Dr. Ram Singh Saini

Vs

Dr. H. N. Bhargava

Civil Appeal No. 1588 of 1974

(A. Alagiriswami, N. L. Untwalia JJ)

28.07.1975

JUDGMENT

ALAGIRISWAMI, J. –

1. This appeal raises the question of the validity of the appointment of the appellant as a Professor of Zoology in the University of Saugar.

2. In pursuance of an advertisement dated May 31, 1971 by the University calling for applications for the post of Professor of Zoology five persons including the appellant and the respondent applied. A committee of selection was constituted in accordance with Section 47-A of the Saugar University Act, 1946 to consider these applications. On December 4, 1971 the Selection Committee recommended the name of the appellant to the Executive Council, which was competent to make the appointment. Under the provisions of Section 47-A the Executive Council has to make the final selection from among persons recommended by the Selection Committee. But where the Executive Council proposes to make appointment otherwise in accordance with the order of merit arranged by the committee the Executive Council should record its reasons in writing and submit its proposal for the sanction of the Chancellor. In the present case the appellant being the only person whose name had been recommended had ordinarily to be appointed. The Executive Council however, refused to accept the recommendation of the Selection Committee on the ground that it would lead to administrative and disciplinary complications. Thereupon the appellant filed a writ petition for quashing the resolution of the Executive Council and it was quashed by the High Court of Madhya Pradesh. Thereafter on February 18, 1973 the Executive Council appointed the appellant as Professor of Zoology. On July 9, 1973 the respondent filed a writ petition for quashing the appellant's appointment. The High Court of Madhya Pradesh quashed the resolution dated February 18, 1973 appointing the appellant as Professor of Zoology and indicated that the University may advertise the post afresh it they desire to fill in the vacancy. The ground on which the resolution was quashed was that appointment was made more than a year after the recommendation of the Selection Committee was made and this was not permissible. The High Court relied upon the Statue 21-AA of the Statutes of the University made under Section 31(aa) of the Act for this conclusion. This section enables statutes to be made among other things for the mode of appointment of teachers of the University paid by University paid by University. The statute in question reads as follows :

"Statute No. 21-AA"

> (1) All vacancies in teaching posts of the University [except those to be filled by the promotion as provided for under sub-section (aaa) of Section 31] shall be duly advertised and all applications will be placed before the Committee of Selection as

provided for under sub-section (2) of Section 47-A of the University of Saugar Amendment Act, 1965.

(2) If no appointment is made to a post within one year from the date of the nomination by the Selection Committee then the post shall be readvertised before making an appointment as provided for under (1) above.

3. Quite clearly the appointment made more than a year after the dated of nomination by the Selection Committee is not in accordance with the Statute 21-AA. The requirement of the statute is that the post should be advertised before making an appointment if the appointment is not made within a year of the Selection Committee's recommendation.

4. On behalf of the appellant it was argued that the statute is directory and not mandatory that in any case the statute is beyond the rule-making power conferred by Section 31(aa). A number of decisions were relied upon in support of the submission that where a provision of law lays down a period within which a public body should perform any function that provision is merely directory and not mandatory. The question whether a particular provision of a statute is directory or mandatory might well arise in a case where merely a period is specified for performing a duty but the consequences of not performing the duty within that period are not mentioned. In this case clearly the statute provides for the contingency of the duty not being performed within the period fixed by the statute and the consequence thereof. This proceeds on the basis that if the post is not filled within a year from the date of the nomination by the Selection Committee the post should be readvertised. So unless the post is readvertised and an appointment is made from among those persons who apply in response to the readvertisement cannot be said to be valid. Though the reason for the delay in making the appointment was the wrongful refusal of the Executive Council to act in pursuance of the recommendation of the Selection Committee and the pendency of the writ petition filed by the appellant in the High Court that does not in any way minimise the effect of sub-rule (2) of Statute No. 21-AA. The position may well have been otherwise if there had been a stay or direction prohibiting the Executive Council from making the appointment. Such is not the case here. We do not therefore think it necessary to discuss the various decisions relied upon by the appellant. Nor can we agree that the statute in question is beyond the rule-making power. Under Section 31(aa) statutes can be made with regard to the mode of appointment of teachers of the University. The statute provides that the appointment should be made after the post is advertised and the applications received considered by a committee of selection. It also provides that if no appointment is made to the post within one year from the date of nomination by the Selection Committee the post shall be readvertised. The rule therefore certainly relates to the mode of appointment. It cannot be said to be unrelated to the mode of appointment. It apparently proceeds on the basis that after the lapse of a year there may be more men to choose from. Unless it could be said that the rule has no relation to the power conferred by the rule-making power it cannot be said to be beyond the rule-making power. Such is not the position here. We are also unable to agree that the statute is in conflict with or in derogation of the provisions of the statute.

5. It was then argued on behalf of the appellant that the post of the Professor or Zoology is not a public office and therefore a writ of quo warranto cannot be issued. The decisions in Dr. P. S. Venkatasway v. University of Mysore (AIR 1964 Mys 159) and S. B. Ray v. P. N. Banerjee (72 CWN 50) were relied upon the contend that the post in question is not a public office and therefore no writ of quo warranto can issue. But it should be noticed that no writ of quo warranto was issued in this case. What was issued was a writ of certiorari as the order of the High Court only quashed then resolution of the Executive Council dated February 18, 1973. In his petition the respondent had

asked for (1) a writ of certiorari, (2) a writ of mandamus and (3) a writ of quo warranto. What was issued was a writ of ceritorari. The question whether the office was could issue in the circumstances of this case and whether the office was a public office was not raised or argued before the High Court. Indeed it was not even raised in the special leave petition filed by the appellant. We cannot therefore decide the present appeal on the basis that what was issued was a writ of quo warranto.

6. It should also be noticed that the post has since been readvertised and it is open to the appellant to apply again.

7. We see no merits in this appeal and it is accordingly dismissed. But in the circumstances of the case there will be no order as to costs.

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