

Krishna Rai (Dead) vs Banaras Hindu University Through ... on 16 June, 2022

Author: Vikram Nath

Bench: Vikram Nath, Dinesh Maheshwari

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 4578–4580 of 2022

(Arising out of S.L.P.(C) Nos.31186–88 of 2016)

KRISHNA RAI (Dead)

APPELLANT(S)

THROUGH LRs & ORS.

VERSUS

BANARAS HINDU UNIVERSITY

THROUGH REGISTRAR & ORS. RESPONDENT(S)

JUDGMENT

Vikram Nath, J.

1. Leave granted.

2. I.A.D.No.133982 of 2021 is allowed.

3. In these three Civil Appeals, this Court has been called upon to decide whether principle of estoppel and acquiescence will prevail over statutory service rules prescribing the procedure for promotion of Class IV employees to Class III working in the Banaras Hindu University¹, Varanasi, a Central University. The learned Single Judge was of the view that the statutory rules would prevail and must be strictly adhered to, whereas, the Division Bench, although, agreeing with the reasoning of the learned Single Judge that the procedure prescribed under the rules was violated, still

proceeded to set aside the judgment of the learned Single Judge applying the principle of estoppel and acquiescence over and above the eligibility 1 BHU conditions having statutory force laid down by the statutory rules.

4. The learned Single Judge had allowed the writ petition filed by the appellants and after setting aside the promotion of respondent Nos.3 to 16, had directed the BHU to carry out the exercise for promotion afresh as per the law and the observations made in the said judgment. The Division Bench allowed the appeal, set aside the judgment of the learned Single Judge and dismissed the writ petition. Aggrieved by the same, the original writ petitioners are in appeal before this Court.

5. Facts in brief are that for filling up 14 posts of Class-II (Junior Clerk Grade) by way of promotion, the University issued a Notification/Advertisement dated 17.12.2005 inviting applications from permanent Class-IV employees for promotion as Junior Clerk in the Pay-Scale of Rs.3050-4590. The eligibility prescribed in the aforesaid Notification reads as under:

“Eligibility:

All Class-IV employees, who have put in five years services and who have passed matriculation examination or equivalent will be eligible for appointment as Junior Clerk under 25% promotion quota.

Such eligible candidates will be tested in: A typing test in English/Hindi for a minimum of 30 words per minutes; and after qualifying in the test.

Note: If an employee does not pass the typing test and is otherwise eligible for promotion he/she be promoted subject to the condition that he/she passes the typing test within two years from the date of his/her promotion failing which he/she will be reverted.

Provided further that for such employees, typing test be held at least twice a year.

Two papers of simple English, Hindi and Arithmetic of one hour duration.”

6. It would be worthwhile to mention here that in the meantime, it was resolved to hold a computer typing test on 20.04.2006. However, upon a representation being made, the said computer type test was deferred vide letter dated 19.04.2006 and, later vide communication dated 04.05.2006, it was informed that final merit list would be based on the marks obtained in typing test, written test and interview. The type test could be taken on a computer or on a manual typewriter. The typing test was held on 16.05.2006; the written test was held on 23.09.2006 and interview was held on 31.05.2007 and 01.06.2007. Thereafter, merit list was prepared by the Board of Examiners appointed for making the selection/promotion and, accordingly, as per its recommendations, 14 selected candidates (respondent nos.3 to 16) were issued appointment letters on 05.06.2007. The appellants made a representation against the decision to appoint respondent nos.3 to 16, which was rejected by the competent authority on 02.07.2007.

7. Aggrieved, the appellants filed Writ Petition No.37741 of 2007; Sri Krishna Rai and 33 others impleading the Banaras Hindu University through its Registrar as respondent No.1, Vice-Chancellor, Banaras Hindu University as respondent No.2, and the 14 selected candidates as respondent nos.3 to 16. The petition was filed primarily on the ground that the Advertisement/Notification, which was issued laying down the eligibility conditions, as per paragraph 6.4 of the Manual did not provide for any interview, but later on, changing the rules of the game and in violation of the eligibility conditions laid down in para 6.4, the Board of Examiners which did not have any authority or power to amend paragraph 6.4 laying down the eligibility conditions introduced an interview. The Board of Examiners further laid down the criteria for preparing the merit list out of total of 100 marks, with the following breakdown: 20 marks for the type test, 60 marks for the written test of Hindi, English and Arithmetic and 20 marks for the interview.

8. In the counter-affidavit filed by the BHU as also by the respondent nos.3 to 16, the eligibility conditions as laid down in para 6.4 of the Manual and duly approved by the Executive Council, which is the supreme Authority, was not disputed. Even during the course of the arguments, learned counsel for the BHU agreed to the submission of the appellants that the Board of Examiners had no authority to alter the eligibility conditions or the procedure prescribed under para 6.4 of the Manual. It is further undisputed that Board of Examiners was not vested with any authority to alter the procedure for promotion or in other words, it could not amend para 6.4 of the Manual. It is also an admitted position that it is only the Executive Council, which could have amended or modified the procedure/eligibility prescribed under para 6.4 of the Manual.

9. The learned Single Judge after considering the entire material on record and also the catena of decisions relied upon by the respondent-BHU and the private respondents was of the view that the Board of Examiners committed grave error in making selections by awarding marks on the type test, written test and interview and then preparing the merit list.

10. The learned Single Judge allowed the writ petition. It quashed the orders impugned dated 05.06.2007 and 02.07.2007 as also the appointments of respondent Nos.3 to 16 on Class-II post and further directed BHU to hold fresh selections for promotion to the post of Class-III, complete the same expeditiously within three months, strictly in accordance with the Rules and in the light of observations made above. It also awarded costs quantified at Rs.50,000/-. The operative part of the judgment of learned Single Judge is reproduced hereunder:

“56. In the result, the writ petition is allowed. Impugned orders dated 5.6.2007 and 2.7.2007 and appointments of respondents 3 to 16 on Class IV posts are hereby quashed.

57. The University is directed to hold fresh selection for promotion to the post of Class III against the vacancies for which selection was held by notification dated 17.12.2005 and complete the same expeditiously and in any case, within three months from the date of production of certified copy of this order strictly in accordance with Rules and in the light of observations made above.

58. Petitioners are entitled to costs which I quantify to Rs. 50,000/₹.

11. The finding recorded by the learned Single Judge as contained in paragraph Nos.53, 54 and 55 are also reproduced hereunder:

“53. In the present case, I am constrained to observe that the notification published by University categorically reiterated what was contained in Clause 6.4 of the Manual. The rules of game were made known to everybody but Board of Examiners, which was constituted to hold selection strictly in accordance with aforesaid decided norms, changed the rules in between the game and held selection in a manner unknown to the extant Rules applicable for promotion from Class IV to Class III in BHU. This was wholly illegal and without jurisdiction. It is well settled that rules of games cannot be allowed to be changed during the game.

54. This Court has no manner of doubt in the light of above discussion that petitioners have been discriminated and have been considered in a manner which was never contemplated by the University for considering promotion from Class IV to Class III.

55. One more aspect also not be ignored. In making such promotions persons totally unequal to each other in various respects have to be considered. A Class IV employee who was appointed in 1977 has much longer experience of a Class IV post but in the context of personality and other aspects, he may not compare with his much junior entered in service as Class IV employee after 10, 20 or 25 years. The subsequent educational advancement also cannot be ignored.

It is evident that persons who were appointed in 1977 to 1997, i.e. petitioners, got occasion for consideration for promotion to Class III post after decades of service. For such persons, making interview as a part of selection when it was not contemplated in the relevant procedure prescribed by the University obviously made it difficult for them to qualify since they may not compete with young and youngest new employees having better qualifications. But one must also have considered that they at the fag end of service to their credit, have long experience. Better honour and respect needed so that they may retire from a higher post after getting at least one promotion at the fag end of their service. The University must have all these facts and other relevant aspects in mind when laid down the procedure in the Manual, but unfortunately the Board of Examiners acted unmindful of wider aspects. The acted wholly illegally by ignoring the established procedure laid down in the Rules and on the contrary settled their own selection procedure by exceeding their authority and jurisdiction.”

12. BHU as also the private respondent nos. 3 to 16 preferred intra-Court Appeals registered as Special Appeal No.24 of 2012 (Banaras Hindu University and another Vs. Sri Krishna Rai and others), Special Appeal No.9 of 2012 (Shri Sarvjit Singh and others Vs. Sri Krishna Rai and others) and Special Appeal No.25 of 2012 (Ram Kishore Pandey and others Vs. Banaras Hindu University and others). The Division Bench vide judgment dated 29.07.2016 was of the view, as already stated

above, that the appellants having appeared in the examination process as also the interview without any protest, upon being unsuccessful could not have challenged the selection process. The Division Bench relied upon a number of decisions, which we shall shortly discuss, in support of its view and accordingly allowed the Special Appeals, set aside the judgment of the learned Single Judge and dismissed the writ petition.

13. Having heard learned counsel for the parties and having perused the material on record as also the case laws relied upon by the learned counsel for the parties, we now proceed to deal with the issue at hand.

14. As per para 6.4 of the Manual duly approved by the Executive Council's Resolution No.223 dated 2/3rd of November, 1980, all Class IV employees, who have put in five years' service and who have passed matriculation examination or equivalent, would be eligible for promotion to the post of Junior Clerk Grade. Such eligible candidates would be tested in a typing test in English/Hindi for a minimum speed of 30 words per minute. The note appended to such Clause of typing test mentions that if an employee does not pass the typing test and is otherwise eligible for promotion, he be promoted subject to the condition that he passes the typing test within two years from the date of his promotion failing which, he would be reverted. The note further provided that for such employees the typing test would be held twice a year. Para 6.4(ii)(b) provided that two papers of simple English, Hindi and Arithmetic of one hour duration would be held.

15. The Executive Council vide its Resolution No.131 dated 29/30.03.1996 had raised the vacancies from 20% to 25% for promotion of Group D in service employees and it further provided that the seniority list would be prepared after passing the departmental test and it further provided that no relaxation in prescribed qualification shall be given for in-service employees.

16. The net effect of the above eligibility and procedure prescribed for promotion of Group D Class IV employees to the cadre of Junior Clerk would be that (1) a type test would be held with a minimum speed of 30 words per minute in Hindi/English. This type test was not mandatorily required to be qualified and even those eligible candidates, who could not qualify the type test, but were otherwise eligible having passed in the departmental test, would be allowed two years' time after joining to qualify the typing test and for such candidates, typing test would be held twice a year.

17. The only test required for eligible candidates was to pass in the departmental test i.e. the test of simple English, Hindi and Arithmetic. Thus, if an eligible candidate passes in the written test of simple English, Hindi and Arithmetic and also passes in the type test, would be entitled to be placed in the seniority list for promotion. It further mandated that even where eligible candidates had passed in the departmental written test of simple English, Hindi and Arithmetic, but could not pass in the typing test, would still be eligible for promotion and be placed in the seniority list with a rider that he/she would have to qualify the typing test within two years and such typing test for these promoted candidates would be held twice a year, that is to say that they would have at least four chances of appearing in the typing test and qualifying it subsequent to their promotion.

18. In the present case, the Board of Examiners comprising of large number of Members changed the entire procedure and they established a completely new procedure. They awarded 20 marks for the type test treating it to be compulsory, 60 marks for the written departmental test of simple English, Hindi and Arithmetic with 20 marks for each subject and further introduced an interview of 20 marks. Thus, the merit list was to be prepared on the total 100 marks as distributed above.

19. There is neither any provision nor any other indication in the Manual duly approved by the Executive Council for preparing such a merit list based upon the marks awarded under different heads. The promotion was to be made on the basis of seniority subject to passing the departmental written test, once the candidate was eligible having five years' experience in Class □IV and matriculation certificate or equivalent. The intention and object as culled out from the aforesaid eligibility procedure was that, seniority subject to qualifying the written test would be the criteria for promotion.

20. The Board of Examiners on their own changed the criteria and made it purely merit based by introducing an interview and also preparing the merit list on the basis of marks awarded in the type test, written test and interview. As per the provisions of Clause 6.4 of the Manual, type test was not mandatory. Anybody who would fail in the type test, could also be promoted subject to the rider that they would have to qualify the type test within two years from his joining.

21. What we notice is that, the Division Bench approved the reasoning of the learned Single Judge. The relevant extract of the judgment of the Division Bench is reproduced below:

“Learned Single Judge as already noted above has rightly proceeded to observe that interview was not at all subscribed by the provisions holding the field. We are also of the same view that procedure prescribed ought to have been adhered to by the Board of Examiners. Board of Examiners on their own could not have changed the procedure already holding the field as laid down by the Executive Council.”

22. However, the Division Bench fell in error in applying the principle of estoppel that the appellants having appeared in the interview and being unsuccessful proceeded to challenge the same and on that ground alone, allowed the appeals, set □aside the judgment of the learned Single Judge. The Division Bench having approved the reasoning of the learned Single Judge, ought not to have interfered in the judgment of the learned Single Judge on a technical plea. The Division Bench ought to have considered that the appellants were Class □IV employees working from 1977 onwards and expecting from them to have raised serious objection or protest at the stage of interview and understanding the principles of changing the Rules of the game, was too far □etched, unreasonable and unwarranted.

23. The case laws relied upon by the Division Bench would have no application in the facts of the present case as none of the judgments relied upon by the Division Bench laid down that principle of estoppel would be above law. It is settled principle that principle of estoppel cannot override the law. The manual duly approved by the Executive Council will prevail over any such principle of estoppel or acquiescence.

24. The Division Bench relied upon the following judgments:

(1) Union of India and another Vs. N. Chandrashekharan and others².

(2) Utkal University and others Vs. Dr. N.C. Sarangi and others³.

(3) Chandra Prakash Tiwari Vs. Shakuntala⁴ . (4) K.A. Nagmani Vs. Indian Airlines⁵.

(5) Madan Lal and others Vs. State of Jammu and Kashmir and others⁶.

² JT 1998(1) SC 295 ³ JT 1999 (1) SC 101.

⁴ 2002 (6) SCC 127 ⁵ 2009 (5) SCC 515 ⁶ 1995(3) SCC 486

25. In the case of Chandrashekharan (supra), the plea taken by the unsuccessful candidates was that the marks prescribed for interview and confidential reports were disproportionately high and the authorities could not fix a minimum to be secured either in interview or in the assessment of annual confidential reports. In the above case, there was no violation of any statutory rules or the eligibility determined by the rule making authority.

26. In the case of Utkal University (supra), the objection taken by the unsuccessful candidates was with regard to the composition of the Selection Committee. This again would not have any application to the facts of the present case.

27. In the case of Chandra Prakash Tiwari (supra), the unsuccessful candidate did not find the result of the interview palatable and the objection taken was that the process of interview was unfair. This also has no application to the facts of the present case.

28. In the case of K.A. Nagmani (supra), the unsuccessful candidates were given equal opportunity and no violation of any statutory rule was alleged, as such, this judgment would also have no application.

29. In the case of Madan Lal (supra), again the objection taken by the unsuccessful candidate was regarding the process of interview being unfair. This case also does not have any application to the facts of the present case.

30. On the contrary, what we find is that, in the case of Dr. Krishna Chandra Sahu and others Vs. State of Orissa and others⁷, it has been held that the suitability criteria is to be laid down by the rule making authority and that the selection criteria cannot be laid down by the Selection Board/Selection Committee unless specifically authorized. In the present case, firstly, there was no authorization to the Board of Examiners to lay down the selection criteria and further there was clear violation of the suitability criteria laid down by the rule making authority. Paragraph nos. 31, 32, 33, 34, 35 and 36 of the said judgment are reproduced hereunder:

“31. Now, power to make rules regulating the conditions of service of persons appointed on Govt. Posts is available to the Governor of the State under the Proviso to Article 309 and it was in exercise of this power that the present rules were made. If the statutory Rules, in a given 7 1995 (6) SCC 1 case, have not been made, either by the Parliament or the State Legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government (the Central Government under Article 73 and the State Government under Article 162) to issue executive instructions. However, if the Rules have been made but they are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions. (See: Sant Ram Sharma V. State of Rajasthan).

32. In the instant case, the Government did neither issue any administrative instruction nor did it supply the omission with regard to the criteria on the basis of which suitability of the candidates was to be determined. The members of the Selection Board, of their own, decided to adopt the confidential character rolls of the candidates who were already employed as Homoeopathic Medical Officers, as the basis for determining their suitability.

33. The members of the Selection Board or for that matter, any other Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the rules made under Article 309. It is basically the function of the Rule making authority to provide the basis for selection. this Court in State of Andhra Pradesh and Anr. v. V. Sadanandam and Ors observed as under: (SCC pp. 583-584, para 17):

“We are now only left with the reasoning of the Tribunal that there is no justification for the continuance of the old rule and for personnel belonging to either zone being transferred on promotion to offices in other zones. In drawing such conclusion, the Tribunal has travelled beyond the limits of its jurisdiction. We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment of the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive.” (Emphasis supplied).

34. The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication. In P.K. Ramachandra lyer and Ors. v. Union of India and Ors. (SCC pp. 180-181 para 44) , it was observed :

“By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reasons that such deviation from the rules is

likely to cause irreparable and irreversible harm”.

35. Similarly, in *Umesh Chandra Shukla Etc. v.*

Union of India and Ors. it was observed that the Selection Committee does not possess any inherent power to lay down its own standards in addition to what is prescribed under the Rules. Both these decisions were followed in *Durgacharan Misra v. State of Orissa and Ors* and the limitation of the Selection Committee were pointed out that it had no jurisdiction to prescribe the minimum marks which a candidate had to secure at the viva-voce test.

36. It may be pointed out that rule making function under Article 309 is legislative and not executive as was laid down by this Court in *B.S. Yadav and Ors. v. State of Haryana and Ors.* For this reason also, the Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection.”

31. Further in the case of *Tata Chemicals Ltd. Vs. Commissioner of Customs (preventive), Jamnagar*⁸, it has been laid down that there can be no estoppel against law. If the law requires something to be done in a particular manner, then it must be done in that manner, and if it is not done in that manner, then it would have no existence in the eye of the law. Paragraph 18 of the said judgment is reproduced below:

“18. The Tribunal’s judgment has proceeded on the basis that even though the samples were drawn contrary to law, the appellants would be estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse finding both on fact and law. On fact, it has been more than amply proved that no representative of the appellant was, in fact, present at the time the Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the Clearing Agent of the appellants in that he was not their employee but also stated that he was not present when the samples were taken. In fact, therefore, there was no representative of the appellants when the samples were taken. In law equally the Tribunal ought to have realized that there can be no estoppel against law. If the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of law at all. The Customs Authorities are not absolved from following the 8 2015 (11) SCC 628 law depending upon the acts of a particular assessee.

Something that is illegal cannot convert itself into something legal by the act of a third person.”

32. For all the reasons recorded above, the appeals deserve to be allowed. They are, accordingly, allowed.

33. The impugned judgment of the Division Bench dated 29.07.2016 is set aside and the judgment of the learned Single Judge dated 26.08.2011 is restored.

34. We have been informed that some of the appellants have retired and a couple of them have also died, post retirement. Rest of them are still working. Since the examinations have already been held in the year 2006-07, all the appellants who are found to be eligible for promotion as per the existing rules and as directed by the learned Single Judge, would be extended all consequential benefits. Further, where the appellants have died, the benefit would be extended to their legal heirs entitled under law for the same.

35. Pending application(s), if any, is/are disposed of.

.....J. [DINESH MAHESHWARI]J. [VIKRAM NATH]
NEW DELHI JUNE 16, 2022.