

CASE NO.:

Appeal (civil) 6048 of 2000

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PETITIONER:

S.K. KUSHWAHA & KURUKSHETRA UNIVERSITY & ANR.

Vs.

RESPONDENT:

D.K. JOSHI AND ORS.

DATE OF JUDGMENT: 18/03/2002

BENCH:

S.N. Phukan & P. Venkatarama Reddi

JUDGMENT:

P.Venkatarama Reddi, J.

The appellant in C.A.No. 6048/2000 who was working as a lecturer in Art and Crafts in the University College of Education, Kurukshetra, for considerable time applied for the post of Principal pursuant to the advertisement No. 10 of 1995 issued by Kurukshetra University. It appears that this advertisement is the fourth in the series since 1990. No candidate was selected on the earlier occasions. The appellant and the 1st respondent in the said appeal who was lecturer in English in the same College, were called for the interview. The Establishment Committee which interviewed candidates, recommended the appointment of the appellant. The recommendation was accepted by the Executive Council on 10.1.1997 and the appellant was appointed as Principal in January 1997. About one year later, the 1st respondent in CA No. 6048 of 2000 filed C.W.P. No. 351/98 questioning the selection and appointment of the appellant on the ground of not having the requisite qualification for the post of Principal and sought for direction not to confirm him in that post. This was preceded by a representation filed a few days earlier by the 1st respondent to the University. The said Writ Petition was disposed of by Punjab & Haryana High Court on 12.1.1998 directing the representation of the 1st respondent to be considered by passing a speaking order before confirming the appellant. By a communication dated 03.09.1998 addressed to the 1st respondent herein, the University communicated the factum of rejection of the representation and the grounds of rejection. The last para of the letter dated 03.09.1998 reads as follows:

"Dr. Kushwaha was M.A. in first Division. No doubt he did not possess the qualification of M.Ed. but in view of the resolution of the Executive Council this qualification was relaxable and accordingly he was considered and selected by the Establishment Committee by relaxing the qualification of M.Ed. Therefore, the plea of Dr. Joshi that he did not possess the qualification laid down in the advertisement is wrong as his case was covered under relaxation clause as passed by the Executive Council in its meeting held on 22.9.1993. Therefore, the representation of Dr. Joshi has no merits and be rejected."

Thereafter another Writ Petition-CWP No. 1082 of 1999 was filed by the

first respondent praying for an order quashing the decision of the Executive Council dated 22.9.1993 by which relaxation of qualification of M.Ed./B.Ed. was granted to the appellant and for quashing the communication dated 3.9.1998 by which his representation was rejected. A further direction was sought for to re-advertise the post of principal by quashing the appointment of the appellant. The judgment rendered in this CWP has given rise to these appeals filed by the appointee - Dr. Kushwaha and the University.

The High Court held that the appellant herein did not possess the essential qualification of M.Ed or B.Ed in terms of the advertisement and it was not open to the Executive Council to relax that qualification as it had no such power. Adverting to the resolution of the Executive Council dated 22.9.1993, the High Court commented that the said Resolution had no relevance to the advertisement issued in the year 1995. The High Court, therefore, set aside the selection and appointment of the 3rd Respondent as Principal and directed a fresh advertisement to fill up the post in accordance with law. The appellant was directed to vacate the post forthwith. However, he has been continuing in office till date in view of the interim order passed by this Court and the consequential decision taken by the University.

We have, therefore, to consider the crucial question whether B.Ed or M.Ed. qualification, as the case may be, is an essential and indispensable requirement for selection to the post of Principal of University College of Education.

The qualifications for the posts of Lecturers and Principals in the recognized Colleges of Education are prescribed by Ordinance XVI. The following are the qualifications prescribed for the post of Principal :-

Principal :

- (a) A Doctor's Degree.
- (b) A consistently good academic record with high Second Class (55% marks or grade B in even point scale) M.A. Education with B.Ed (Second Class with 50% marks in Theory and Practice separately) or Master's Degree in any subject with M.Ed (55% marks in one degree and 50% marks in the other).
- (c) Teaching experience of at least 8 years in a recognized College or University out of which teaching experience of at least five years should be in recognized College of Education or the Department of Education of a University. Persons with some administrative experience in an educational Institution will be preferred.

Provided that the teaching experience in the case of lady Principals of Women Colleges of Education may be reduced upto five years by the Vice-Chancellor on the basis of merit taking into consideration the age, academic record and experience.

Note :

- (i) The condition of Ph.D. Degree shall not apply to those having 16 years of teaching experience in the capacity as a regular lecturer in a College.
- (ii) The following qualifications are applicable in the case of University appointed lecturer or a university approved lecturer of a Recognised college appointed before 27.1.1976.

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Principal -

(a) A consistently good academic record with High Second Class (55% marks or grade B in seven point scale) M.A. Education with B.Ed. (Second Class with 50% marks in Theory and Practice separately) or Master's degree in any subject with M.Ed. (55% marks in one degree and 50% marks in the other).

(Relaxable in the case of a University appointed lecturer or a University approved lecturer in any capacity, of a recognized College appointed before 27.1.1976); and

(b) An M.Phil Degree or a recognized degree beyond the Master's level or published work indicating the capacity of a candidate for independent research work.

(c) Provided that if a candidate possessing the qualification as at (b) is not available or not considered suitable, the College on the recommendation of the Selection Committee may appoint a person possessing the qualifications as at (a).

(d) Teaching experience of at least 10 years in a recognized or affiliated college or University out of which teaching experience of at least 5 years should be in recognised college of Education or the Department of Education of a University. Persons with some administrative experience in an educational institution will be preferred.

Provided that the teaching experience in the case of lady Principals of Women Colleges of Education may be reduced up to five years by the Vice-Chancellor on the basis of merit taking into consideration the age, academic record and experience."

In the advertisement, it is stated that the qualifications are mentioned in the application form. A copy of the application form is not on record. However, an extract of the qualifications for the post of Principal, University College of Education is found in the paper book. In that, the word 'and' occurring at sub-clause (a) of Note II (extracted above) is found omitted. The same mistake is repeated in the extract of qualifications given by the High Court. The qualifications set out in the advertisement coupled with the application form are supposed to be in conformity with the relevant rules and ordinances. A copy of the Ordinance No. XVI (corrected upto 1994) has been filed by the learned counsel for the 1st respondent-writ petitioner at the time of hearing. We must presume that the qualifications mentioned in the application form are in conformity with the Ordinance. Therefore, we proceed on the basis that at the end of sub-clause (a) following Note II, the expression 'and' occurs. We have pointed out this glaring omission as the word 'and' has some bearing on the interpretation sought to be placed by the learned counsel for the appellant.

It may be seen that two categories of eligible candidates are dealt with in the Ordinance. The second part prescribes the qualifications for such of

those lecturers who were either appointed by the University or whose appointments in a recognized College were approved by the University before 27.1.1976. The first part applies to the candidates who do not come within the ambit of second part (i.e. Note II of the Ordinance). We are concerned here with second part underlined above.

Now, let us see the educational qualifications of the first respondent. They are: M.A. in 1st Division with the subjects of drawing and painting, Ph.D (in Fine Arts subject) and 5 year diploma in Commercial Arts. Admittedly, he does not possess the qualification of M.A. (Education) with B.Ed or Masters Degree with M.Ed. as required under sub-clause (a). Of course, he had teaching experience of 26 years as lecturer.

The learned senior counsel for the appellant, Shri G.L. Sanghi, has put forward, in the first instance, a new contention harping on sub-clause (c) which, for the sake of ready reference, is repeated hereunder:

"(c)-Provided that if a candidate possessing the qualification as at (b) is not available or not considered suitable, the College on the recommendation of the Selection Committee may appoint a person possessing the qualifications as at (a)."

According to Shri G.L. Sanghi, sub-clause (c) lays down a rule of preference and if a candidate with M.Phil or Ph.D is available, it enjoins that such a candidate should necessarily be appointed. As the appellant possesses Ph.D. Degree which is a recognized Degree beyond the Masters' level within the meaning of sub-clause (b) and he fulfils the teaching experience criteria, he is eligible for appointment irrespective of the fact that he does not have one of the qualifications set out in sub-clause (a). The learned counsel wants to read sub-clauses (a) and (b) as alternative qualifications and the qualification in (b) prevailing over those in (a). Such argument, in our view, ignores the conjunctive expression 'and'. There is no compelling reason to read the word 'and' as 'or'. In our view, the reasonable and harmonious way of construing sub-clause (c) is this : in order to get eligibility for selection to the post of Principal, one of the two academic qualifications set out in (a) i.e. M.A. (Education) with B.Ed. or Masters Degree in any subject with M.Ed. is necessary. In addition thereto, the qualification in (b) should also be fulfilled in the normal course. That is to say, a candidate in addition to the academic qualification in sub-clause (a) should have M.Phil Degree or a recognized Degree beyond the Masters' level or published a research-level work. However, in case such a candidate having both the qualifications is not available or is otherwise found unsuitable, the option is left to select a candidate fulfilling the qualifications laid down in (a) only. That, in our view, is the plain meaning of sub-clause (c) and we agree with the submission made by Mr.R.Dwivedi, the learned Senior counsel for Respondent No.1 in this regard.

We cannot, therefore, read Clause (c) as laying down any rule of preference in favour of a candidate having M. Phil or Ph.D qualification, but it is only a provision enabling the appointment of a candidate without the qualification specified in (b) i.e. M. Phil or a Master's level degree beyond that which may include Ph.D. In fact, the interpretation which is sought to be placed on behalf of the appellant was never placed by the University. On the other hand, the University was only harping on the purported power of relaxation. It was only for the first time in the course of the arguments, the learned counsel for the University made an endeavour to support this argument advanced by the learned Counsel for the appellant.

We shall now turn our attention to the next contention regarding relaxation of qualification which loomed large before the High Court. The stand of the appellant and the University is that the academic qualification prescribed as well as minimum marks in Masters' Degree could be relaxed in appropriate cases, whereas the stand of the first respondent is that relaxation is contemplated in relation to percentage of marks only. The

provision for relaxation is contained in the bracketed portion immediately following sub-clause (a) to Note II of the Ordinance quoted supra. The same provision is also found in Advertisement No.2 of 1990 which is the first in the series. Two questions arise here : (1) Whether the power to relax educational qualification is vested with the competent body/authority? (2) Factually, was there relaxation? If so, by a competent body or Authority? The answer to first question turns on the ambit and amplitude of relaxation clause. It seems to us that the interpretation placed by the University body in its resolution dated 22.9.1993 is a reasonably possible view, going by the plain language and the contextual setting of relaxation provision. Such provision for relaxation could have been thought of to open up opportunities to the lecturers of long standing and creditable record who may be deficient in one of the prescribed qualifications, whatever may be the wisdom behind it. For instance, a candidate under consideration has at least B.Ed. qualification. There is no serious dispute that the requirement of M.Ed. degree could be relaxed. The wide scope of the relaxation provision was recognized by the University authorities even in the year 1990 and that is why the proposal was placed before the Executive Council to curtail its scope so as to limit the relaxation to marks only. The Executive Council approved the same on 23.11.1990 and decided to amend the Ordinance. We have not been enlightened as to what further happened. No one has pleaded that the relaxation clause was amended as per the resolution. In the Ordinance which we extracted above, the same provision in widely couched language exists. One point we would like to make clear is that we are not concerned here with the propriety of reserving the power to relax the basic educational qualification in a given case because such provision has not been attacked as ultra vires the Constitution or Statute. We need not, therefore, test it from the angle of Articles 14 and 16. We are concerned here with the limited aspect of existence or otherwise of the power to relax qualifications, on the basis of the relaxation clause, as it stands.

Coming to the second question, the first document to be referred to is Annexure R-5 to the counter of 1st respondent which is a Note circulated to the Executive Council which met on 31.7.1998 to take a decision on agenda item No.62 pursuant to the direction given in C.W.P. No. 351/98. Therein it is mentioned that the appellant was called for interview on the orders of Vice-Chancellor issued on 15.12.1995 keeping in view the decision of the Executive Council recorded in resolution No.28 dated 22.9.1993. The said resolution dated 22.9.1993 reads as follows :-

"The Executive Council considered the representation of Shri S.K. Kushwaha, lecturer in Arts and Craft, University College of Education, and resolved that he is eligible to appear before the selection committee in terms of the advertisement as published in February 1990. He is an approved lecturer of the recognised college. The term relaxation as used in this advertisement is not restricted to percentage of marks only as interpreted by the then executive Council in its resolution No.82 dated 23.11.90, but has an extended meaning covering entire essential qualifications as listed in Clause (a) of this advertisement".

The High Court was of the view that this resolution has no relevance to the advertisement No.10 of 1995. That, in our view, amounts to taking a narrow view of the scope of the resolution. Though the resolution refers to the 'terms' and 'qualifications' stipulated in the advertisement of February 1990, it holds good for the selections held subsequent to that date also so long as the conditions of eligibility and qualifications prescribed are the same. A xerox copy of the advertisement No.2 of 1990 has been filed by the counsel for the University. The fact that the qualifications in the advertisement of 1990 and the present advertisement of 1995 are the same admits of no doubt. It is

specifically mentioned so in the note placed before the Executive Council for its meeting held on 31.7.1998. In this fact situation, if the power of relaxation was exercised once, the benefit of such relaxation will enure to the appellant in relation to the subsequent advertisement also for the reason that the qualifications did not change and secondly the selection did not materialise for one reason or the other. However, going by the language of the resolution, a doubt arises whether the Executive Council, which is undisputedly the competent authority, had in fact relaxed the M.Ed. qualification in the case of the appellant. The resolution dated 22.9.1993 merely sets out the wider scope of the relaxation clause. It does not say anything more than that. The statement in the resolution that the appellant is eligible to appear before the selection committee does not necessarily imply that the power of relaxation of educational qualification was in fact exercised. The relevant record only could bear testimony to that fact. There is another allied aspect. Even if factum of relaxation before or at the time of passing the resolution dated 22.9.1993 is not established, it would still be necessary to enquire whether the relaxation was given by competent authority in December 1995 when the appellant was called for interview on the orders of the Vice-Chancellor. In this connection, what is stated in the concluding para of the communication dated 3.9.1998 addressed to the first respondent deserves notice. It is said therein : "in view of the resolution of the Executive Council this qualification was relaxable and accordingly he was considered and selected by the Establishment Committee by relaxing the qualification of M.Ed". Prima facie it indicates that the Establishment Committee relaxed the qualification. But, the Establishment Committee which was in charge of selection cannot usurp the power of relaxation which is vested in the Executive Council. Therefore, it has to be seen with reference to the record whether there was relaxation in December 1995 before the appellant was called for interview and if so, such relaxation was given by the Executive Council, after applying its mind to the factors justifying relaxation. It is made clear that in case there was due relaxation in September 1993 by the Executive Council, it is unnecessary to probe into question of relaxation in December 1995.

To summarise, we hold that the appellant cannot take refuge under sub-clause (c). He lacks one of the qualifications prescribed in sub-clause (a), namely, M.Ed. At the same time, we have held that the Executive Council was empowered to relax the educational qualification but not merely the requirement as to minimum percentage of marks. We have expressed a doubt on the question whether the power of relaxation was in fact exercised in favour of the appellant by the competent authority either during 1993 or 1995, after applying its mind to the factors warranting relaxation. That fact has to be verified with reference to records and additional pleadings if any. The validity or otherwise of the Ordinance conferring power to relax one of the educational qualifications is left open.

Finally, we must advert to the contention raised by the learned counsel for the appellant that the delay on the part of the first respondent and his conduct disentitled him for relief under Article 226 of the Constitution and the High Court at the instance of the first respondent should not have gone to the extent of setting aside the appointment made long back. It is pointed out that the first respondent filed the writ petition nearly one year after the appointment of the appellant though he was well aware of such appointment. It is submitted that even though the first respondent was on study leave for some time he was regularly visiting the University campus and therefore he must have been aware of developments. Moreover, it is contented that the first respondent being fully aware of the decision of the University relaxing the qualifications as early as in 1993 did not challenge that resolution all these years. On the other hand, having participated in the selection process and failed to get selected, he started the present litigation. The learned senior counsel for the first respondent, Shri R. Dwivedi, countered this contention mainly on the ground that this objection was not raised before the High Court and,

therefore, the High Court did not have occasion to consider the same. Learned counsel submits that it is not open to the appellant to raise this issue of delay and latches at this point of time. We find from the pleadings that the appellant did raise the question of delay and latches on the part of the first respondent. As the case is being remitted to the High Court for consideration of the points set out above, we feel, it will be appropriate for the High Court to consider this aspect as well. Whether or not there was unexplained delay and, if so, whether it will have effect on the ultimate order that the High Court is inclined to pass will have to be considered by the High Court. We do not propose to express any view on this aspect. It is needless to point out that in case the finding of the High Court on the issue relating to relaxation is in favour of the appellant, no further question arises.

For the reasons aforesaid, we set aside the judgment of the High Court and remit the matter to the High Court for fresh consideration in the light of the declaration of law and the observations made in the judgment, as expeditiously as possible. The appeal is thus allowed. No costs.

.J.
(S.N. Phukan)

..J.
(P.Venkatarama Reddi)

March 18, 2002.