

(1987) 12 CAL CK 0022
In the Calcutta High Court
Case No : A.F.O.O. Tender No. 2211 of 1986

University of Calcutta and Others	Vs	APPELLANT
Dr. Amiya Kumar Chakraborty		RESPONDENT

Date of Decision : 02-12-1987

Acts Referred:

Calcutta University Act, 1966 — Section 4(19)
Calcutta University Rules — Rule 7
Constitution of India, 1950 — Article 226

Citation : AIR 1988 Cal 238

Hon'ble Judges : Manasnath Roy, J; Dilip Kumar Basu, J

Bench : Division Bench

Advocate : S. Mukherjee and Tapan Kumar Mukherjee, for the Appellant;
Bhaskar Gupta, S. Mitra and D. Bera, for the Respondent

Final Decision : Dismissed

Judgement

M.N. Roy, J.—This appeal from Original Order, is directed against the judgment and order dated 13th May, 1986, passed in C. Order No. 10453(W) of 1984, by Prahir Kumar Majumder, J. By such determination, the application, which was moved by the respondent herein, was allowed and a communication bearing No. 353/D. Sc. dated 7th May, 1984 and as issued by the Authorities of the University of Calcutta, has been set aside and they have been directed to reconsider within a stipulated time, the case of the writ petitioner, on the basis of the recommendations of the Board, which was 2 : 1 and to take steps to award the D.Sc. Degree in General Surgery, on the basis of the thesis as submitted by him.

2. It is an admitted fact that the respondent got all his Degrees up to M.S. with due credit and because of his knowledge in the field of Surgery, he held various posts. It would appear that on or about 11th Dec.. 1961, he joined the West Bengal Health Services and that apart, he held various responsible and coveted posts, and he had to his credit, teaching experience for 29 years and has also to

his credit many publications, including some original works in different Medical Journals. He was also appointed as member of the Selection Board of Public Service Commission in 1984.

3. By a communication dated 24th July, 1976, the Authorities of the University of Calcutta, granted the respondent, who at the relevant time was officiating as a Reader in the Department of Surgery, Rule G.Kar Medical College, permission to undertake research work for obtaining D.Sc. Degree in Clinical Surgery from the University of Calcutta, on the following terms : --

(i) that he will carry on the Research work after performance of normal duties, which should not suffer;

(it) that such permission will not stand in the way of his transfer if it is so required in the exigencies of public interest;

(iii) that he will execute a bond undertaking to serve the State Govt. at least for a period of 3 (three) years on completion of his research work and then on 16th Dec., 1980, he submitted the necessary copies of D.Sc. Thesis under the caption "Studies on the Etiopathogenesis of Buerger's Disease" to the Registrar, University of Calcutta. Along with this Thesis, the respondent had also filed and produced the other relevant and required documents and records and also in terms of the requisitions by the Authorities concerned, he duly put in the necessary postal charges, for transmitting his thesis to various Foreign Examiners. It appeared from the records as produced, the Thesis, on the recommendation of the Calcutta University Council, was directed to be sent to (1) Mr. Martin Birnstingl, M.S., F.R.C.S., Consultant Surgeon, St. Bartholomew's Hospital, London, (2) Mr. Samuel Silbot. The second Surgical Serviet, Mount Sinei Hospital, New York and (3) Mr. G. L. Hill, Programmer in Surgery, Foreman Building, University of Texas Medical School, Houston Medical Centre, Houston, Texas 770925. It was submitted by Mr. Mukherjee, appearing for the appellants, that such selection was made, out of ten persons. It also appeared from the records and which fact was stated by Mr. Mukherjee to the Court, that Mr. Samuel Silbut having declined, Mr. Victor A. Mckusie, Department of Medicine, The Johns Hopkins University School of Medicine and Hospital was selected in his place from amongst the list as mentioned above. The last named examiner (hereinafter referred to as the "said examiner"), gave his opinion adverse to the respondent, while the other two highly recommended his case.

4-5. The adverse report of the said examiner was communicated to the respondent by the University Authorities, by their letter of 12th Dec. 1987 and they also asked for his observations regarding the comments of the said examiner relating to the "Ethical Aspects" of his research work. It should be noted that the said examiner really commented against the research work of the respondent on that aspect. It was the case of the respondent that the said examiner was a physician and not a Surgeon although his Thesis was on surgery and it also appeared from the communication, which was sent to him for his

comments that his Thesis was really circulated amongst some unnamed and inspecified members of the Department of Pathology of the Johns Hopkins Hospital and in fact, those persons have been stated to have expressed certain opinions and it was claimed that such circulation or examination of his Thesis by those persons, was highly irregular and improper. The fact of such examination of the concerned Thesis by the persons as mentioned above, appeared to be correct, as such would appear from the communication of the said examiner to the Assistant Registrar of the Culcutta University as quoted hereunder : --

The main findings of the research on which the thesis is based is that of haemorrhage in the adrenals which were removed in a therapeutic attempt. It is the opinion of my colleagues in the Department of Pathology here at the Johns Hopkins Hospital that this "haemorrhage" is an expression of the clamping of the blood vessels and/or other manipulations in connection with the adrenalectomy and is not a condition that preexisted surgery. The opinion of the pathologists was, furthermore, that the renal changes were unimpressive.

In addition to the dubiousness of the scientific conclusion, I believe there is a serious ethical problem with the research on which the thesis is based. Dr. Chakrabarti performed adrenalectomy in 200 patients with Buerger's disease but there is no mention whatever in the thesis as to the effect, if any, on the disease. At the least, it should be stated that no benefit was observed if such was the case. It seems to me that after a few cases, it would become evident as to whether benefit was being achieved and therefore I would have thought it was unethical to persist to a total of 200 patients with procedure which must (sic) of had significant morbidity and probably some mortality associated with it. It would be the moral and ethical, as well as scientific, responsibility of the investigator to design a controlled study performing adrenalectomy only in alternate cases, let us say.

In summary, I feel that the conclusion advanced by the author of the thesis are not supported by evidence and that the stuthes on which they were based are questionable from an ethical point of view. We should at this stage record appreciation and regard for the said examiner in disclosing the correct fact. If so intended, he could not even disclose such fact.

6-7. The respondent however, submitted his observations against the adverse report of the said examiner, elaborately and comprehensively dealing with the said report and with the Ethical aspects of his work and thereafter, he also draws the attention of the Authorities concerned, indicating the irregularities in having is Thesis examined by a Physician and the other persons concerned.

8. Thereafter, the Authorities of the University of Calcutta, by their letter dated 7th May 1984 informed the respondent, that since the adjudicators were not unanimous in recommending his Thesis for the award of the Degree in question in General Surgery, so no action in the matter could be taken. The respondent has of course, as stated earlier, denied the validity and legality of the Report of

the said examiner and all throughout claimed that since admittedly the majority opinion of the three men Board was 2 : 1, so there was no justification in not awarding the Degree as asked for. He also claimed that in his case and that too for the refusal of the Degree, there was violation of principles of natural justice and as such also, the decision as taken and communicated to him was a nullity- He further contended that on the basis of the prevailing Rules, relevant for the award is the concerned Degree, unanimity was neither required nor necessary and as indicated earlier, he should have been awarded the Degree on the basis of the majority opinion of the Board, and that being the position the Authorities of the University of Calcutta should have awarded him the required Degree. To appreciate the point as referred to by the Respondent, the relevant Rules should be indicated. Admittedly, the case of the Respondent was governed by the following Rules: --

1 to 6.....

7. If the thesis is approved by the Board, and if the candidate has obtained a First Class at the examination for the Degree of Master of Science or has obtained the Degree of Doctor of Medicine or Master of Surgery or Master of obstetrics or Doctor of Philosophy (Ph. D) in Science, he shall not be required to submit to any further written examination; but he may be required by the Board, at their discretion, to appear before them to be tested orally or practically, or by both these methods, with reference to the thesis, and the special subject selected by him. The Board shall report to the Syndicate the result of the examination of the thesis, and of the oral and practical examination, if any, and if the Syndicate, upon the report consider the candidate worthy of the Degree of Doctor of Science, they shall cause his name to be published, with the subject of his thesis, and the titles of his published contributions (if any) to the advancement of science.

8 to 11.....

and thus the said provisions required that the Thesis should be approved by the Board. The appellant of course claimed that the Respondent's case was governed by a new set of Regulations, which came into immediate effect from 6th Sept. 1983 and in para 3.02 of that Regulation, while on the question of evaluation for the award of (i) Doctor of Literature (D. Litt.), (ii) Doctor of Science (D. Sc.) in Science/Medicine/Engineering/ Technology/Agricultural/ ublic Health, and (iii) Doctor of Law (LL. D.), it has been laid down that the Syndicate shall award the degree on the unanimous recommendation of the three examiners. Since the Respondent had submitted his Thesis on 16th Dec. 1980, there cannot be any doubt and as mentioned earlier, that his case will be covered by the earlier Rules and not the present Rules. The submissions of the parties on the point and other points will be indicated hereafter. The Respondent also claimed and contended that the present Rules were not retrospective.

9. The Appellant/Respondents in their affidavit-in-opposition dated 13th Sep.

1984, which was affirmed by Shri Satyaranjan Ghosh, the Registrar of the University of Calcutta have contended inter alia that according to the Rules relevant, for obtaining the Degree of Doctor of Science, the University should refer the concerned Thesis to a Board of three adjudicators for adjudication and he has also agreed that the decision of the said Board was 2 : 1 in favour of the Respondent and the said examiner was of the opinion that the concerned Thesis was not supported by evidence and the stuthes on which they were based, were questionable from ethical point of view and he submitted a report to that effect, on which again, the comments, of the said Respondent were obtained. It was indicated by the deponent that in view of the ratio of the decision of the Board, the recommendation was not unanimous and as such the award of the concerned degree in favour of the Respondent, was not made. He has further pointed out that since the direction of the University Authorities to the concerned examiners that they may examine the Thesis in consultation with their colleagues and to forward a joint report or they may forward their individual opinion about the merit of the Thesis, so the consultation of the said examiner with his other colleagues as indicated hereinbefore, was not improper. Such submissions, it is very difficult for us to accept, as we feel that on the terms of the reference, consultation with the colleagues would mean and include consultation amongst or with the members of the Board as constituted and not others, as in this case.

10. It was further indicated by the deponent that on the basis of the old Regulations as indicated hereinbefore, there was no scope for awarding the Degree in question, to the Respondent on the basis of the majority of the examiners or adjudication, as his research entitled "Stuthes in Etiopathogenesis of Buerger's Diseases" required combined medical and surgical supervision and as such, the same was required to be examined by the said examiner also, who was a Physician, from the medical stand point and fact, it has been pointed out that there was really difference of opinion as expressed by the said examiner and in the facts of the case the opinions of the Surgeons" alone were not sufficient. It was the specific case of the deponent that the new Regulation came into force in 1983 and under the provisions of the same, Syndicate could award such Degree as in this case, only when the decision was unanimous. We are of the view that in the facts of the case, the case of the Respondent was governed by the old Rules and not the new Regulations, which again were neither retrospective nor had repealed the old Rules specifically.

11. During the course of hearing before the learned Trial Judge, a point arose as to whether there was any report duly made by the Board of Examiners, since their report showed that there was no consultation among the three members of the Board and on the other hand, the said examiner had really on his own admission, consulted with outsiders. As indicated earlier this was the contention of the appellants all throughout that such consultation would not mean consultation among the members of the Board only, but they could consult with others. We have already indicated our views on this point. It also appeared that before the learned Trial Judge, the appellants also took the plea that such

consultation was not forbidden by them and on the other hand, the records would show that such consultation in respect of other Degrees of the same nature, have also been allowed by the appellants. On such, the learned Trial Judge got a supplementary affidavit filed and by the same, the appellants and their authorities were given the opportunity to establish their case as mentioned above. It has been recorded by the learned Trial Judge (sic) got a supplementary affidavit filed and by the same, the appellants and their authorities were given the opportunity to establish their case as mentioned above. It has been recorded by the learned Trial Judge that even in spite of such opportunities and filing of the supplementary affidavit, no clear case on the point could be made out by the appellants and on the other hand, the appellants argued before him and which was also their arguments before us, that their interpretation of the word "approved" as mentioned in the old Regulations, would mean unanimous decision of all the experts or agreement or concurrence of all of them, who were appointed to adjudicate upon the Thesis.

12. Mr. Mukherjee, appearing for the appellants before us, placed Rules 7 and 8 of the old Rules and submitted that the concerned word "approve", would really mean the unanimous decision of the Board and since the decision of the Board in the instant case, was 2 : 1, so the decision was not unanimous. To establish the meaning of the word "approve", he firstly, relied on Burton's Legal Thesaurus (Deluxe Edition), where the word "approve" has been indicated to mean accede to, accept, acquiescence in, agree to and allow. Then, he referred to the Canadian Law Dictionary, according to which "approval" would mean the act of confirming, ratifying, sanctioning some act or thing done by another. He thereafter referred to Black's Law Dictionary, according to which "approval" means the act of confirming, ratifying, sanctioning or consenting to some act or thing done by another and word "approve" would mean, to be satisfied with, to confirm, ratify, sanction or consent to some act of thing done by another. "Approval" according to Oxford Dictionary would mean, approving, favourable opinion and consent and the word "approve" means, confirm, give assent to. We feel that the reference to the meaning of the words "approval" or "approve" would not be of any help or assistance to the appellants. In our view, those words in the facts and circumstances of the case and when the majority of the decision was 2 : 1, would mean that by such majority, the Thesis as submitted by the Respondent was approved and as such approval would not be necessary to be expressed by all the three examiners together, since according to Webster's the said word "approve" will mean prove, attest, to have or expressed a favourable opinion of, to accept as satisfactory and to give formal or official sanction to. The above meaning in Webster's, we feel also, will supplement our decision that when the members of the Board had expressed their views in favour of the Thesis of the Respondent, there was approval by the Board as the minority view was one only. If in a Board of three members, two have opined in favour of the Thesis and one has not, then by such ratio of decision of the members of the Board, it can be deduced and observed that the Thesis as filed was approved. Thus, the

submissions of Mr. Mukherjee on the point should fail. When the determination as mentioned hereinbefore viz. 2 : 1 has been made, on following the majority view, we think that such view should and can be accepted, the more so when, the definition of the word "majority" means and signifies the greater number. The principle of accepting the majority view has been well established at least in respect of Corporations and corporate bodies, who can only express their views by the whole or a majority of the views of their members and furthermore when, the act of a majority is regarded as the act of the whole.

13. As mentioned earlier, it was the further case of the appellants and that too made in the supplementary affidavit as mentioned hereinbefore, that there was or has been no occasion in the appellant University's records, for the award of D.Sc. or D. Litt. or Ph. D. or D. Phil. Degrees without having an unanimous opinion of all the adjudicators or unless they have submitted an agreed opinion or recommendations. Such statements were not duly established either before the learned Trial Judge or before us, even though Mr. Mukherjee contended that there were records to establish such submissions. It was also claimed by him that according to the appellants, as the Respondent's Thesis was not approved by the three adjudicators unanimously, there was no question of awarding the concerned degree to him. While on the point, on the basis of the submissions as made by Mr. Mukherjee and also on the basis of the records as available, we feel, find and reiterate that the consultation by the said examiner with other outsiders, was improper. We also, are not in a position to accept the submissions as made by Mr. Mukherjee, on the basis of the term and definition of the word "approve", as appearing in the old Rules the particulars whereof, both of the old Rules and the submissions as made, have been indicated hereinbefore.

14. The submissions which were made by the Respondent in his proceedings before the learned Trial Judge and so also before us, were similar. It was contended that since the old Rules had application, so the case of the Respondent should have been entertained by the appellants or their Syndicate and the Respondent should have been held and found to be a fit and proper person, for the award of the Degree of Doctorate of Science. It was also submitted that the word "approve", as appearing in the old Rules, would mean that the concerned Degree should have been conferred on the Respondent, since the views of the Board was 2 : 1 and more particularly when, "approved by the Board" should mean, that if the Thesis is approved by the majority members of the Board, which, in fact was the case before us, the same should be taken as approved by the Board, within or in terms of Rule 7 of the old Rules. On consideration of the above submissions read with the submissions as made by Mr. Mukherjee appearing for the appellants, we feel no hesitation in holding that when the Thesis of the Respondent was recommended for approval by the majority of the members of the Board, the same should have been taken as duly approved by the Board within the meaning of the Rules as mentioned above and more particularly when, the case of the Respondent, as indicated earlier, was really governed by the old Rules.

15. It is really true that by the subsequent new Regulations, the Rule of unanimity has been incorporated by clause 3.02. On such, Mr. Gupta contended that if under the old Rules, the rule of unanimity was either practised or prevalent as claimed, then there was no need or any necessity of incorporating such rule of unanimity by the subsequent new Regulations, more particularly when, the said new Regulations, have neither replaced the old Rules nor has replaced the same or has made the new Regulations with retrospective operation. Considering those submissions along with the submissions as made by Mr. Mukherjee, we feel that there was no substance in such submissions of Mr. Mukherjee because if the rule of unanimity, as claimed, was either valid in the past or the same was really the rule, then there was no need or any necessity for having the subsequent new Regulations, incorporated or to bring the rule of unanimity through the same. We find that on the point whether the rule of unanimity applies or would apply, there is sharp distinction between the two Rules and the Respondent's case would be governed, in the facts of this case, as mentioned earlier, by the old Rules and not by the new Regulations. In such view of the matter, on construction of the concerned Rules, we are of the view that the Respondent was entitled to have the benefits of the opinion as expressed by the majority members of the Board and while on the point, we have also considered the decision of the Queen's Bench in the case of *Nithnel v. Gartham* 1775 All ER (Re-print) 543, which lays down that where a body of person is to do and act, a majority of that body would bind the rest, which decision again, has been quoted with approval in the case of *Perrott and Perrott v, Stephenson* 1933 All ER (Re-print) 549. In fact, the abovementioned cases were cited before the, learned Trial Judge and in our opinion, the views as expressed by him, are not required to be interfered with. We also agree with the sub missions of the Respondent that the consultation by the said examiner with outsiders, was not proper and justified and the expression "opinion of colleagues", as indicated in the letter of appointment by the appellants to the members of the Board, really meant and would mean necessary consultation, if any, between the members of the Board and not with outsiders. It is needless to point that the said examiner was not a Surgeon but a Physician, who got the opinion of the colleague pathologist of his University and even on the basis of the submissions of Mr. Mukherjee, that the concerned Thesis involved both surgical and medicinal side, such consultation by the said member as mentioned hereinbefore, was improper. By the letters addressed by the appellants to the members of the Board, they were required either to consult amongst themselves and send a joint report or to submit individual reports and when in this case, there has admittedly been no joint report, but all the reports came separately from the three members of the Board, so also we feel that the rule of majority can be applied in this case and there would be no justification in accepting the submissions of Mr. Mukherjee that the majority rule, which applied in case of Corporations or Corporate bothes should not be made applicable in case of University or dealing with University matters. As we have indicated earlier and still we keep it on record, that there was no material or opinion recorded, produced and placed before the learned Trial Judge,

to establish that the rule of unanimity was followed by the appellants in awarding Doctorate Degrees in the different discipline as mentioned hereinbefore and we we're also not shown any such happenings.

16. It should be noted that not only before the learned Trial Judge but also before us, Mr. Mukherjee appearing for the appellants relied on and referred to the case of Principal, Patna College, Patna v. Kalyan Srinivas Raman AIR 1966 SC 767, where dealing with the point, as to what should be the procedure when two interpretations of the two Regulations of the University are possible and which course is to be followed^ it has been observed that where the question involved is one of interpreting a Regulation framed by the Academic Council of a University, the High Court should primarily be reluctant to issue a writ of certiorari where it is plain that the Regulation in question, is capable of two constructions, and it would generally not be expethent for the High Court to reverse a decision of the educational authorities on the ground that the construction placed by such authorities on the relevant Regulations appears to the High Court less reasonable than the alternative construction which it is pleased to accept, and on that basis, Mr. Mukherjee claimed that since in this case also, two interpretations on the basis of the Rules as mentioned hereinbefore, were possible, so the one which was favoured by the appellants, should have been followed. On facts the learned Trial Judge has found and we also find that in this case, that there was or is not possibility of two interpretations or any such interpretation as was sought to be given by the appellants and as such the said determination is not appropriately applicable in this case. Thus, finally we hold that the Respondent's case was governed by Rule 7 of the old Rules and the terms of the same did not require that the rule of unanimity as claimed and not the rule of majority, should apply in this case. We also hold that the said examiner had acted in most unauthorised manner, in having consultations with authorities other than his colleague members of the Board and as such, his opinion cannot be considered as the opinion of his own. The fact of subsequent incorporation of the term "unanimous" in the new Regulations, would make it amply clear that under the old Rules, such rule of unanimity was not there or had no application.

17. At the conclusion of his submissions, Mr. Mukherjee referred to and relied on the case of University of Calcutta v. Subrata Mukhopadhyay (1986) 1 CH.N. 169, where a point arose as to whether a writ application would be entertainable in Appellate Jurisdiction of this court, when all Respondents except one were within the Original Jurisdiction of this Court. In that case, the two Respondents, who were medical graduates appeared at the Entrance Examination for admission to the Master of Surgery (Orthopaedic) Course, 1984, but they were not selected. They filed the writ petitions praying that the respondents be restrained from giving effect to the result of the said examination and for declaring that the writ petitioners had been eligible for admission to the said course. The learned Trial Judge passed an interim order directing that the two petitioners be admitted to the said course provisionally and on ad hoc basis. It was against the said interim

order, the appeals were preferred and ninety five objective type questions were set and the candidates were required to put only one answer. According to the petitioner, some of the questions were ambiguous and, in respect of some of the questions, different textbooks gave different answers, some of the questions again admitted more than one correct and appropriate answer, and yet, some of the questions set, were either wrong or absurd. The appellants have denied the said allegations and contended that as the petitioners failed to establish that the questions were demonstratively wrong, the trial Court ought not to have made a mandatory interim order for their admission. A preliminary objection was raised on behalf of the appellants, contending that all the respondent No. 4 had their offices within the Original Jurisdiction of this court and that the respondent No. 4, was not a necessary party and, as such, the learned trial Judge sitting in the Appellate Side could not have entertained the writ petitions and passed the impugned orders and it has been observed that this Court under Clause 37 of the Letters Patent read with the Constitutional provisions in Article 226 of the Constitution, has power to make Rules and Orders for regulation of its proceedings and from time to time comprehensive Rules have been framed, which govern all applications both in the Original and the Appellate Sides of this Court under Article 226 of the Constitution. In the instant case, the office of the respondent No. 4 was situated outside the limits of Ordinary Original Jurisdiction of this Court Therefore, Rule 4 of the Rules was inapplicable and the matter was to be dealt with by the Appellate Side in terms of Rule 7 and in the appeals from interlocutory orders, points outside the scope of the appeals cannot be adjudicated, apart from holding that it is well-settled principle of law that decree or order shall be reversed or substantially varied in appeal on account of any mis-joinder of cause of action or any errors, defect or irregularity in any proceeding not affecting the merits of the case or jurisdiction of the Court (vide Section 99 of C.P. Code). The appellants cannot therefore be allowed to raise the objection at the appellate stage to the filing of the writ application in the Appellate Side of the High Court and after a lapse of time from the date of the impugned order and the more so when the theoretical classes of the Post Graduate courses in question, have been already concluded The balance of convenience appears to be in favour of allowing the two writ petitions to complete the rest of their courses subject to decision at the final hearing of the Rules obtained by them. It would be unjust to prevent them from completing the remaining part of their courses. Mr. Mukherjee claimed and contended that since all Respondents in this case were and are within the Original Jurisdiction of this Court, so the original writ proceeding was not maintainable in the Appellate Side Jurisdiction of the Court. Admittedly, such defence was not appropriately taken before the learned Trial Judge and he had no occasion to consider the said defence. We are aware of the fact that even though such defence was not appropriately taken, but the same can be urged in appeal. But we feel, that in the facts and circumstances of this case and in view of the patent irregularity, which according to us, has been committed in this case, the said point cannot be allowed to be agitated now, because for the patent illegality or the inaction of the authorities of the

appellants, the Respondent, who is a renowned Surgeon and has already retired after rendering effective services for a long time, should not be made to suffer more.

18. In view of the above, we dismiss this Appeal with costs assessed at 30 G. Ms. We thus affirm the determinations of the learned Trial Judge.

19. Stay of operation of the order as prayed for is refused Leave to appeal to the Supreme Court was further prayed for, but we refuse such prayer, since we are of the view that points involved in this case are not required to be decided by the Supreme Court, and they do not also raise any point of great public importance.

Dilip Kumar Basu, J.

20. I agree.