

CASE NO.:
Appeal (civil) 355 of 2000

PETITIONER:
K. SHEKAR

Vs.

RESPONDENT:
V. INDIRAMMA & ORS.

DATE OF JUDGMENT: 27/02/2002

BENCH:
S. Rajendra Babu & Ruma Pal

JUDGMENT:

with C.A.No. 356 of 2000
J U D G M E N T

RUMA PAL, J.

The question in these appeals is whether, K. Shekar, the appellant in C.A. No. 355 of 2000 (referred to as the appellant hereafter) is entitled to continue as Additional Professor in the National Institute of Mental Health and Neuro Sciences (NIMHANS). The appellant was initially appointed as Lecturer. The post of Lecturer was redesignated as Assistant Professor pursuant to the 4th Pay Commission. During the pendency of the proceedings, he has been promoted as Associate Professor on 30th June 1992 and thereafter as Additional Professor with NIMHANS w.e.f. 1st July 1996. Both the Single Judge and the Division Bench of the Karnataka High Court, on an application under Article 226 filed by the respondent No.1 have held that he had no such right. This decision has been impugned before us not only by the appellant but also by NIMHANS by way of a separate appeal.

The relation of facts can start with 1984 when the Indian Council of Medical Research (ICMR), New Delhi undertook to set up a project in major institutions and medical colleges for developing advanced research. The Council laid down several conditions subject to which such centers were to be set up, the relevant clause (wherein ICMR is referred to as the Council) being:

"The host institution must undertake to provide the necessary basic facilities for carrying out medical research for a period of at least 5 years. The host institutions are expected to take over the Centres from the Council after the stipulated period when the Council's support has been withdrawn.

One such Advanced Research Centre was set up at NIMHANS by ICMR which came to be known as the ICMR Advanced Research Centre on Community Mental Health. The appellant was appointed in the Centre as Research Officer in December 1984.

On 28th September 1986, an advertisement was issued by NIMHANS to fill the Research Project Posts in the Centre. It was made clear in the advertisement that the Project was for a period of three years and that some posts were likely to be made permanent after three years. Of the several posts advertised, we are concerned with the post of Assistant Professor (Psychiatric Social Work). The qualifications prescribed for the post were:

"(a) First or Second Class Master's Degree in Social Work or allied Discipline or its equivalent.

(b) Ph.D/D. Sc. In Medical or Psychiatric Social Work for a recognised University or Institute."

In addition, a candidate had to have '4 years teaching and or research experience in the discipline after obtaining the Ph.D. Degree". It was also stipulated that if a suitable candidate is not found, the Selection committee could recommend a candidate for a lower post.

In the application submitted by the appellant, against the column "Reference" he cited three persons to produce a testimonial from them in regard to his fitness for the post. The three referees were persons who were on the Selection Committee. The Selection Committee did not appoint the appellant as Assistant Professor of Psychiatric Social Work but appointed him as a Lecturer in Psychiatric Social Work, a post which admittedly had not formed part of the advertisement which was published on 28th September 1986.

The appellant was issued a letter of appointment on 28th November 1986 by the 'Chairman, Governing Body/ Director of NIMHANS". The letter of appointment stated that the post was temporary and renewable on a year to year basis and that the appellant would be on probation for a period of two years from the date of appointment "which may be extended or curtailed at the discretion of the competent authority". The appointment letter also specified that the appellant's appointment was terminable on giving three months' notice. The appellant signed the letter of appointment in token of acceptance.

On 6th December 1986, a second advertisement was issued by NIMHANS for its own purposes and not for the purposes of the ICMR Centre. This advertisement called for applications for various posts, one of which was a Lecturer in Psychiatric Social Work. The qualifications were:

"(a) First or Second Class Master's Degree in Social work or allied disciplines or its equivalent with Medical Psychiatric Social Work, as one of the subjects or equivalent.

(b) M.Phil. in Psychiatric social Work or equivalent (2 years course) from a recognised University OR Ph.D. in Medical or Psychiatric Social Work from a recognised University Institution."

The appellant and the respondent No. 1 both applied.

Interviews were held on 1st March 1987. By this date, the respondent No. 1 who had already a Master's degree in Psychology and an M. Phil in Psychiatric Social Work, had in addition acquired her Ph.D. degree. The Selection Committee interviewed all the candidates including the appellant and the respondent No. 1. As it turned out this was an unnecessary exercise because according to NIMHANS, the post was reserved for a Scheduled Caste candidate. After considering the merits of all the candidates, it was noted that there was only one SC candidate who was not found suitable. Therefore, the post was not filled up.

After the second advertisement was issued, Dr. R. Srinivasa Murthy who was heading the ICMR Centre wrote to the Director, NIMHANS that NIMHANS had an agreement with ICMR to "absorb the faculty posts". It was suggested by Dr. Murthy that "in view of this it would be appropriate that the appointment order could be suitably modified" and that "the same could apply to the appointment of Mr. Mahendra Sharma, Lecturer in Clinical Psychology and Dr. K. Sekar(sic), Lecturer in Psychiatric Social Work". The suggestion of Dr. Murthy was accepted by NIMHANS and an order dated 21st April 1987 was issued by the Chief Administrative Officer (with a copy to Dr. Murthy) by way of a Corrigendum to the letter of appointment issued to the appellant. The first correction was as to the nature of his appointment. From a 'temporary tenure appointment', the appointment letter was corrected to read 'the post is permanent but the appointment is on officiating basis'. A further correction was introduced by the corrigendum which provided that 'on completion of the tenure appointment in the Centre, appointees will revert back to the service in the respective departments at NIMHANS. Further, the services rendered will count for seniority in the service of NIMHANS from the date of joining the post in the Centre". And so, by virtue of this corrigendum, the appellant's temporary appointment as a Lecturer with the Centre, became a permanent one with NIMHANS.

On 9th November 1989, the Government of India approved the re-designation and Faculty Improvement Programme in respect of faculty posts under NIMHANS. Consequent upon this, the appellant was re-designated as Assistant Professor w.e.f. 1.10.86 with NIMHANS although the appellant continued to serve in the ICMR Centre.

On 1st June 1989, a third advertisement was issued by NIMHANS calling for applications to fill the posts of Assistant Professor in Psychiatric Social Work (Deaddiction Unit) and Lecturer, Psychiatric Social Work (De-addiction Unit). The qualifications prescribed were substantially the same as those which had earlier been prescribed for the posts of Assistant Professor and Lecturer in the second advertisement. The respondent No. 1 applied for both the posts. No interviews were held nor any selection made and the respondent No.1 heard nothing further from NIMHANS.

The appellant was appointed as Assistant Professor (Psychiatric Social Work) in NIMHANS in 1990. According to the appellant and NIMHANS, this was consequent upon the Centre being wound up in June 1990. Along with the appellant Dr. Mahendra Prakash Sharma was posted to the Department of Clinical Psychology in NIMHANS.

According to the Respondent No.1, the process for appointing an Assistant Professor started by the advertisement issued in 1989 had been circumvented by the posting of the

appellant from the Centre to NIMHANS. The respondent No. 1 filed a writ application in which she challenged inter-alia the appointment of the appellant as Assistant Professor in NIMHANS. She subsequently withdrew this writ petition with the leave of the Court to file a second writ petition on the same cause of action. In the second writ petition, the respondent No. 1 questioned the authority of NIMHANS to fill the post of Assistant Professor in the Department of Psychiatric Social Work by converting the temporary post in the ICMR into a permanent one and by resorting to reversion on the basis that the appellant had served with NIMHANS before he was appointed at the Centre. She made specific allegations of partiality against the respondent No. 3 in the writ petition who was a member of the Selection Committee and also one of the persons cited by the appellant as a reference.

Statements of objections were filed by the appellant and the Chief Administrative Officer of NIMHANS. The respondent No. 3 chose not to file any reply. It was the case of the appellant and NIMHANS in their statements of objections, that the procedure followed in the appointment and subsequent absorption of the appellant in NIMHANS was perfectly regular. According to them there was no need to advertise the post of a lecturer in view of the following clause in the advertisement: "If the candidate is not found suitable to the post applied for the selection committee may recommend the candidate for a lower post in case of highly qualified candidate, the selection committee may recommend to a higher post other than the one advertised." It was further said that the respondent No. 1 had no locus standi to question the appellant's appointment in 1986 since she could not have been considered at all for the post of Lecturer since she had a 3rd class Masters degree. It was also stated that the selection process which had been started by the publication of the advertisement in 1989 had been abandoned because the Union Government was not interested in funding a de-addiction unit in NIMHANS. The learned Single Judge called for the records and after scrutinising them came to the conclusion that the appellant's appointment as Lecturer pursuant to the advertisement issued on 28th September 1986 was invalid because the post of Lecturer has not been advertised. He held that the clause which permitted the Selection Committee to appoint a 'suitable' candidate for a lower post, did not entitle the Selection Committee to either create a new post which had not been advertised or to at all consider a candidate who was not eligible to apply for the post advertised. According to the learned Single Judge, it was only when the candidate possessed the minimum qualifications for the post of Assistant Professor and he was not found suitable for whatever reason to hold the post, that the Selection Committee could consider him for being appointed to a lower post. The learned Single Judge held that at the interview for the post of Lecturer held pursuant to the second advertisement, the Selection Committee had found that the appellant was not suitable. The learned Judge found from the records that the appellant did not have any substantive appointment with NIMHANS and, therefore, the question of his reversion under the Corrigendum did not arise. The learned Judge concluded that the selection of the appellant was a 'fraud on the power of NIMHANS'; that NIMHANS had 'allowed itself to safeguard the interests of one individual', and that 'undue interest' had been taken in the appointment of the appellant. The appointment of the appellant having been set aside, the learned Judge directed the post of Assistant Professor, Psychiatric Social Work which then fell vacant, to be filled up in terms of the advertisement issued in 1989, and further that the experience acquired by the appellant by virtue of his illegal appointment was not to be taken into account.

Both NIMHANS and the appellant preferred two separate appeals. The Division Bench upheld the finding of the learned Single Judge and dismissed the appeals.

According to the appellant and NIMHANS, the High Court's finding that appellant's appointment as Lecturer in 1986 was invalid was uncalled for as the respondent No.1 had not challenged the appointment. Even if she had, the challenge was grossly delayed. What had been challenged, according to the appellants, was the corrigendum dated 21st April, 1987 and the order directing the posting of the appellant to NIMHANS as Assistant Professor. It is contended that the respondent No.1 did not have the locus standi to challenge the appointment of the appellant either as Lecturer or subsequently as an Assistant Professor not only because she herself had not applied pursuant to the 29th September 1986 advertisement but also because she did not have the necessary educational qualifications to be appointed to either post. It is urged that the writ petition filed by the respondent No. 1 was not bona-fide as the appointment of Dr. M.K. Sharma as Assistant Professor had not been challenged. According to the appellant and NIMHANS, NIMHANS was under an obligation to absorb the employees of the ICMR project because of the agreement between NIMHANS and ICMR arrived at in 1984. The finding of the High Court that at the interview held pursuant to the second advertisement, the appellant was found unsuitable for the post of Lecturer has been criticised on the ground that the High Court had failed to note that the post had been reserved for a scheduled caste candidate and the only scheduled caste candidate was not found suitable. According to the appellants, the High Court also failed to consider that the third advertisement which was issued on 1.6.1989 had been abandoned because of a lack of funds. There was as such no question of the process being completed as directed by the High Court. The appellant has also urged us to consider the matter from an equitable point of view. He has put in several years of hard work after his appointment in 1986 all of which would be nullified if his appointment were set aside.

The respondent No.1 has contended that her basic grievance was that the NIMHANS had appointed the appellant as Assistant Professor by a backdoor method, contrary to the Recruitment Rules of NIMHANS, without completing the process started by the third advertisement. The respondent No.1's claim was overlooked although she was fully qualified, only to accommodate the appellant. The entire process of appointing the appellant as against the post of Assistant Professor in NIMHANS was vitiated by fraud and bias starting with his irregular initial appointment in 1986 and culminating with his recruitment by absorption. According to the respondent No. 1, the Recruitment Rules could not be overridden by any agreement with ICMR. It is pointed out that the affidavit filed on behalf of NIMHANS contained several contradictory statements which further substantiated the concurrent findings of the Single Judge and the Division Bench of the High Court that the appellant's appointment was the outcome of bias.

We can take judicial notice of the fact that that NIMHANS is an institution of repute. It has already been so recognised by this Court in B.R. Kapoor and Another V. Union of India and Others 1989 (3) SCC 387. It is also true that generally speaking Courts have been reluctant to interfere with the running of educational institutions. But there can be 'no islands of insubordination to the rule of law'. The actions of educational institutions, however highly reputed, are not immune from judicial scrutiny. Indeed to preserve the high reputation, there is a greater

need to avoid even the semblance of arbitrariness or extraneous considerations colouring the Institution's actions. It may be that the respondent No. 1 could not directly challenge the appellant's appointment as Lecturer at the Centre in 1986 either because she herself was merely not an applicant but was unqualified to be so appointed or on the ground of delay. But the immediate grievance of the respondent No.1 was the appellant's appointment in 1990 as Assistant Professor. Because the appointment was as a result of the appellant's appointment as a Lecturer in the ICMR Centre in 1986, it was also called into question. To get rid of the "weed" so to speak, one had to eliminate the root. It is nobody's case that the respondent No. 1 could not be considered for appointment as Assistant Professor in 1990. The Writ Application was filed in the same year. There was as such no question of the respondent No.1's application being defeated because of any delay.

If we start with the 'root', - there can be no doubt that the appellant's appointment as Lecturer in 1986 was not in terms of the advertisement pursuant to which he had applied. Before any appointment could be made to the post of Lecturer, the post should have been advertised together with the eligibility criteria in respect thereof. The submission of NIMHANS was that since the post of Lecturer was lower than an Assistant Professor's, it was not necessary to be advertised. If this argument were accepted, it would amount to a violation of Articles 14 and 16. The absence of an advertisement necessarily deprived persons who could have applied for the post, of the opportunity of applying for the post. The clause in the advertisement which enabled the Selection Committee to recommend the candidate for a lower post if the candidate was not found suitable to fill the post applied for, did not give NIMHANS the power to appoint the recommended candidate against an unadvertised post. Significantly, in the other advertisements on record dated 6.12.1986 and 1.6.1989, the post of Assistant Professor and the post of Lecturer were both advertised.

The clause, far from allowing NIMHANS the power to dispense with the advertisement of any lower post as a pre-condition to appointment, indicates that only eligible persons could be considered for selection. Once the barrier of eligibility was crossed, the Selection Committee could consider the suitability of the candidate for the post advertised. It follows that the appellant should not have been called for interview at all. His application clearly showed that he did not fulfill the requisite eligibility criteria for the post he had applied for, because he lacked any post-doctorate experience at all. The power in the Selection Committee to relax the eligibility criteria cannot be read as including the power to do away with the criteria altogether.

Then again, the post which was advertised was a temporary tenure post and yet by virtue of the Corrigendum, the posts were made permanent. It is true that the advertisement stated there was a likelihood of some of the advertised posts being made permanent after three years. All that this meant was that the posts would remain temporary tenure posts for three years after which there was a possibility of the appointments being made permanent. When the post itself was made permanent from its very inception by the corrigendum issued several months later, the post should have been re-advertised so as to give fair notice to all prospective candidates regarding the nature of the vacancy to be filled. It was not open to NIMHANS to retrospectively and subsequent to the appointment change the nature of post advertised by issuing the Corrigendum.

In any case, the Corrigendum proceeded on a mis-interpretation of the terms and conditions under which the Centre was set up by the ICMR. There was no obligation on the part of the NIMHANS by reason of any 'agreement' with ICMR to absorb any employee of the Centre. ICMR's condition as quoted earlier merely obliged all Institutes where such centres were set up to continue the work after ICMR withdrew its financial support at the end of five years.

The corrigendum in so far as it provided for the 'reversion' of persons working at the Centre to NIMHANS certainly could not operate to revert back the appellant. The Cadre and Recruitment Rules of NIMHANS provide that appointments to the posts of Assistant Professor and Lecturer are to be made by direct recruitment. Besides, the appellant was in fact serving as Research Officer with the ICMR Centre when he was appointed as a Lecturer in 1986. There was a distinction between appointment as a Lecturer at the ICMR Centre and appointment to the post of a Lecturer in NIMHANS. That is why the appellant, even after having been issued the letter of appointment as Lecturer in the ICMR Centre, applied again pursuant to the second advertisement for appointment as Lecturer in NIMHANS. He could not, in the circumstances, be reverted back to NIMHANS.

It is unnecessary to consider any further submission as there are already sufficient reasons for dismissing these appeals and upholding the judgment of the Karnataka High Court.

However the appellants are correct in their submission that the High Court should not have directed the selection of an Assistant Professor on the basis of the 1989 advertisement. That advertisement related to appointments in the De-addiction Unit. NIMHANS' statement that the setting up of the De-addiction Unit in NIMHANS had been abandoned because of lack of funds has been categorically refuted by respondent No. 1. Without going into the controversy having regard to the lapse of several years on account of the pendency of the litigation before different Courts, it would not be appropriate to direct the process initiated in 1989 to be completed more than 11 years later. The vacancy created by the setting aside the appellant's appointment will have to be filled and a fresh advertisement will have to be issued by NIMHANS in accordance with its Cadre and Recruitment Rules. The unfortunate consequence that the appellant will suffer by reason of the setting aside of his appointment as Assistant Professor in NIMHANS cannot be avoided on any equitable considerations although the harshness may be mitigated to some extent.

Accordingly, while affirming the decision of the High Court, we modify it to the extent that the actual experience gained by the appellant by virtue of his appointment as Assistant Professor may be taken into account if the appellant applies pursuant to any future advertisement that may be issued by NIMHANS for the post of Assistant Professor in the Department of Psychiatric Social Work.

With this modification, the appeals are dismissed but without any order as to costs.

....J.
(S. Rajendra Babu)

J.
(Ruma Pal)

JUDIS