, it has been averred that out of the three examiners, who assessed the answer-books in the Code of Civil Procedure, One was the Chairman who co-ordinated and supervised the assessment work. However, there is nothing on record to show that the Chairman in that subject did carry out any supervision of the assessment work or

that he coordinated the same. It is further stated in the said affidavit that the examiners had with them the scheme of marking which was prepared from the recommended Text Book of Sir Dinshaw Mulla on Code of Civil Procedure. We presume that this was the Students' Edition of Sir Dinshaw Mulla's Book on the Code of Civil Procedure. However, Mr. Bafna candidly made it clear that all this averment means is that the examiners had with them the keys to answers but no guidance whatever as to the standard to be applied in assessment. In this situation, it was inevitable that in some cases there would be a wide divergence in the standard applied by different examiners and the students subjected to unjust and unfair discrimination. A student has no choice regarding the examiner who is to examine his paper with the result that in the same examination and in the same paper out of two students who have written answers at a particular level or standard one might pass well and the other might fail hopelessly. Such a system must be regarded as hopelessly discriminatory and violative of law. The result of following such a system might be to vitiate the entire assessment. However, we find that in the present case, the bulk of the students, namely over 90% have passed in the paper on the Code of Civil Procedure. The unfortunate 22 students whose papers were examined by Prof. X failed. It would not be fair to the students who have passed in this subject to upset the entire result in a situation like this. It is, however, clear that the assessment of marks in the paper on the CPC in respect of the 22 students whose papers were examined by Prof. X is liable to be struck down. As far as the petitioners are concerned, their answer books in the CPC will have to be examined afresh by such examiner as may be appointed by the University but bearing in mind the standard applied by the two examiners in the CPC other than Prof. X. As far as the remaining students out of this lot of 22 students is concerned, unless they have already passed in the said paper, their papers will also be assessed on the same footing as we have set out earlier.

7. We may make it clear that the provisions of Ordinance 237A which we have held to be valid do not in any manner conflict with the order which we have indicated above, because we are not directing any re-valuation as such but we are striking down the initial assessment and directing a fresh assessment as set out earlier.

8. Mr. Bafna relied on a decision of the Supreme Court in *Jawaharlal Nehru University Vs. B.S. Narwal*, where it has been held by the Supreme Court that when duly qualified and competent academic authorities examine and assess the work of a student over a period of time and declare his work to be unsatisfactory, no question of a right to be heard can arise. The duty of an academic body in such a case is "to form an unbiased assessment of the student standard of work based on the entirety of his record and potential". The principle laid down in this decision, we are afraid, has no relevance whatever to the case before us. In the case before the Supreme Court the question was whether in the task of assessment of the work of a student there was any duty to give the student concerned an opportunity to be heard, which is not the question before us.

Moreover, in the said case decided by the Supreme Court it was not a case of the papers in the same subject in the same examination being examined by different examiners without any guideline as to the standard assessment or a system of moderation, as we have pointed out. That decision, therefore, is of no assistance to Mr. Bafna.

9. We may now refer to the copy of the Central Assessment Project (Ex. 2), which was tendered by Mr. Bafna in the course of the delivery of the judgment. We must express our strong disapproval of the manner in which this document has been tendered, although we have taken it on record. In paragraph 18 of this Project, it is provided that at the beginning of the Central Assessment Work, the Chairman shall discuss the synoptic answers with his examiners to ensure uniform standards of assessment. Paragraph 29 provides that the Chairman/Senior Examiner has the right to review the assessment done by an individual examiner. If he is not satisfied with the quality of the assessment done by an examiner, he shall issue instructions to the concerned examiner to review or even re-assess the assessed answer books and the examiner shall abide by such instructions. We must readily state that these provisions largely take care of the inherent possibility of discrimination in the manner of assessment followed in the present case. We are, however, very much distressed that this important document, which should have been really tendered as soon as the petition was amended, was not tendered or even referred to till after the judgment commenced. It was the duty of the officers of the University instructing the counsel for the University to have shown to him this document and to ascertain whether its provisions had been complied with in fact. The mere fact that the Central Assessment Project contains aforesaid paragraphs 18 and 29 would not result in eliminating discrimination. What is more important is that the salutary requirements of those paragraphs should have been complied with. In this connection, Mr. Bafna candidly informed us that he was unable to state and that he was not even in a position to find out whether at the beginning of the assessment work, the Chairman had discussed the synoptic answers with his examiners at all. He further stated that he was also not in a position to state or to ascertain whether the Chairman or the Senior Examiner had bothered to review the assessment done by Prof. X. In this set of circumstances, the fact that these safeguards were provided by the University is of no avail. On the other hand, it shows that the authorities of the University were fully aware of the inherent possibility and even probability of discrimination resulting from the method of assessment which they followed and made provisions to abate the same; but, after having made these provisions, they have not bothered to take care to see to it that these provisions were complied with, and, even when the matter has reached the Appeal Court, they are unable to state whether those provisions have been complied with. This attitude only displays a sad lack of regard for the welfare of the students whose academic interests and future are in the hands of the University.

10. In the result, the appeal is allowed. It is directed that the answer papers of

the petitioners in CPC in October, 1985 III L.L.B. Examination shall be assessed afresh within a week from today and their results declared. As for the remaining 16 students, out of the 22, who have been failed by Prof. X, in the CPC in the October, 1985 III LL.B. Examination, we are informed that four of them have subsequently appeared and passed in this Examination. That leaves a balance of 12 students. So far as these 12 students are concerned, we direct the University to have their papers also assessed afresh. The fresh assessments shall be done by such examiner as may be nominated by the University but keeping in mind the standard applied by the other examiners in the paper on the CPC at the October, 1985, III LL.B. Examination. The said assessment to be completed within one week from today. The learned Counsel for the University is present and he states that this will be done without waiting for a certified copy of the judgment.

11. No order as to costs.