
(1990) 10 BOM CK 0003

In the Bombay High Court

Case No : Writ Petition No. 3246 of 1989

Suraina Subhash Rane Dr. (Miss)

APPELLANT

Vs

University of Bombay and Others

RESPONDENT

Date of Decision : 12-10-1990

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1991) 2 BomCR 263

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : R.M. Bhagalia, for the Appellant; S.R. Radhakrishnan, for respondents 1, 2 and 6, S.G. Surana, for respondents 4 and 5, for the Respondent

Judgement

S.M. Daud, J.—This petition takes exception to alleged arbitrariness in the excessive weightage given to orals with a corresponding total denigration of dissertations in assessing the proficiency of candidates appearing at the Bombay University's examination in M.D. Pathology.

2. Petitioner, after securing a Diploma in Pathology and Bacteriology (DPB) a course conducted by third respondent, joined the M.D. Pathology degree course. Her topic for dissertation/thesis prepared under the supervision of one Dr. A.R. Chitale was accepted. This entitled her to appear for the M.D. exam., held in July 1989. "Orals" are one facet in which candidates at the above exam, are tested - the other two being "Theory" and "Practicals". Respondent 6 who is on the staff of the L.T. Medical College (LTMC) at Sion, Bombay was the Head-Examiner for the orals. Besides respondent 6 there were three other Examiners. Petitioner is from the Grant Medical College (GMC) and there has been a tit-for-tat war - so says petitioner - between LTMC and GMC Examiners. This confers a biased preference or loss to candidates hailing from these Colleges. The tests in theory and practicals are practically fool-proof which is the reverse of the test in orals. In orals, no record of the questions asked or answers given is maintained. The

time taken in orals is insignificant as compared to that in the other two subjects. In the orals, respondent 6 was the only Examiner from out of the four to question her. The trend of her questioning was such as to leave no doubt of her bias against students from the GMC. This apart the testing by performance at orals is wholly arbitrary. All the questions put to her were those covered by the theory papers. This being the position petitioner could not have performed differently in the two tests. Except for the Bombay University none of the other Universities treat the orals as a separate head or give it a rating on par with other heads. Neither is dissertation downgraded to the position of an entrance examination as is the case with M.D. Pathology exams, conducted by this University. Petitioner was declared failed and an examination of her Marks List (Ex.B) showed that she had secured the requisite passing marks in theory and practicals but not orals. This was due entirely to the part played by respondent 6, emboldened to do so because of the in-built arbitrariness in the manner and method of conducting the same. Circular No. 338 of 1987 (Circular Ex. G) which brought about the deletion of dissertation from an assessment at the exam was issued by respondent 1 in violation of Court orders to lessen the undue weightage given to orals. The petitioner claims directions to undo the damage caused by treating orals as a separate head of examination and ignoring these altogether. Next, she be declared to have passed the exam. by ignoring the marks given to her at the orals.

3. Respondents 1, 2 and 6 have filed returns - the latter to deny allegations of bias levelled against her. She points out that in orals, Examiner Dr. Kikani, had given lesser points than her to the petitioner. Respondents 1/2 question the maintainability of the petition contending that it takes exception to an academic standard devised by academic authorities which is outside the ambit of judicial review. Petitioner had secured average marks in theory and practicals. This belied her claims to high proficiency leading to an irresistible inference that she had to be awarded passing marks in the orals. The oral exam. was a necessary test devised by academic organs of the University to test the competence of aspirants to an M.D. degree. The vice pleaded as afflicting the appraisal in orals, did not exist. It was not correct to say that thesis was not given due worth. In fact its acceptance was the pre-condition to being allowed to participate in the other three subjects. Granting of an equal marking to orals vis-a-vis theory and practicals, was not erroneous.

4. Having regard to the averments summarised above the questions arising for determination would be :-

I. Whether the petition as framed is maintainable under Article 226?

II. Whether the accusation of malafides levelled against respondent 6 is established ?

III. Whether according the performance at orals parity with theory and practicals fosters arbitrariness and caprice ?

IV. Whether excluding thesis from the appraisal of a candidate's performance occasions arbitrariness in the assessment ?

5. Respondent 6 is accused of master-minding the award of points to petitioner vis-a-vis her performance at the orals. In all there were four Examiners, respondent 6 being the Head-Examiner. The only Examiner putting questions to petitioner - so she alleges - was respondent 6. The questioning covered topics covered in her theory test. She had passed the theory test and when the orals were a repeat, it followed that she could not have done differently. Respondent 6 swayed the marking against her because of the hostility harboured by the staff of the LTMC and GMC against candidates of one another. The points secured at the orals by the petitioner at the hands of the four Examiners were as follows :-

3 points awarded by each of the two Examiners.

1 point awarded by Dr. Kikani.

2 points awarded by respondent 6.

resulting in an aggregation of 2.2. In both theory and practicals the petitioner secured an aggregation of 3 and that sufficed to enable a pass. She had to get a similar an aggregate in orals and what stumped her there was a deficit of three points which had she got would have enabled the aggregate of 3 instead of 2.2. In fact a raise of the points by a fraction of 0.3. would have entitled her to get an aggregation of 3 by the rounding-up process. Petitioner ascribes her missing the prize to machinations of respondent 6. Like many allegations of this nature, there is no material to bear out even a little thereof. As good a refutation as any is the pointer to respondent 6 awarding a point more to petitioner than Dr. Kikani. Petitioner's contention that the orals were a repeat of the theory papers and having successfully waded through the latter, she could not have failed in the former is an assumption-no more. A conclusion based on assumptions and that too of an interested party can carry no weight. Therefore the factual malafides aspect cannot be held in petitioner's favour.

6. Turning to the issue of the petition's maintainability and now restricting it to the grounds covered by points 3 and 4, the matter is no longer res-integra. Inclusion or exclusion of a particular head or sub-head in an examination is an aspect of academic appraisal. What marks to award to each head or sub-head, is again a question which the University authorities are best qualified to decide. The Courts do not have the qualifications to rule upon the advisability or otherwise of these features. But, and this is of equal importance, the subjects chosen and the marks awardable should have a nexus to the assessment of the professed proficiency. The choice should not be such as to conceal an instrument for perpetration of favouritism or arbitrariness. Many a time the selection of a subject or manner of testing may not have these objectives. Even so, if it is likely to give subjective considerations a dominant role, the choice will have to be struck down as encouraging arbitrariness. Arbitrariness is violative of the principle of equality for it denies to the victims the basic promise of the equal

protection of laws. What truth there be in the petitioner's grievance will now be scrutinized.

7. Petitioner complains that the impugned inclusion and exclusion bring about arbitrariness. The dissertation or thesis should be awarded marks or points and that is not done by the Bombay University. In fact, until recently dissertation was a sub-head for passing in the M.D. examination. It was only on 18-8-1987 that assessment of dissertation was deleted from the regulations and syllabus governing M.D. examination. In the recommendations made by the Medical Council of India (MCI) for post graduate medical education, though thesis has been prescribed as compulsory it has been excluded from the examination proper. The recommendation made by the MCI is that acceptance of thesis should be pre-condition for permission to sit in the rest of the examination. Therefore, the Bombay University has not acted illegally or improperly in deleting dissertation from the examination proper. Displacing dissertation from that slot does not mean that there will be no assessment in regard to dissertations. In fact, the Bombay University has now conformed to the MCI recommendation by making its acceptance a pre-condition for the candidate to sit in the rest of the examination. Reliance is placed upon the examination prescribed for other Universities in the State. The prescription by the Pune University says that the dissertation will be assessed and that the candidate has to obtain at least 50% marks therein. However, it is made clear that dissertation marks will not be taken into consideration in the final mark-sheet. The Nagpur University also treats the dissertation as preliminary to the examination proper. It prescribes that a candidate whose thesis has not been unanimously approved by the Examiners shall not be admitted to the written, oral and practical examinations. The Shivaji University mandates the submission of a dissertation by a candidate and so does the curriculum of the Marathwada University. Having regard to the curriculum of these Universities it cannot be said that the Bombay University has done anything different by making the dissertation something in the nature of a per-entrance requirement.

8. The other complaint of the petitioner is about the granting of points or marks in orals equal to theory and practicals as a condition for being declared successful at the M.D. examination. First, is the alleged divergence from the recommendations of the MCI where orals has been combined with a practical examination as one head. The recommendations of the MCI are not mandatory. Divergence therefrom would not render the appraisal illegal. To that effect are the decisions reported in Dr. Lalit K. Sharma Vs. Principal and Controller S.M.S. Medical College attached Hospitals and Others, and Kumari Darsha Ahuja Vs. University of Agra and Another, . The fact that orals was a sub-head in the Bombay University curriculum until 1987 or so and that this continues to be the position in the other Universities of the State, is of no consequence. It is not necessary that the Bombay University curriculum for examinations should be on par with that of other Universities.

9. Counsel for the petitioner relies upon certain reported decisions. The first to be taken into consideration is *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, where the Court observed:-

"there can be no doubt that, having regard to the drawbacks and deficiencies in the oral interview test and the conditions prevailing in the country, particularly when there is deterioration in moral values and corruption and nepotism are very much on the increase, allocation of a high percentage of marks for the oral interview as compared to the marks allocated for the written test, cannot be accepted by the Court as free from the vice of arbitrariness."

But this taint is not necessarily such as to afflict all examinations where the orals are given marks equal to other subjects. Measures can be taken to avoid the charge of arbitrariness such as those which earned encomiums suggested in the cases of *Asif Hameed and others Vs. State of Jammu and Kashmir and Others*, and *Koshal Kumar Gupta and Others Vs. State of Jammu & Kashmir and Others*, . Mr. Bhagalia relies upon *Dr. Hariprasad Sanat Trivedi v. The Dean, Topiwala National Medical College, Bombay and others* 1988 M.L.J. 475 : 1988 (3) B.C.R. 215 where a Division Bench of this Court suggested that in respect of examinations for super-specialities the marks reserved for practicals and viva-voce should not exceed 18% of the total marks. Conceding that super-specialities are a higher form of post-graduate studies, it does not necessarily follow that the guidelines suggested in *Hariprasad's* case (supra) cannot be departed from. In *Hariprasad's* case (supra) the Court was concerned with laying down guidelines for admission to super-specialities for which an entrance examination was to be held. At that examination, the Division Bench recommended that the marks reserved for practicals and viva-voce should not exceed 18% of the total marks. In the instant case the examination is that held for awarding the degree of M.D. Whether or not the marks obtainable for passing in orals at any examination vitiates the selection process depends upon a variety of circumstances. *Chinnappa Reddy, J., in Lila Dhar Vs. State of Rajasthan and Others*, appraised the different situations. This appraisal was quoted with approval in *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, . Said the Court -

"The spread of marks in the viva-voce test being enormously large compared to the spread of marks in the written examination, the viva-voce test tended to become a determining factor in the selection process, because even if a candidate secured the highest marks in the written examination, he could be easily knocked out of the race by awarding him the lowest marks in the viva-voce test and correspondingly, a candidate who obtained the lowest marks in the written examination could be raised to the topmost position in the merit list by an inordinately high making in the viva-voce test."

Mr. Bhagalia suggests that any test where the marks allocated to viva-voce test exceed 25% of the total stands vitiated because of the factor of arbitrariness. This is on the basis of observations appearing in *Ashok Kumar Yadav's* case

(supra). But the Court in that case was dealing with selection to the Haryana Civil Services and other allied services. The examination here is the M.D. Pathology examination conducted by the Bombay University. In the petition it is contended that in Pathology is a non-clinical speciality and a Specialist in this field is not brought into contact with patients. The entire field is concerned with research work carried out in laboratories. This being the position, the testing at orals has no bearing on the field of operation in which the candidates seeks to specialise. In other words, orals should not be given undue prominence in M.D. Pathology, for the candidate who aspires for such a degree is not to be tested for mental alertness and agility. In fact, a Specialist in the field of Pathology has to be careful and cautious. The experts have decided otherwise viz. that a testing by orals is as important as testing in theory and practicals. A Specialist in Pathology may require to devote more time to laboratory and research work. That however does not mean that his mental alertness and agility do not require to be tested. Pathology and the Pathologists are an important feature of modern medicine. Pre-surgical tests require the expertise of the Pathologist. Even when a surgery is in progress problems may come up where the Surgeon and the Anaesthetist require a snap decision by an expert in the field of Pathology. The Pathologist in attendance has thus to be mentally alert. Viva-voce test is a useful tool for measuring such personnel characteristics as initiative, ingenuity and ability to elicit co-operation...When properly employed, the oral test today deserves a place in the battery used by the technical examiner (these observations are made by Glenn Stehl in his book on Public Personnel Administration quoted with approval in Ashok Kumar Yadav's case (supra). What marks should be awarded to a head and whether a particular feature of the examination should constitute an independent head or sub-head, is a subject better left to the academic experts. It is argued that the orals which have met with the approval of the Courts have to be fool-proof such as those in Kaush Kumar Gupta (supra) and not like the one figuring in this case. Now it is true that no record of questions and answers asked and given at the M.D. examination is maintained. Also true it is that the questions and answers are not tape-recorded. For that matter the time taken by the candidates in an oral examinations is far less than that taken in the theory and practical examinations. But the purpose of the orals is as vital as that of the testing of the candidate by his performance at the theory and practicals.

10. Having considered all the factors I find it difficult to hold that the choice of orals as a subject of equal importance like that accorded to theory and practicals or the manner in which the oral examination is conducted, vitiates the result. The burden to establish that there was arbitrariness vitiating the result of examination lay upon the petitioner and she has failed on both counts viz., mala fides attributable to respondent No. 6 and the arbitrariness inherent in the system selected by respondent No. 1. In the end I must confess to sharing with H.J. Laski the wonderment underlying his comment in respect of examinations:-

"I have the baffled sense of disbelieving in exams without knowing how to

replace them."

The petition fails and the rule is discharged with parties being left to bear their own costs.