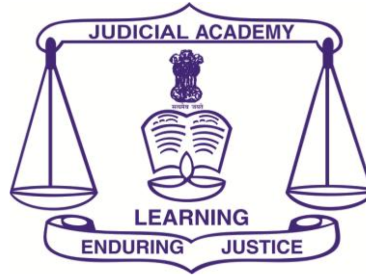

JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(August 26-September 01, 2019)

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1. Samsul Haque v. State of Assam , (2019 SCC OnLine SC 1093)

Decided on : -26.08.2019
Bench :- 1. Hon'ble Mr. Justice Sanjay Kishan Kaul
2. Hon'ble Mr. Justice K. M. Joseph

(Statement recorded under Section 313 of the Cr.P.C.- the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of *audi alteram partem*.)

Facts

Keramat Ali Maral (the deceased) was having tea at the tea stall known as Kalia Hotel. It is alleged that Abdul Hai, Abdul Rashid, Imdadul Islam, Rahul Amin, Mofizuddin Islam and Abdul Rahim Faruki, being the first six accused entered the stall and all of a sudden accused Nos. 2 & 3 fired at Keramat Ali with a pistol, while the other accused injured him by stabbing and hacking with daggers, swords, etc. Keramat Ali is stated to have died on the spot. The son of Keramat Ali, Nazrul Islam (PW-3) lodged the FIR, stating that he was present at the site along with other witnesses, but when they offered resistance, they were threatened with pistols. To save their life, they ran away from the site. Insofar as accused Nos. 7, 8 & 9 are concerned, it is stated that "further it may be mentioned that the incident took place at the instance and instigation of accused Nos. 7, 8 and 9."

On the investigation being completed, a charge-sheet was filed and charges were framed by the Sessions Judge under Sections 147, 148, 302/149 and 302 of the IPC against all. Accused Nos. 7 to 9 faced charges under Sections 302/109 of the IPC. In the course of trial, accused No. 4, Rahul Amin, absconded. Accused No. 1, Abdul Hai, died/was allegedly murdered during the course of trial. On completion of trial the Sessions Judge, found that accused No. 1 was the main culprit who had killed the deceased, Keramat Ali. The trial court also found that the guilt of accused Nos. 5 & 6 was also established beyond reasonable doubt.

The convicted accused filed an appeal before the Gauhati High Court and so did the State of Assam *qua* the accused who had been acquitted. The appeal of the convicted accused was dismissed by the High Court and the Special Leave Petition ('SLP') filed against the same was also dismissed and, thus, that matter attained finality.

The impugned judgment dated 12.2.2009 dealt with the appeal of the State and had reversed the judgment of the trial court convicting the five accused.

Accused No. 9, Samsul Haque filed Criminal Appeal No. 1905/2009, while Abdul Rashid (accused No. 2) and Imdadul Islam (accused No. 3) filed Criminal Appeal No. 246/2011 before the Apex Court.

Observations and Decision

While three of the witnesses are relatives, PW-1 is an independent witness. It may be noted that Mr. Dilip Modak, owner of the hotel, or any other independent witness present at the place of occurrence was not examined. It may also be noted that the defence examined only one witness, i.e. Siraj Ali (DW-1), who was at the place of the occurrence as recognised by the prosecution.

PW-3 in his complaint did state that the incident took place at the instance and instigation of accused No. 9 along with accused Nos. 7 & 8.However, in his deposition it has been stated that these persons asked the other accused to catch hold of the deceased. This by itself, in the Court's view, would not be fatal for the case of the prosecution. Similarly, there is some variation between what exactly these three persons stated, as available from the testimonies of even PW-4 and PW-6. However, the crucial aspect is that PW-1, the only independent witness, does not even implicate accused No. 9, much less assign any role to him. He has stated that he had not even seen accused No. 9, even though he was the person who was at the place of occurrence. DW-1, who was not produced as a witness by the prosecution, though was stated to be present at the place of occurrence, was examined by the defence and deposed against the main accused (accused No. 1) and others, while not assigning even the factum of presence to accused No. 9. Interestingly, even when the prosecution sought to cross-examine the said witness, the case of the prosecution was put as if only accused No. 7 ordered the other accused persons to assault the deceased. Had accused No. 9 played a role, that would logically have been put to DW-1 by the prosecution.

The Apex Court then emphasized that the most vital aspect is the manner in which the court put the case to accused No. 9, and the statement recorded under Section 313 of the Cr.P.C. The Apex Court found it to be perfunctory.

In the opinion of the Apex Court, ***the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem.*** The Apex Court referred to the judgment in ***Asraf Ali v. State of Assam***[1] wherein it was observed:

> "21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.
>
> 22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in *S. Harnam Singh* v. *The State* ((1976) 2 SCC 819 : AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

In *Asraf Ali,* the Apex Court had also referred to its earlier judgment of the three Judge Bench in ***Shivaji Sahabrao Bobade* v. *State of Maharashtra***[2] which considered the fall out of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 of the Cr.P.C., the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed.[3]

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[1] (2008) 16 SCC 328
[2] (1973) 2 SCC 793
[3] *Shivaji Sahabrao Bobade* v. *State of Maharashtra*, (1973) 2 SCC 793

In the given factual matrix, the Apex Court opined that the appellate court could hardly have overturned the acquittal of the trial court into one of conviction. The trial court took note of the close relationship of PW-3, PW-4 & PW-6 to the deceased, as also the array of the accused and the murder of accused No. 1, to come to the conclusion that the abetment of accused No. 9, as alleged, had not been proved beyond reasonable doubt. In fact, it is opined that there is no evidence that the said accused was inside or outside Kalia Hotel at the time of the occurrence. Given the circumstances, while not disagreeing with the legal proposition stated in the impugned judgment, that there is no law that the evidence of relatives cannot be acted upon, but, with extra care and caution, the presence of disinterested witnesses as PW-1 and DW-1 relate another story. The finding in the impugned order, that in the FIR filed by PW-3 as the complainant, on the very date of the occurrence, setting out the involvement of all the accused as clearly stated, again cannot be sustained for the reason of the improvements and embellishments between what was stated in the FIR and what came from the mouth of PW-3 as his testimony in the court. Therefore, the Apex Court held that the prosecution has not been able to establish a case against accused No. 9, much less beyond reasonable doubt.

In relation to the case of accused Nos. 2 & 3, the subsequent testimonies, however, sought to assign a different role than the one assigned in the FIR, bringing about an inconsistency. Therefore, the Apex Court was of the considered opinion that the prosecution has not been able to prove the case beyond reasonable doubt against the two accused, and they must get the benefit of doubt and consequently have to be acquitted. Samsul Haque, accused No. 9 was entitled to a clean acquittal.

2. *Khuman Singh v. State of Madhya Pradesh, (2019 SCC OnLine SC 1104)*

Decided on : -27.08.2019

Bench :- 1. Hon'ble Ms. Justice R. Banumathi
2. Hon'ble Mr. Justice A. S. Bopanna

(No evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable.)

Facts

When deceased Veer Singh was cultivating the field and others were grazing the cattle, appellant-accused Khuman Singh came to the field of deceased Veer Singh and left his buffaloes for grazing. Deceased Veer Singh objected to it and drove the buffaloes of the appellant-accused out of his field on which, appellant became furious and started abusing and scolding the deceased that how the deceased who belongs to *Khangar* Caste could drive away the buffaloes of *Thakurs* out of his field. When deceased objected to it, it is alleged that the appellant with an intention to kill the deceased, attacked him with an axe due to which, deceased Veer Singh fell down. Thereafter, appellant-accused allegedly gave two-three blows on the head of the deceased with axe. On seeing the complainant (PW-1), his brother (PW-2) and Badam Singh (PW-7) coming, appellant-accused ran away from the spot. Deceased died on the spot itself. Rajaram (PW-1) lodged the *Dehati Nalishi*/complaint (Ex.-P1) based on which, FIR was registered against the appellant-accused under Section 302 IPC and under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Upon consideration of evidence, the trial court convicted the appellant-accused under Section 302 IPC and sentenced him to undergo life imprisonment. Since the deceased was a Scheduled Caste, the appellant-accused was also convicted under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and sentenced to undergo life imprisonment along with a fine of Rs. 1,000/-. Being aggrieved, the appellant preferred appeal before the High Court . However, the conviction was affirmed. Thus, the Appeal was filed before the Apex Court.

Decision and Observations

The Apex Court considered whether the act of the appellant-accused would fall under Exception 4 to Section 300 IPC. In the present case, the Apex Court noted that, the appellant-accused and the deceased exchanged wordy abuses on which, appellant gave the deceased blows on his head causing six head injuries. Where the occurrence took place suddenly and there was no premeditation on the part of the accused, it falls under Exception 4 to Section 300 IPC. The conviction of the appellant-accused under Section 302 IPC was therefore modified as conviction under Section 304 Part II IPC.

The Apex Court then considered whether the conviction under Section 3(2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act can be sustained. The Apex Court noted that from the evidence and other materials on record, there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to a Scheduled Caste. Both the trial court and the High Court recorded the finding that the appellant-accused scolded the deceased Veer Singh that he belongs to "*Khangar*" Caste and how he could drive away the cattle of the person belonging to "*Thakur*" Caste and therefore, the appellant-accused has committed the offence under Section 3(2)(v)[4] of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

The Apex Court then referred to ***Dinesh alias Buddha* v. *State of Rajasthan***[5] wherein it was held that it was not the case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the present case also, the Apex Court held that there is ***no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable.***

[4] **"Section 3 - Punishments for offences of atrocities -**
(1) ………
(2) Whoever, not being a member of a Scheduled Caste or a Schedule Tribe, -
…….
(v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"
[5] (2006) 3 SCC 771

3. *State of Tamil Nadu and Others v. G. Hemalathaa and Another, (2019 SCC OnLine SC 1113)*

Decided on : -27.08.2019

Bench :- 1. Hon'ble Ms. Justice L. Nageswara Rao

2. Hon'ble Mr. Justice Hemant Gupta

(The High Court in exercise of powers under Article 226 of the Constitution cannot modify/relax the Instructions issued by the Commission.)

Facts

The Respondent is an Advocate enrolled in the Bar Council of Tamil Nadu. The Tamil Nadu Public Service Commission (for short, '*the Commission*') issued a Notification dated 09.04.2018 inviting applications from eligible candidates for filling up 320 vacancies to the posts of Civil Judges in the Tamil Nadu State Judicial Service. The Respondent was successful in the preliminary examination conducted on 09.06.2018. The written test was conducted on 11th and 12th August, 2018. Results of the written test were announced on 19.09.2018 and the name of the Respondent did not appear in the list of successful candidates. Interviews were conducted from 27.09.2018 to 05.10.2018 and the final results of successful candidates were published on 05.12.2018. The Respondent came to know that another candidate belonging to the same community to which she belongs (Most Backward Class) was selected in spite of her performance not being satisfactory. The Respondent made a representation to the Commission to furnish her marks in the written examination. On 07.01.2019, the Commission conveyed to the Respondent that her Law Paper 1 written examination was invalidated in view of violation of the Instructions to Applicants (for short, '*the Instructions*') issued by the Commission.

The Respondent filed a Writ Petition in the High Court for a direction to declare her result and appoint her as a Civil Judge, provided she has secured more marks than the last selected candidate in the Most Backward Class category. The High Court directed the Commission to announce the results of the Respondent in Law Paper-1 of the main written examination. If she was found qualified, the Commission was directed to conduct the interview of the Respondent as a special case. The Commission was further directed to complete the exercise

and announce the final result of the Respondent within a period of four weeks from the date of the judgment. Being dissatisfied with the said judgment of the High Court, this appeal is filed.

Decision and Observations

The Apex Court noted that the Instructions issued by the Commission are mandatory, having the force of law and they have to be strictly complied with. Strict adherence to the terms and conditions of the Instructions is of paramount importance. The Apex Court stated that ***the High Court in exercise of powers under Article 226 of the Constitution cannot modify/relax the Instructions issued by the Commission***. Further, the Court said that:

> "It cannot be said that such exercise of discretion should be affirmed by us, especially when such direction is in the teeth of the Instructions which are binding on the candidates taking the examinations."

The Apex Court stated that ***hard cases make bad law***. On this point the Court referred to ***Umesh Chandra Shukla* v. *Union of India***,[6]wherein Venkataramiah, J., held that:

> *"13.... exercise of such power of moderation is likely to create a feeling of distrust in the process of selection to public appointments which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness. The cases pointed out by the High Court are no doubt hard cases, but hard cases cannot be allowed to make bad law. In the circumstances, we lean in favour of a strict construction of the Rules and hold that the High Court had no such power under the Rules.*

Also, Roberts, CJ. in ***Caperton* v. *A.T. Massey***[7] held that:

> *"Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."*

Therefore, the Apex Court held that any order in favour of the candidate who had violated the mandatory Instructions would be laying down bad law.

[6] (1985) 3 SCC 721

[7] 556 U.S. 868 (2009)

4. *Dr. Professor Rajendra Chaudhary and Another v. State of Uttar Pradesh and Others, (2019 SCC OnLine SC 1111)*

Decided on : -28. 08.2019

Bench :- 1. Hon'ble Mr. Justice L. Nageswara Rao

2. Hon'ble Mr. Justice Hemant Gupta

(Regulations framed by the MCI relating to the conditions of service of Professors in Medical Colleges shall prevail over the Service Rules framed by the State)

Facts

The controversy in the above Appeals is regarding reservations to be applied for appointment by direct recruitment to the posts of Professor in Medical Colleges in the State of Uttar Pradesh and enhancement of the maximum age limit from 45 years to 65 years. There was no direct recruitment to the posts of Professors in 12 Government Medical Colleges (Allopathy) for 12 years prior to 2015. An advertisement was issued on 21.12.2015 by the Uttar Pradesh Public Service Commission seeking applications for appointment by direct recruitment to 47 substantive vacant posts of Professors in various Allopathic Medical Colleges. The said advertisement was subject matter of challenge in a Writ Petition filed in the High Court of Judicature at Allahabad. Apart from other grounds, the main point raised by the Writ Petitioners was that no posts were reserved for Scheduled Castes, Scheduled Tribes and Other Backward Class candidates. The enhancement of the upper age limit, from 45 years to 65 years, was also questioned in the Writ Petition on the ground that it was in violation of Uttar Pradesh State Medical Colleges' Teachers Services (Second Amendment) Rules, 2005 (for short, 'Service Rules'). Another advertisement was issued on 24.10.2017 revising the eligibility criteria pertaining to educational qualifications.

The High Court dismissed the Writ Petitions by rejecting the submissions relating to the reservations and enhancement of the upper age limit. Therefore, these Appeals have been filed before the Apex Court.

Decision and Observations

The two points that fell for consideration before the Apex Court were:

a) Whether the advertisement impugned in the Writ Petition was violative of Uttar Pradesh Public Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short "the Reservation Act): and

b) Whether enhancement of the upper age limit for appointment to the post of Professor by direct recruitment was contrary to the Uttar Pradesh Medical Colleges Teachers' Service (Second Amendment) Rules, 2005.

Reservation for Appointment by Direct Recruitment to the Post of Professor

The Apex Court referred to Section 3[8] of the Reservation Act. Also, the Apex Court referred to Rule 6 of the Service Rules which makes reservation applicable for appointment to direct recruitment to the posts of Professors. The Apex Court noted that there was no dispute that the proviso postulates that each speciality/department in Category 'A' should be deemed as a single unit. Category 'A' pertained to posts earmarked for promotion to the extent of 75 per cent of the cadre posts. The remaining 25 per cent were to be dealt with in Category 'B' which should be filled up by direct recruitment. A perusal of Category 'B' of

[8] "Section 3: Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. - [(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in subsection (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, -

(a) In case of Scheduled Caste: Twenty-one per cent;
(b) In the case of Scheduled Tribes: Two per cent;
(c) In the case of Other Backward Classes of citizens:
Twenty-seven per cent:
Provided that the reservation under clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:
Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of cadre strength of the service to which the recruitment is to be made:
(2) xxx
(3) xxx
(4) xxx
(5) The State Government shall for applying the reservation under sub section (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points and the roster so issued shall be implemented in the form of a running account from year to year until the reservation for various categories of persons mentioned in subsection (1) is achieved and the operation of the roster and the running account shall, thereafter, come to an end, and when a vacancy arises thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster."

Appendix 'A' to the Service Rules would disclose that the departments to which advertisement was issued for appointment of Professors have less than four posts, except two departments i.e. General Medicine and General Surgery. In these two departments, only two posts of Professors in each department were available for being filled up. Therefore, only four posts in each department were available for being filled up by direct recruitment as per the advertisement dated 21.12.2015.

The Apex Court found it relevant to refer to a judgment of the High Court of Judicature at Allahabad in ***Dr. Juhi Singhal* v. *State of U.P*.**[9] which examined a challenge to the advertisement dated 21.12.2015 which was the subject matter of the present Appeals. The High Court upheld the notification by holding that there was no infringement of the Service Rules. A full Bench of the High Court of Judicature at Allahabad considered the applicability of reservations to Scheduled Castes under the Reservation Act, as applicable to the aided institutions. It was held that the Reservation Act could not be pressed into service where the number of posts in the cadre were less than five.

The Apex Court was of the opinion that no error was committed by the Respondents in not providing reservations for appointment by direct recruitment to the post of Professor in Government Medical Colleges. The unit of appointment was speciality/department and the number of posts available in each speciality/department was less than five. Category 'B' in Appendix 'A' of the Service Rules referred to direct recruitment which was the subject matter of the advertisement. The Apex Court found that the Appellants' contention that the cadre of Professors in all the departments put together had to be taken into account for providing reservations had rightly been rejected by the High Court of Judicature at Allahabad.

Enhancement of Upper Age Limit:

The Apex Court referred to Rule 9 of the Service Rules which provided that maximum age limit for appointment to the post of Professor was 45 years. The Appellants contended that the upper age limit of 65 years prescribed by the advertisement was contrary to Rule 9 of the Service Rules. The Appellants argued that the enhancement of the upper age limit was done by a Government Order dated 06.02.2015. According to them, a rule made under the proviso to Article 309 of the Constitution of India could not be overridden by an executive order.

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[9] Service Bench No. 4292 of 2016

On the other hand, The Respondents contended that minimum qualifications for teachers in Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998 (for short, '*the Regulations*') were framed by the Medical Council of India (MCI) governing the maximum age for appointment of Professors in Medical Colleges. According to the said amended Regulations, the maximum age is set at 70 years.

The Apex Court held:

> "[T]he finding recorded by the High Court that the decision to increase the upper age limit from 45 years to 65 years is not vitiated. The High Court rejected the challenge to the enhancement of upper age limit for direct recruitment to the post of Professor in *Dr. Juhi Singhal* by holding that the Regulations framed by the MCI would prevail over the Service Rules. In the said judgment, the High Court was of the view that the Government Order dated 06.02.2015 only supplements the Rules and does not supplant them. The High Court further observed that the relaxation was done in view of the shortage of teachers in Medical Institutions who are qualified for appointment to the posts of Professors. The relaxation of the upper age limit was applicable only to those departments where 25 per cent or more posts were vacant and in respect of other departments, the State Government decided not to fill them up. In *Navyug Abhiyan Samiti* ,the Division Bench of the High Court followed the same logic and reasoning while considering the increase of upper age limit to the post of Principals in Government Medical Colleges. We see no reason to disagree with the said findings recorded by the High court. There can be no manner of doubt that the Regulations framed by the MCI relating to the conditions of service of Professors in Medical Colleges shall prevail over the Service Rules framed by the State of Uttar Pradesh. The Government Order dated 06.02.2015 has not been challenged by the Appellants for which reason they cannot make any grievance about the same."

5. *Vinit Garg and Others v. University Grants Commission and Others,(2019 SCC OnLine SC 1118)*

Decided on : -29. 08.2019
Bench :- 1. Hon'ble Mr. Justice U. U. Lalit
2. Hon'ble Mr. Justice Sanjiv Khanna

(The Apex Court found that TIET, Patiala was not competent to award graduation degrees in technical courses via distance mode due to lack of prior approval of the UGC or AICTE.)

Facts

The petitioners, 92 in number, in the writ petition under Article 32 of the Constitution of India prayed for directing the University Grants Commission, (for short, referred to as 'UGC') to issue a clarification that the degrees of Bachelor of Technology (for short,referred to as 'B.Tech.') acquired by them through open and distance learning mode from the Thapar Institute of Engineering and Technology, Patiala, (for short, referred to as 'TIET, Patiala') are valid, recognised and should be treated at par with degrees granted to regular students who have undertaken such courses in TIET, Patiala and other recognised universities. UGC was refusing to treat the technical degrees issued by TIET, Patiala under distance learning mode as valid, primarily for the reason that the B.Tech. courses conducted by TIET, Patiala were without their approval and approval of the All India Council for Technical Education (for short, referred to as 'AICTE').

Decision and Observations

The Apex Court referred to ***Annamalai University Represented by Registrar* v. *Secretary to Government, Information and Tourism Department,***[10] wherein it was observed that no relaxation can be granted with regard to the basic things necessary for conferment of a degree and if the mandatory provisions are not complied with by an administering authority, the action would be void. Decision of the Court in *Annamalai University* had examined the interplay between the provisions of the UGC Act and Indira Gandhi National Open University Act, 1985 (for short, referred to as 'Open University Act') and the purported repugnance between the two. The UGC Act, it was observed, was enacted to make

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[10] (2009) 4 SCC 590

provisions for coordination and determination of standards in universities and for this purpose, the UGC was established by the Central Government in terms of Section 4 of the UGC Act with its powers and functions laid down in Chapter III. Section 12[11] of the UGC Act provides for functions of the UGC. Section 22[12] of the UGC Act relates to the rights of a university/deemed university/institution to confer degrees. In the case of *Annamalai*, it was observed:

> "42. The provisions of the UGC Act are binding on all universities whether conventional or open. Its powers are very broad. The Regulations framed by it in terms of clauses (e), (f), (g) and (h) of subsection (1) of Section 26 are of wide amplitude. They apply equally to open universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by UGC. The standards and the co-ordination of work or facilities in universities must be maintained and for that purpose required to be regulated. The powers of UGC under Sections 26(1)(f) and 26(1)(g) are very broad in nature. […]"

In *Annamalai University* ,a reference to an earlier judgment in ***State of Tamil Nadu* v. *Adhiyaman Educational and Research Institute*[13]** was made. Reference was also made to ***Osmania University Teachers' Association* v. *State of Andhra***

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[11] "12. **Functions of the Commission**.—It shall be the general duty of the Commission to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion and co-ordination of University education and for the determination and maintenance of standards of teaching, examination and research in Universities, and for the purpose of performing its functions under this Act, the Commission may—

xxx

(d) recommend to any University the measures necessary for the improvement of University education and advise the University upon the action to be taken for the purpose of implementing such recommendation;

xxx

(i) require a University to furnish it with such information as may be needed relating to the financial position of the University or the studies in the various branches of learning undertaken in that University, together with all the rules and regulations relating to the standards of teaching and examination in that University respecting each of such branches of learning;"

[12] **"22. Right to confer degrees**.—(1) The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under Section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees."

[13] (1995) 4 SCC 104

Pradesh[14] .Accordingly, in *Annamalai University* it was held that the UGC Act would prevail over the Open University Act, observing:

> "59. The provisions of the UGC Act are not in conflict with the provisions of the Open University Act. It is beyond any cavil of doubt that the UGC Act shall prevail over the Open University Act. It has, however, been argued that the Open University Act is a later Act. But we have noticed hereinbefore that the nodal Ministry knew of the provisions of both the Acts. The Regulations were framed almost at the same time after passing of the Open University Act. The Regulations were framed at a later point of time. Indisputably, the Regulations embrace within its fold the matters covered under the Open University Act also."

The Apex Court then referred to ***Orissa Lift Irrigation Corporation Limited-I***,[15] wherein reference was made to All India Council for Technical Education Act, 1989 (for short, referred to as 'AICTE Act') and distinction was drawn between 'technical education' and 'technical institution' as defined in Section 2(g) and 2(h) respectively to observe that functions of the AICTE stipulated under sub-clauses (a), (d), (e), (f), (l) and (n) of Section 10 of the AICTE Act are concerned with the broader facets of 'technical education', while functions enumerated under sub-clauses (k), (m), (p) and (q) deal with matters concerning 'technical institutions' and the functions as set out in sub-clauses (g) and (o) apply to both 'technical institutions' and universities imparting 'technical education'. Sub-clauses (b), (d) and (f) of Section 10 deal with, inter alia, coordination of the technical education in the country at all levels; promoting innovation, research and development, establishment of new technologies, generation, adoption and adaptation of new technologies to meet the development requirements; and promoting effecting link between technical education and systems and other relevant systems. Drawing on the distinction between 'technical education' and 'technical institution' and multifarious functions of the AICTE prescribed by Section 10 of the AICTE Act, it was held that the AICTE is the sole repository of power to lay down parameters or qualitative norms for 'technical education' and it would, therefore, not matter whether the term 'technical institution' would exclude a university/deemed to be university. What should be course content, what subjects should be taught and what should be the length and duration of the courses as well as the manner in which those courses be conducted is a part of the larger concept of 'technical education'. Any idea or innovation in

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[14] (1987) 4 SCC 671

[15] *Orissa Lift Irrigation Corporation Limited* v. *Rabi Sankar Patro,* (2018) 1 SCC 468

that field is also a part of the concept of 'technical education' and must, as a matter of principle, be in the exclusive domain of the AICTE.

On role of the AICTE and distance learning as a mode for acquiring B.Tech degrees, the Apex Court referred to *Orissa Lift Irrigation Corporation Limited-I* wherein it was held that:

> "48. Technical education leading to the award of degrees in Engineering consists of imparting of lessons in theory as well as practicals. The practicals form the backbone of such education which is hands-on approach involving actual application of principles taught in theory under the watchful eyes of demonstrators or lecturers. Face to face imparting of knowledge in theory classes is to be reinforced in practical classes. The practicals, thus, constitute an integral part of the technical education system. If this established concept of imparting technical education as a qualitative norm is to be modified or altered and in a given case to be substituted by distance education learning, then as a concept AICTE ought to have accepted it in clear terms. What parameters ought to be satisfied if the regular course of imparting technical education is in any way to be modified or altered, is for AICTE alone to decide. The decision must be specific and unequivocal and cannot be inferred merely because of absence of any guidelines in the matter. No such decision was ever expressed by AICTE. On the other hand, it has always maintained that courses leading to degrees in Engineering cannot be undertaken through distance education mode. Whether that approach is correct or not is not the point in issue. For the present purposes, if according to AICTE such courses ought not to be taught in distance education mode, that is the final word and is binding—unless rectified in a manner known to law. Even National Policy on Education while emphasising the need to have a flexible, pattern and programmes through distance education learning in technical and managerial education, laid down in Para 6.19 that AICTE will be responsible for planning, formulation and maintenance of norms and standards including maintenance of parity of certification and ensuring coordinated and integrated development of technical and management education. In our view, whether subjects leading to degrees in Engineering could be taught in distance education mode or not is within the exclusive domain of AICTE. The answer to the first limb of the first question posed by us is therefore clear that without the guidelines having been issued in that behalf by AICTE expressly permitting degree courses in Engineering through distance education mode, the deemed to be universities were not justified in introducing such courses."

Therefore, the Apex Court held that it is plainly clear that approval of the AICTE was mandatory for starting the aforesaid courses. Admittedly, approval of the AICTE was not obtained by TIET, Patiala.

In relation to the question of approval of the UGC, the Apex Court again mentioned ***Orissa Lift Irrigation Corporation Limited-I,*** wherein reference was made to paragraphs 4 and 5[16] of the 'Guidelines for Establishing New Departments Within the Campus, Setting Up of Off-Campus Centre(s)/Institution(s)/Off-Shore Campus and Starting Distance Education Programmes by the Deemed Universities' (hereinafter referred to as '2004 Guidelines'), issued by the UGC which dealt with the procedure to be followed by deemed to be universities offering distance education programmes.

According to Paragraph 4 it is crystal clear that post the 2004 Guidelines, every deemed to be university would require approvals of the UGC and DEC, for starting any degree course through open and distance learning mode. The condition of approval was mandatory. It is not the case of the petitioners or TIET, Patiala that the latter had taken prior approval of the UGC for the B.Tech. degrees obtained through distance learning mode. Paragraph 5 relates to *ex-post facto* approval of the UGC/DEC for continuation of distance education programmes/study centres started without specific approval of the UGC/DEC. Paragraph 5 is not applicable in the present case as the degree courses were started post enactment of the 2004 Guidelines.

Therefore, in view of the aforesaid statutory provisions and ***lack of prior approval of the UGC or AICTE, the Apex Court found that TIET, Patiala was not competent to award graduation degrees in technical courses via distance mode.***

[16] "4. **Distance education.—** The deemed to be university could offer the distance education programmes only with the specific approval of the Distance Education Council (DEC) and the University Grants Commission (UGC). As such, any study centre(s) can be opened only with the specific approval of Distance Education Council and UGC.
5. **Ex post facto approval.—** The deemed universities shall obtain the ex post facto approval of the GOI/UGC/DEC, whichever applicable within a period of six months in the following cases:

I. Continuation of all the departments opened in the campus of the deemed universities and off-campus study centre(s)/institutions/off-shore campus started without the prior approval of the UGC.

II. Distance education programme(s)/study centre(s) started without the specific approval of the DEC/UGC."

6. [Rajasthan High Court, Jodhpur and Another v. Neetu Harsh and Another, (2019 SCC OnLine SC 1119)]

Decided on : -29. 08.2019
Bench :- 1. Hon'ble Ms. Justice R. Banumathi
2. Hon'ble Mr. Justice A.S. Bopanna

(A candidate who has applied in the General Category cannot claim the benefit of Differently Abled category later on.)

Facts

The appellants in the present case had issued a Notification calling for applications for recruitment to the post of Civil Judge-cum-Judicial Magistrate in the Civil Judge Cadre for 72 posts. Among the same, two posts were kept reserved for persons with disabilities. The private respondent in the present case had responded to the said Notification but filed the application indicating her category as "General" and in the column provided for indication of the claim under the Differently Abled Category had mentioned "No". Hence, for all purposes private respondent herein was considered as a General category candidate and had accordingly appeared for the preliminary examination. On being declared successful she had appeared for the main examination and thereafter in the interview also as General category candidate without reliance being placed on the disability certificate. The result was declared on 15.11.2016. In the said list the marks obtained by all the candidates were disclosed. The petitioner had obtained 136 marks and she was placed at Serial No. 137. As against the two vacancies for the differently abled persons, one of the applicants who had obtained 138 marks was at Serial No. 57. It is subsequent thereto the private respondent made a representation dated 28.11.2016 with a request to consider her candidature under the category for Differently Abled persons as visually impaired and to provide the appointment. The said representation being taken note, the private respondent was informed that her candidature under the category of Differently Abled persons cannot be accepted. It is in that view the private respondent claiming to be aggrieved filed the writ petition seeking direction for consideration of her request. While seeking consideration under the Differently Abled category the claim is that the private respondent is having 80% disability as indicated in the certificate dated 05.07.2010 issued by the competent doctor.

Though it is not in dispute that the private respondent had indicated her category as "General" in the application, the High Court was of the view that even though a mistake was committed by the candidate, the representation submitted by her subsequently ought to have been considered sympathetically and in this regard it was observed that the object of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the "PWD Act") should have been kept in view. In that regard the position of law relating to the consideration under the said Act was taken note and the provisions contained therein not to fill up the vacancies by any other category but to carry forward the same was also taken into consideration.

Through the order dated 04.05.2017 the writ petition was allowed and the appellants herein were directed to consider the candidature of the private respondent herein for appointment on the post of Civil Judge-cum-Judicial Magistrate in the Civil Judge Cadre against the two vacancies reserved for disabled candidates in the Rajasthan Judicial Service Examination, 2016 and provide appointment as per merit of said category, if she is otherwise eligible. The said order and direction of the High Court is assailed herein primarily on the contention that the private respondent herein had not applied against the vacancies advertised for the physically challenged category but had applied as a General Category candidate and as per the merit list she was not entitled to be appointed as there were more meritorious candidates in the General Category and the appointment having been made, the process has been completed.

In that background the consideration required herein is as to whether the High Court was justified in its approach in applying the proposition of providing opportunity to Differently Abled Persons as provided under PWD Act, notwithstanding the fact that the issue presently related to the appointment of the Judicial Officer in the backdrop of the provisions contained in the Rajasthan Judicial Service Rules governing the same and the vacancy is filled up. Further, the issue also is as to whether the direction is justified when no application was filed seeking benefit of the reserved category.

<u>Decision and Observations</u>

The Apex Court stated that one aspect of the matter which is to be taken note is with regard to the contention of the respondent that the mandamus issued by the High Court is

sustainable since the vacancy could not have been filled up by any other category but ought to have been carried forward and in that circumstance if the provision as contained in Section 36 of PWD Act is kept in view, the action of the appellants herein in operating Rule 10(4) of the Rajasthan Judicial Service Rules, 2010 would not be sustainable. It is, therefore, contended by the respondent that in such circumstance in any event one post reserved for the Differently Abled person in the selection for the year 2016 should have been kept vacant to be carried forward to the next recruitment for want of candidate and in that background keeping in view Section 36 of the PWD Act, instead of carrying forward to the next recruitment the same being ordered to be filled up by an available Differently Abled person is justified. The Apex Court took note of the provision as contained in Section 36[17] of the PWD Act, 1995 and also the Rajasthan Judicial Service Rules, 2010 framed under the Notification[18] dated 18.01.2010 which is in exercise of the power conferred by Article 233 and 234 read with proviso to Article 309 of the Constitution of India.

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[17] **"Vacancies not filled up to be carried forward** - Wherein any recruitment year any vacancy under section 33 cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability.

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

[18] **"G.S.R.81**.- In exercise of the powers conferred by Article 233 and 234 read with proviso to Article 309 of the Constitution of India and all other powers enabling him in this behalf, the Governor of Rajasthan in consultation with the Rajasthan Public Service Commission and the High Court of Judicature for Rajasthan hereby makes the following rules regulating recruitment to the posts in, and the conditions and other matters related to the service of persons appointed to the Rajasthan Judicial Service, namely:-"

In the said Rajasthan Judicial Service Rules, Rule 10(4) reads as hereunder:

"(1) x x x x x x

(2) x x x x x x

(3) x x x x x x

(4) Reservation of posts for Persons with Disabilities as defined in the Rajasthan Employment of Disabled Persons Rules, 2000, shall be 3% category-wise which shall be horizontal and shall be available only at the time of initial recruitment. In the event of non-availability of eligible and suitable persons with disabilities in a particular year, the vacancy so reserved for them shall be filled in accordance with the normal procedure and such vacancies shall not be carried forward to the subsequent year.

The Apex Court noted that the Rule therefore framed is under the provisions of the Constitution of India which relates to the selection of the Judicial Officers, for which the yardsticks could be laid down in the Rules. The Apex Court then referred to ***V. Surendra Mohan v. State of Tamil Nadu***[19] and said :

> "In the said case, this Court in a matter relating to the selection for the post of Civil Judge (Junior Division) to the Tamil Nadu Judicial Service was confronted with a situation whereunder the Notification prescribed the percentage of disability at 40 to 50 % for partially blind and partially deaf for selection. The candidate who had assailed the action possessed the disability certificate mentioning the disability at 70 %. Since under Section 33 of the PWD Act, 1995 no restriction on disability to the extent of 40 to 50 % can be put, the restriction on disability as per the Notification was assailed before the Madras High Court which culminated in the appeal before this Court. In that context while considering the matter, this Court had adverted to the issue as to whether the restriction on disability is in breach of the provisions of the PWD Act, 1995 and is it to be set aside. In that context, the validity of the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 vis-a-vis the provisions of the PWD Act, 1995 was examined and the power under which the Rules 2007 (which is akin to the Rajasthan Rules, 2010) being framed, as empowered under the provisions of the Constitution was taken note with reference to the earlier judgments of this Court. Though the said decision is not in relation to Section 36 of the PWD Act, 1995, prima facie when it is noticed that Rule 10(4) is contained in the Rules, 2010 framed in exercise of the powers conferred under Article 233 and 234 read with proviso to Article 309 of the Constitution of India, the Rule being operated will be justified. As already noted, neither the notification nor the Rule were under challenge. In terms thereof the appellants on taking note that there is no other application/applicant seeking the appointment under the category reserved for Differently Abled Persons has filled up by selecting the next meritorious candidate from the other category. Hence in a circumstance where no challenge is laid to the Rule the action to that extent would be justified."

The Apex Court also took note of the fact that the private respondent in addition to indicating her category as 'General' has paid the fee of Rs. 250/- as applicable. Further, though the disability certificate dated 05.07.2010 was relied upon, there has been no material to indicate that the same was enclosed along with the application or produced till the

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Provided that the total number of posts reserved for all such categories in a direct recruitment shall not exceed 50% of the total vacancies."

[19] (2019) 4 SCC 237

completion of interview. On this point the Apex Court relied upon ***J&K Public Service Commission* v. *Israr Ahmad***[20] wherein it has been held:

> "5. We have considered the rival contentions advanced by both the parties. The contention of the first respondent cannot be accepted as he has not applied for selection as a candidate entitled to get reservation. He did not produce any certificate along with his application. The fact that he has not availed of the benefit for the preliminary examination itself is sufficient to treat him as a candidate not entitled to get reservation. He passed the preliminary examination as a general candidate and at the subsequent stage of the main examination he cannot avail of reservation on the ground that he was successful in getting the required certificate only at a later stage. The nature and status of the candidate who was applying for the selection could only be treated alike and once a candidate has chosen to opt for the category to which he is entitled, he cannot later change the status and make fresh claim. The Division Bench was not correct in holding that as a candidate he had also had the qualification and the production of the certificate at a later stage would make him entitled to seek reservation. Therefore, we set aside the judgment of the Division Bench and allow the appeal."

Also, in ***Registrars General, Calcutta High Court* v. *Shriniwas Prasad Shah***[21] the Apex Court disallowed the claim in a case where in the application the category of reservation was indicated but certificate was not produced and the fee applicable to general candidate was paid.

Further, the Apex Court stated that, it is no doubt true that the employment opportunities to the differently abled persons was to be provided as a matter of right when a case is made out and there was no need for sympathetic consideration. However, in the instant facts when the claim was not made and there were debatable issues, the nature of direction issued by the High Court in any event was not considered as justified.

[20] (2005) 12 SCC 498

[21] (2013) 12 SCC 364