

Court No. - 49**Reserved
A.F.R.****Case :-** WRIT - A No. - 6849 of 2022**Petitioner :-** Dr. Vikas Yadav**Respondent :-** State of U.P. and others**Counsel for Petitioner :-** Hritudhwaj Pratap Sahi, Pradeep Kumar Rai, Sankalp Narain**Counsel for Respondent :-** Avneesh Tripathi, C.S.C.

Connected with

Case :- WRIT - A No. - 14778 of 2019**Petitioner :-** Dr. Vikas Yadav**Respondent :-** State of U.P. and others**Counsel for Petitioner :-** Devendra Kumar, Krishna Mohan Misra, Kunal Ravi Singh, Manjari Singh, Shivam Yadav**Counsel for Respondent :-** Avneesh Tripathi, C.S.C.**Hon'ble J.J. Munir, J.**

1. By this common judgment, we propose to decide the present writ petition and connected Writ-A No.14778 of 2019. Writ-A No.6849 of 2022 has been heard as the leading case. Facts shall be noticed from the leading case.

2. This petition is directed against an order of the Vice Chancellor, Harcourt Butler Technical University, Kanpur dated 19.04.2022, to the extent alone that it excludes the petitioner and his Department wholesomely from the benefit of consideration for promotion under the Career Advancement Scheme (for short, 'CAS'). The petitioner has further prayed that this Court do issue a *mandamus*, commanding the Vice Chancellor to consider his case for extension of the benefit of CAS, in the same manner, as in the case of teaching staff of other Departments of the University.

3. The Harcourt Butler Technical University, Kanpur (for short, 'the University') was established by an Act of the State

Legislature, called the Uttar Pradesh Harcourt Butler Technical University Act, 2016 (U.P. Act No.11 of 2016) (for short, 'the Act of 2016'). Prior to its incorporation, the University had a predecessor establishment, called the Harcourt Butler Technological Institute, Kanpur (for short, 'the Institute'). The Institute was affiliated to the Kanpur University. The affairs of the Institute were controlled and regulated by a Society, called the Harcourt Butler Technological Institute (Kanpur) Society (for short, 'the Society'). The Society was registered under the Societies Registration Act, 1860 and had its bylaws to manage its affairs, including the Institute.

4. The petitioner applied for the post of a Physical Training Instructor advertised by the Institute *vide* advertisement dated 27.01.2006. In due course, he was selected and appointed as a Physical Training Instructor with the Institute *vide* letter of appointment dated 18.01.2007. At the time, the petitioner was selected and appointed, the bylaws of the Institute included the post of the Physical Training Instructor in the cadre of the academic staff. There were broadly five cadres of staff serving the Institute. These were – (a) academic and administrative; (b) academic; (c) teaching supporting; (d) technical; and, (e) administrative non-teaching. A moreful reference to the relevant bylaw, defining the posts included within the cadre of the academic staff and the other cadres, shall be made later in this judgment.

5. According to the petitioner, he joined service on 03.02.2007 and his record is unblemished. The cause of action for the petitioner arose as he was denied the same benefits, including the pay-scale that were given to the other teaching staff of the University. Aggrieved by this denial, which the petitioner calls arbitrary, he instituted Writ-A No.14778 of 2019

(the connected writ petition) against the University, praying that a *mandamus* be issued to the University to grant the petitioner status/ designation as per U.G.C./ A.I.C.T.E. norms, including the grade pay of Rs.6000/- (Sixth Pay Commission). He also claimed arrears, promotion etc. and other benefits, attached to the post, since the time of his initial appointment. These benefits were all claimed by the petitioner, treating himself to be a part of the cadre of the teaching staff.

6. A notice of motion was issued in the said writ petition, but no counter affidavit was filed, in answer, on behalf of any of the respondents.

7. Writ-A No.14778 of 2019 was directed to come up along with the leading writ petition *vide* order dated 12.05.2022 and treated as a connected case *vide* order dated 12.12.2022. The said writ petition is still pending.

8. Pending the last mentioned writ petition, on 06.02.2020 a letter was sent by the Vice Chancellor of the University to all Heads of the Departments saying that they were required to submit the details of all teaching staff serving in their respective Departments in the proper format, so that benefit of the CAS may be extended to them. Acting on the Vice Chancellor's letter of 6th February, last mentioned, the petitioner moved a representation dated 29.02.2020 to the Registrar of the University, filling in his application/ representation in the requisite format; by this application/ representation, the petitioner sought extension of benefit of the CAS.

9. No action was taken by the Vice Chancellor or any other Authority of the University on the above mentioned application. The Registrar of the University addressed a letter to all Heads of Departments of the University, requiring them to submit

details of all the teaching staff serving in their respective Departments, for the purpose of consideration under the CAS, as directed by the Vice Chancellor. The petitioner made a representation dated 10.09.2021 in the prescribed format, seeking extension of the benefit of the CAS. The petitioner says that much to his dismay, the Vice Chancellor passed an order dated 19.04.2022, requiring the Registrar to issue interview letters to teaching staff of all Departments, excluding the petitioner's Department, to wit, the University's Student Activity Council, calling those invited to interview to appear before the Selection Committee for a consideration for promotion under the CAS. The petitioner was excluded from the list of interviewees for the CAS. It is to the extent that the Department, which the petitioner serves, has been excluded from consideration for promotion under the CAS, including the petitioner that he seeks to challenge the Vice Chancellor's order dated 19.04.2022.

10. It may be remarked here that for reasons, more than obvious, the cause of action involved in Writ-A No.14778 of 2019 stands subsumed in that involved in the present writ petition.

11. A notice of motion was issued *vide* order dated 12.05.2022. In course of time, parties have exchanged affidavits. The petition was admitted to hearing on 26.04.2024, which proceeded forthwith on that day, and, thereafter, on a number of days. On 08.01.2025, judgment was reserved.

12. Heard Mr. V.K. Singh, learned Senior Advocate assisted by Mr. Pradeep Kumar Rai, learned Counsel for the petitioner, Mr. Avneesh Tripathi, learned Counsel appearing on behalf of respondent Nos.2 and 3 and Mr. Girijesh Kumar Tripathi,

learned Additional Chief Standing Counsel appearing on behalf of the State.

13. The moot question involved in this petition is whether a Physical Training Instructor, serving in the University, belongs to the academic cadre and a teacher, entitling him to the benefit of CAS.

14. Mr. V.K. Singh, learned Senior Advocate has advanced elaborate submissions to canvass the point that the post of a Physical Training Instructor, though prior to 27.11.1990, was a technical post under the bylaws of the Institute then in force, the bylaws were amended by the Board of Governors on 27.11.1990, including it in the cadre of teaching posts. The Institute, at the relevant time, was governed by the Society and the amended bylaws were sent to the Registrar, Firms, Societies and Chits. He submits that there is no requirement of registration of the bylaws and upon communication of the amended bylaws by the Board of Governors, acting for the Society, then governing the University's predecessor, to wit, the Institute, the bylaws came into force. He has been at pains to point out that after the incorporation of the Institute and its Society into a University under the Act of 2016, Section 46(1) provides that the First Ordinance of the University shall be made by the Executive Council, and so long as the First Ordinance is not made, the rules, memorandum and bylaws of the Society shall have legal force. The bylaws etc. of the Society, that would have force in the University, would be those as were immediately in force before the commencement of the Act of 2016.

15. He has further drawn the Court's attention to Section 3(5) of the Act of 2016 to submit that except for the posts of the

Director, the Deputy Director, the Registrar, the Deputy Registrar and the Assistant Registrar of the Institute, all other persons employed by the Institute shall continue on the same terms and conditions, notwithstanding anything to the contrary contained in any other provisions of the Act of 2016. He also emphasizes that under Section 3(5), the changed terms of employment under the Act would apply to an employee of the Institute, who becomes an employee of the University upon incorporation under the Act of 2016, only if he opts for the University's terms and conditions of employment.

16. It is submitted by the learned Senior Advocate that since the University have still not made their First Ordinance, the effect of Section 46(1) of the Act of 2016 would be that the bylaws of the Institute would continue to govern and regulate the service conditions and status etc. of the petitioner and other employees of the University. Since, the petitioner, under the bylaws dated 27.11.1990 framed by the Institute, stands included in the academic staff, the petitioner's status as a member of the academic staff of the University, would continue. It could change only if the University were to frame ordinances and regulations different from the bylaws and the petitioner opted to be governed by the University's terms and conditions of employment. Since neither of the things have happened, the petitioner is entitled to be treated as part of the University's academic staff, that is to say, a teacher and dealt with as such in the matter of his service entitlement as to promotion etc.

17. It is particularly argued by Mr. V.K. Singh that the petitioner's appointment was made after enforcement of the new bylaws made by the Institute, i.e. on 27.11.1990, and according to the classifications of posts mentioned under the amended bylaws, the post of a Physical Training Instructor

would fall in the category of academic staff, a status that is protected for the petitioner by virtue of Section 46(1) of the Act of 2016. It is also argued by the learned Senior Advocate that the duties and functions assigned to the petitioner are akin to those of the teaching staff in the University. He has enumerated during the hearing some of those functions and duties in order to drive home the point that the petitioner is substantially, after all, a teacher – a part of the academic staff of the University.

18. Resisting the petitioner's claim, it is submitted by Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel, appearing on behalf of the State and Mr. Avneesh Tripathi, learned Counsel appearing on behalf of the University, that the petitioner has been appointed on 19.10.2006 in terms of Advertisement No.2 of 2006 to a non-teaching post in the pay scale of Rs.8000-275-13500/-. He has received salary all along relating to a non-teaching post approved by the Finance Department of the State Government. It is argued that despite classification of the posts, to which the petitioner was appointed as a non-teaching post, he claims benefit of the CAS, which is meant exclusively for teachers. The petitioner is in no way a teacher under the Act of 2016 nor the post sanctioned by the State Government, to which he has been appointed a teaching post. The impugned order dated 19.04.2022, excluding the petitioner from consideration under the CAS, regarding him a non-teacher, is perfectly valid in law. It is emphasized by Mr. Girijesh Kumar Tripathi that the post of Physical Training Instructor was advertised and classified as a non-teaching and non-academic post in the year 2006, when the petitioner was appointed. The petitioner accepted these terms at the time of joining. He is now estopped from saying that he, under the bylaws which have force of law, entitled to be treated a teacher

and considered for promotion under the CAS.

19. It is argued by Mr. Girijesh Kumar Tripathi that the petitioner's claim is untenable as the post of Physical Training Instructor has already been classified as non-teaching and non-academic. Any amendment or decision by the University to re-classify the post as academic lacks validity, inasmuch as no prior approval from the State Government, which is mandatory for such a change, was ever sought or granted. The State Government is not liable for the University's unilateral change in status of the post, without the Government's consent. The matter of the post of Physical Training Instructor being re-classified as an academic post, through an amendment to the Society's bylaws in the year 1990, which govern the Institution, was never brought before the State Government for approval, much less approved. The post of Physical Instructor has remained a non-teaching and non-academic post under the State Government's classification. It is also emphasized that in the year 2015, a proposal by the University to re-name the post of Physical Instructor as Assistant Director (Physical Education) was rejected by the State Government through their order dated 09.07.2015. It is, in the last, submitted that the petitioner, who holds a non-teaching post, is ineligible for promotion under the CAS or to receive any remuneration as such, which is reserved exclusively for the teaching staff.

20. We have carefully considered the submissions advanced on behalf of the learned Counsel for the parties.

21. It is true that in the advertisement dated 21.07.2006, the petitioner's post was advertised as part of teaching supporting/ administrative post and not a teaching post. Rather, the teaching posts were separately advertised in the same

advertisement in Part A whereas teaching supporting/ administrative post, to which the petitioner belonged, was advertised in Part B. The petitioner was appointed apparently, according to the advertisement, on a non-teaching post. But the question is, would the advertisement be conclusive about the nature of the post held. If under the Act, Ordinance, Regulations applicable to the University or the bylaws applicable to the Institute when the petitioner was appointed, the post against which the petitioner was appointed, is a teaching post, its description in the advertisement would apparently not prevail.

22. The principle that in case of an inconsistency between an advertisement and the recruitment rules, the rules prevail, has come to be well accepted. Reference in this connection may be made to **Malik Mazhar Sultan and another v. U.P. Public Service Commission and others, (2006) 9 SCC 507**, where it has been held:

"21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1-7-2001 and 1-7-2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules."

(emphasis by Court)

23. **Malik Mazhar Sultan** (*supra*) has been followed by a Bench of our own Court in **Smt. Madhumita Pandey v. Union**

of India and others, 2024 (12) ADJ 466 (DB), where it has been held:

"15. To address the said question, we are required to have a quick survey of the statutory rules, advertisement and the notifications issued from time to time on the said subject. Record reveals there exist Service Rules for Postal Gramin Dak Sevak for recruitment of Sub Postmasters and Branch Postmasters prescribing qualification of matriculation or equivalent examination. Though we find that the advertisement does not speak about any equivalence barring the qualification of matriculation but what is relevant is the statutory rules which would in all eventualities prevail in case of any inconsistency with the advertisement where the recruitment rules prescribe for equivalent qualification. The said aspect is no more res integra as the same stands crystallized in the case of **Ashish Kumar v. State of Uttar Pradesh, 2018 (3) SCC 55**, wherein the following was observed.-

"27. Any part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescription. Thus, looking to the qualification prescribed in the statutory rules, the appellant fulfils the qualification and after being selected for the post denying appointment to him is arbitrary and illegal. It is well-settled that when there is variance in the advertisement and in the statutory rules, it is the statutory rules which take precedence."

16. Recently the Hon'ble Supreme Court in the case in **Civil Appeal No. 152 of 2022 the Employee State Insurance Corporation Ltd. v. Union of India** decided on 20.1.2022 held as under :

"It is settled law that if an advertisement is inconsistent with the recruitment rules, the rules would prevail, as held by this Court in **Malik Mazhar Sultan and another v. U.P. Public Service Commission and others, 2006 (9) SCC 507.**"

17. Applying the principles of law as culled out in the above noted decision in the facts of the present case, an irresistible conclusion stands drawn that the recruitment rules will have precedence over the advertisement and the advertisement is to yield before the recruitment rules."

24. It is true that the above principles have been laid down in the context of a conflict about the prescribed qualification or the eligibility age between the recruitment rules and the advertisement and here the conflict is between the advertisement and rules that speak about the nature of the post, to which the petitioner was appointed. If the rules say that the nature of the post is of one kind and the advertisement says it is of the other, the principle as to overriding effect of the recruitment rules as to qualification etc., *vis-a-vis* the advertisement, would equally apply to a case of this kind.

25. The next question to be examined is: What is the nature of the post held by the petitioner, teaching or non-teaching? It is not in cavil of any kind that the petitioner was appointed a Physical Training Instructor after applying on the basis of an advertisement that mentioned the post to be a non-teaching one. We have already noticed that the University had for its predecessor the Institute, which was governed by a Society registered under the Societies Registration Act. It is not in dispute also that the bylaws of the Society, registered on 26.03.1965, provided for classification of members of the staff, marshalling them into five categories. Bylaws 2(a), 2(b), 2(c), 2(d) and 2(e) spelt out these five categories as: (a) Academic & Administrative; (b) Academic; (c) Industrial Research Wing; (d) Technical; and, (e) Administrative, respectively. The post of a Physical Training Instructor, under the bylaws dated 26.03.1965, fell under the Technical Category. A copy of the relevant part of these bylaws are annexed as Annexure No.1 to the supplementary rejoinder affidavit. The classification of the Institute's staff was re-structured *vide* bylaws dated 27.11.1990 passed by the Board of Governors of the Institute, which were duly submitted to the Registrar, Firms, Societies and Chits. A

perusal of bylaw 2 of the amended bylaws of the Institute dated 27.11.1990 shows the changed classification of members of the staff as follows:

"2. CLASSIFICATION OF MEMBERS OF THE STAFF OF THE INSTITUTE

Except in Case of employees paid from contingencies, the members of the staff of the Institute shall be classified as follows:

(a) Academic and Administrative.

i) Principal/Director

(b) Academic

i) Professor including Professor, Training & Placement

ii) Associate Professor, if any,

iii) Reader/Assistant Professor,

iv) Lecturer,

v) Workshop Superintendent,

vi) Asstt. Workshop Superintendent

vii) Physical Training Instructor, if any

viii) Teaching/Research Assistant

ix) Such other academic staff as may be decided by the Board.

(c) Teaching supporting

i) Computer Systems Manager

ii) Computer Programmer

iii) Technical Assistants

iv) Demonstrators

v) Workshop Instructors/Instructors

vi) Computer Operators

vii) Computer Data Operators

(d) Technical

i) Forman,

ii) Supervisor (Workshop),

iii) Mechanics

- iv) Horticultural Assistant, if any
- v) Draftsman, and
- vi) Such other technical staff as may be decided by the Board.

(e) Administrative (Non-Teaching)

- i) Registrar
- ii) Deputy Registrar
- iii) Assistant Registrar/Head Assistant
- iv) Accounts Officer,
- v) Audit Officer, if any,
- vi) Stores or Purchase Officer, if any,
- vii) Estate Officer, if any,
- viii) Medical Officer, if any,
- ix) Engineer (Executive/Assistant)
- x) Librarian,
- xi) Deputy Librarian, if any,
- xii) Assistant Librarian, if any,
- xiii) Such other administrative staff as may be decided by the Board."

26. It is evident that under the amended bylaws of the Institute, amended way back on 27.11.1990, the post of Physical Training Instructor was included in the cadre of teaching staff after removing it from the Technical Cadre. It is not disputed by either party that these amended bylaws of 1990 were framed by the Institute. It is, however, strenuously argued on behalf of the State and the University by their learned Counsel that the bylaws dated 27.11.1990 never took effect for reason that these were not registered by the Registrar, Firms, Societies and Chits. In the counter affidavit, that has been filed by the University, a photostat copy of a certified copy of the bylaws issued by the Deputy Registrar, Firms, Societies and Chits, Kanpur has been appended. A perusal of this copy shows that while this document was on record of the Deputy

Registrar, Firms, Societies and Chits, Kanpur, there is a rubber stamp seal, endorsing the fact that this document is placed on the Society's file, but not registered under the relevant sections of the Societies Registration Act, 1860.

27. Now, an amendment to the bylaws once duly passed, if not registered by the Registrar of Societies, would render them without legal force, is the next issue to be examined. The question, which this issue postulates, is no longer *res integra* in view of **Managing Committee, Khalsa Middle School and another v. Mohinder Kaur (Smt) and another, 1993 Supp (4) SCC 26**. In **Khalsa Middle School** (*supra*), it has been held by the Supreme Court:

"10. Apart from the requirement contained in Section 12-A for registration of the change of name of a society with the Registrar, there is no requirement in the Societies Registration Act which requires registration of any amendment in the Memorandum of Association or the Rules and Regulations of a society to be registered with the Registrar. Even in the Companies Act, 1956 a distinction is made in the matter of alteration of the Memorandum of Association and alteration of the Articles of Association. Under Section 18 of the Companies Act, it is necessary that the alteration of Memorandum of Association be registered with the Registrar of Companies within the prescribed period and the alteration takes effect from the date of its registration and under Section 19(1), it is provided that the alteration shall have effect only if it has been duly registered in accordance with the provisions of Section 18. There is no such requirement with regard to registration of the alteration in the Articles of Association of the company. Here we are concerned with the amendment in the Rules and Regulations of the Society. In the absence of any requirement in the Societies Registration Act that the alteration in the Rules and Regulations must be registered with the Registrar, it cannot be held that registration of the amendment is a condition precedent for such an alteration to come into effect."

28. There is nothing brought to the notice of the Court about

any statutory change in the State of Uttar Pradesh to Sections 12A to 12D or elsewhere, that may have the effect of altering the statutory basis in the context whereof the Supreme Court laid down the above noted principle in **Khalsa Middle School**. The inevitable consequence is that there is no requirement whatsoever for the Registrar to register a change to the bylaws of the Society or its rules or regulations by whatever name called. Also, the absence of registration of any amendment to the bylaws of a Society, made by its managing body would not deprive the amended bylaws of their legal efficacy and force. We, therefore, have to conclude that the bylaws dated 27.11.1990, notwithstanding non-registration by the Registrar, Firms, Societies and Chits, would still have legal force and bind parties as well as Authorities obliged to act under the amended bylaws.

29. When the Institute was effaced out of existence and born as a University upon incorporation under the Act of 2016, the bylaws in force in the Institute, relating to classification of members of the staff, were those made on 27.11.1990, which classified Physical Training Instructor under bylaw 2(b) vii) under the category of academic staff.

30. Section 46(1) of the Act of 2016 provides:

"46. (1) The First Ordinances of the University shall be made by the Executive Council, and so long as the First Ordinances are not made, the Rules, Memorandum, Leave Regulations Conduct Rules and Bye Laws of Harcourt Butler Technological Institute (Kanpur) Society shall be in force before the commencement of this Act. The students rules shall be same as those mentioned in Information Brochure of the preceding Academic Session just before the commencement the Act in the absence of First Ordinances."

31. At the same time, Section 3(5) of the Act of 2016 says:

"3. Incorporation of the University.-

(5) Every person employed by Harcourt Butler Technological Institute, Kanpur, immediately before the commencement of this Act, shall hold his office or service in the University, except to Director, the Deputy Director, the Registrar, the Deputy Registrar and the Assistant Registrar, on the same terms and conditions, notwithstanding anything to the contrary contained in any other provisions of this Act and unless changed, including leave, pension, gratuity, provident fund etc. and other matters, as he would have held by him before the commencement of this Act, shall continue to hold as such unless and until his employment is terminated or he opts for the University's terms and conditions of employment;"

32. A conjoint read of bylaws 2. (b) vii) of the bylaws of 1990 made by the Institute, together with Sections 46(1) and 3(5) of the Act of 2016, would lead to the inevitable conclusion that so long as the First Ordinances of the University are not made, the rules, memorandum and bylaws of the Institute, as in force before the commencement of the Act of 2016, shall continue to remain in force in the University. As far as an employee appointed to the Institute, immediately before the commencement of the Act of 2016 is concerned, he will hold office or service in the University on the same terms and conditions as he would have held before commencement of the Act, notwithstanding anything to the contrary contained in any other provision of the Act of 2016. There are, thus, two distinct propositions that emerge from a conjoint reading of the bylaws and the two provisions of the Act of 2016. The first is about the conditions of service of persons in the University, who were employed before incorporation of the Institute into the University under the Act of 2016, and, the other, is about persons, who were employed in the University after its incorporation. We need not go into the question as to what would be the effect of the bylaws relating to service as regards persons who were employed by the University after its

incorporation for that does not arise on the facts here.

33. So far as persons employed by the Institute before incorporation thereof as a University under the Act of 2016 are concerned, the provisions of Section 3(5) of the Act of 2016 are unambiguous. The terms and conditions of service for persons employed in the Institute after incorporation into the University would remain unchanged and they would hold their post on the same terms and conditions as applicable prior to incorporation. The terms and conditions of service of employees of the Institute, who have subsequently become employees of the University, are insulated from any change to their conditions of service, provided under the Act of 2016, by a *non obstante clause* occurring in Section 46(1). Thus, for employees of the Institute, who have come into harness of the University upon the Institute's incorporation under the Act of 2016, the bylaws governing their terms and conditions are unaffected by any provision of the Act, providing to the contrary. The bylaws governing their terms and conditions of service are immutable.

34. Since the petitioner, under the amended bylaws of 1990, held a post that was classified as academic, the provisions to the contrary in the Act would not affect the petitioner's status. It is no doubt true that under Section 2(20) of the Act of 2016, a teacher is defined as follows:

"2. Definitions.- In this Act, unless the context otherwise requires,-

(20) "Teacher" means a Professor, Associate Professor or Assistant Professor working in the University;"

35. The said definition would not certainly include a Physical Training Instructor, but, as already remarked, the petitioner's position as a member of the academic staff and *a fortiori* a

teacher in the University, cannot be questioned because for him being under bylaw 2. (b) vii), classed as a member of the academic staff along with professors, associate professors, assistant professors, lecturers etc. To the above extent, the definition of a teacher under Section 2 (20) of the Act of 2016 would have to yield to the *non obstante clause* under Section 46(1) of the said Act.

36. There is no doubt, a very persuasive submission made by Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel on behalf of the State, when he says that there are no lectures or teaching activity, or teaching assignments given to a Physical Training Instructor in the University, which does not run a course in Bachelor of Physical Education (BPEd) or Master of Physical Education (MPEd). He submits that the University is an all out technical University, which teaches engineering alone to their students, leading to degrees in engineering; not physical education. The argument though attractive, a little more than on the first blush, but, regrettably, cannot be accepted.

37. Physical education may not be a subject, which is of the essence of a degree in engineering of any grade, which the University confers after a candidate has successfully pursued his course of study, but it is nevertheless a part of the academic curriculum. Education is not acquisition of proficiency in a particular subject, but a process which leads to realization of the individual's personality. It is a multifaceted process; not a commando target to be hit and won. In paragraph No.43 of connected Writ-A No.14778 of 2019, the petitioner has pleaded specifically the nature and particulars of his duties. Paragraph No.43 of Writ-A No.14778 of 2019 reads:

"43. That petitioner respectfully submits that the duties and functions assigned to him are akin to the duties of the teaching staff in the institution he has multifarious duties some of which are as under:-

A) To arrange games and sports daily in the evening for the students.

B) To look after the procurement of sports materials and maintenance of the sports grounds.

C) To arrange inter branch and Inter collegiate tournaments.

D) To accompany the students teams of Inter University/Inter Club/ District Level Tournaments

E) To teach the students about the rules of various games and sports

F) To teach the students various skills technique and tactics of these games apart from the rules applicable to these games.

G) Conduct Induction programme (As per AICTE Mandate) of new entrant of institutions/ Universities. The programme is compulsory for (Improving Student learning (1.1.2.1) for first year B.Tech in sports classes of 1.30 hours daily and compulsory for all 1st Year B.Tech Students.

H) Award General Proficiency marks to students on the basis of evaluation in sports and related games and activity which is mentioned in every B.Tech Student mark sheet in term of G.P. Marks in support of above said contention petitioner is herewith attaching correspondents between him and University authority whereby he is being asked to provide G.P. Marks this correspondence is dated 4.6.2018, 21.06.2018, 11.12.2018 and 2.1.2019 which all are jointly being attached herewith and marked as **Annexure No.27** to this petition."

38. A letter dated 02.01.2019, annexed to the aforesaid writ petition as Annexure No.27, shows that the petitioner evaluates students of the B.Tech. and MCA courses of the University for general proficiency under student activities, awarding them marks, which are claimed to be in partial fulfillment of their courses leading to a degree. The letter dated 02.01.2019, addressed by the petitioner to the Dean Student's Welfare of the University, reads:

“University Students Activity Council
Harcourt Butler Technical University
Kanpur-203002
Ref. No. 869/USAC/2019
Date: 02/01/2019

Dean Students' Welfare
H.B.T.U., Kanpur

In partial fulfilment of Academic Programmes (B.Tech. & MCA) of our university, the evaluation of general proficiency marks under student activities is attached herewith in compliance to your letter no. 72/अ० छा० क०/2018 dated 11/12/2018.

The award of these marks are based on student participation/performance in Inter University/ University/ Club/ Inter Branch level competition, through out odd semester 2018-19.

Sd./- illegible
02/01/18

(Dr. Vikas Yadav) Physical Instructor

Enclosure: General proficiency marks list of students (odd semester 2018-19”

39. No counter has been filed by the respondents in the connected writ petition, controverting the allegations in paragraph No.43 or the contents of the letter carried in Annexure No.27 to the connected writ petition. In the various affidavits filed in the present writ petition also, the nature of duties, that fall on the petitioner's shoulder, have not been enumerated much less to show that these are absolutely non-academic and do not contribute towards the students' education, who are otherwise pursuing courses in engineering. It would be apposite to refer here to **P.S. Ramamohana Rao v. A.P. Agricultural University and another, (1997) 8 SCC 350**, where the definition of a teacher fell for consideration of the Supreme Court in the context if a Physical Education Director in the Andhra Pradesh Agricultural University was a teacher within the meaning of Section 2(n) of the Andhra Pradesh Agricultural University Act, 1963. The question arose in the context of a cause, where the writ petitioner, who was a Physical Education Director, claimed that he was entitled to continue in service till the age of 60 years, the prescribed age of superannuation for teachers, but was being wrongfully made to retire at the age of

58 years, treating him as an officer of the non-teaching staff. No doubt, in **P.S. Ramamohana Rao** (*supra*), the definition of a teacher under Section 2(n) of the Andhra Pradesh Agricultural University Act, 1963 was wide like many other statutes and noticed by their Lordships in paragraph No.5 of the report, in the following words:

"5. For the purpose of deciding the above issue arising between the parties, it is necessary to refer to the relevant provisions of the Act and the Regulations. Clause (n) of Section 2 defines "teacher" as follows:

"2. (n) 'teacher' includes a professor, reader, lecturer or other person appointed or recognised by the University for the purpose of imparting instruction or conducting and guiding research or extension programmes, and any person declared by the statutes to be a teacher;

The definition does not say what the word "teacher" means but includes certain categories within the meaning of the said word."

40. In P.S. Ramamohana Rao, it was held by the Supreme Court:

"8. Neither the Act nor the rules and regulations specify the duties and functions of a Physical Director. We have, therefore, to go by the material available in the affidavits filed by the parties to decide that question. In the additional counter-affidavit filed on behalf of the University in the High Court, it is stated in para 7 as follows:

"I further submit that the duties of the Physical Directors in this University, in brief, are as follows:

(a) to arrange games and sports daily in the evenings for the students,

(b) to look after the procurement of sports material and the maintenance of the sports grounds,

(c) to arrange inter-class and inter-collegiate tournaments,

(d) to accompany the student teams for the inter-university tournaments,

(e) to *guide* the students about the *rules* of the various *games* and *sports*."

9. From the aforesaid affidavit, it is clear that a Physical Director has multifarious duties. He not only arranges games and sports for the students every evening and looks after the procurement of sports material and the maintenance of the grounds but also arranges inter-class and inter-college tournaments and accompanies the students' team when they go for the inter-university tournaments. For that purpose it is one of his important duties to guide them about the rules of the various games and sports. It is well known that different games and sports have different rules and practices and unless the students are guided about the said rules and practices they will not be able to play the games and participate in the sports in a proper manner. Further, in our view, it is inherent in the duties of a Physical Director that he imparts to the students various skills and techniques of these games and sports. There are a large number of indoor and outdoor games in which the students have to be trained. Therefore, he has to teach them several skills and techniques of these games apart from the rules applicable to these games.

10. Having regard to the abovesaid material before us, we are clearly of the view that the appellant comes within the definition of a teacher in sub-clause (n) of Section 2 of the Act.

17. In our view, the learned Judges did not go into the meaning of the word "teacher" in the main part of the clause nor assessed correctly the effect of the material evidence on record. The learned Judges observed that assuming Physical Directors imparted instructions to their students, unless the University recognised them as teachers they could not claim the benefit of Section 2(n) of the Act. Obviously the learned Judges were referring to the last part of Section 2(n) which includes persons other than those enumerated in the inclusive part if so recognised by the University. As we have held that the Physical Directors come within the main part of the definition of "teacher", it is in our opinion not necessary that they should be separately recognised as teachers by an order or statute of the University.

18. In the additional affidavit of the University, referred to earlier, it is no doubt contended that a semester course in the University means a unit of instruction and devotes a segment of the subject-matter to be covered in a semester. Under such a system a person has to get a specific number of credits. A credit hour "means one hour lecture or two to three hours of laboratory or fieldwork" in practicals. It is contended that the student undergoes a course of study leading to various undergraduate programmes in the University and has to pass courses and complete the minimum number of credit hours prescribed therefor from time to time. So far the games and sports are concerned, it is contended, that there is no weightage of credit hours and there are also no theoretical and practical courses prescribed for the students. It is contended that for the said reasons Physical Directors cannot be treated as teachers.

19. We are unable to agree. It may be that the Physical Director gives his guidance or teaching to the students only in the evenings after the regular classes are over. It may also be that the University has not prescribed in writing any theoretical and practical classes for the students so far as physical education is concerned. But as pointed by us earlier, among various duties of the Physical Director, expressly or otherwise, are included the duty to teach the skills of various games as well as their rules and practices. The said duties bring him clearly within the main part of the definition as a "teacher". We, therefore, do not accept the contention raised in the additional counter-affidavit of the University."

41. It is true that there is much difference in the wide definition of a teacher under the Andhra Pradesh Statute, which is an inclusive definition and the exclusive definition of a teacher under the Act of 2016, which limits it to Professors, Associate Professors and Assistant Professors, and nothing more. But, we cannot ignore the *non obstante clause* in Section 3(5) of the Act of 2016, which gives overriding effect in case of persons employed with the Institute immediately before the commencement of the Act, to their right to hold office in the University, amongst other matters, on the same terms (of

service) as they were holding with the Institute before the commencement of the Act. The terms of service can be changed if such an employee opts for the University's terms and conditions of employment. Since under bylaw 2. (b) vii), a Physical Training Instructor in the Institute, at the time of its incorporation as a University under the Act, was the holder of an academic post, placed in the cadre of teachers in the Institute, it is difficult to ignore the petitioner's status as a member of the academic staff and a teacher, going by an isolated reading of the definition in Section 2(20) of the Act of 2016. The definition in Section 2(20) has to be harmoniously read together with bylaw 2. (b) vii) of the bylaws of the Institute, bearing in mind the provisions of Section 3(5) of the Act of 2016. The petitioner, therefore, has to be regarded a member of the academic staff and *a fortiori* a teacher.

42. It may be added here that in view of the principles in **P.S. Ramamohana Rao**, notwithstanding the wider definition of a teacher under the statute, that fell for consideration before their Lordships of the Supreme Court, the general principle, unmistakably discernible, is that a functionary, who imparts physical education and instruction to students, can well be regarded a teacher, unless that inference is forbidden by the law. On the existing law, as we have noticed, far from being forbidden for Physical Education Instructors, who joined service of the Institute and then became employees of the University, it is a logical consequence of the principle about protection of terms and conditions of service with the Institute by virtue of Section 3(5) of the Act of 2016.

43. This takes us to the last submission advanced by Mr. Girijesh Kumar Tripathi. And, that is about the change of a Physical Training Instructor from a non-teaching and non-

academic member of the staff to a teacher under the amended bylaws of 1990 by the Institute without prior approval being secured from the State Government, which is said to be mandatory for such a change. No provision of the law or principle has been shown to us, which obliged the Society governing the Institute to secure prior approval of the State Government to bring about that change in the bylaws. Rather, we have already held that a change to the bylaws, re-classifying the post of a Physical Training Instructor from a non-teaching or technical post to an academic post and including it in the cadre of teachers, did not require registration of the amended bylaws by the Registrar, Firms, Societies and Chits in view of the law down in **Khalsa Middle School**.

44. There is also no material shown to us that back in the year 1990, when the bylaws of the Society were amended, re-classifying the post of Physical Training Instructor as an academic post, including it in the cadre of teachers, there was any objection or frown by the State Government to the change. Nevertheless, it is pointed out by Mr. Girijesh Kumar Tripathi that the petitioner's pay all along has been disbursed, treating him to be the holder of a non-teaching post. This makes some difference for the petitioner, but only to the extent of abridgment of his rights to be paid as a teacher. Since, he was part of the cadre of teachers under the amended bylaws of the year 1990, he was entitled to salary as a teacher and not as a non-teaching and non-academic member of the staff. When he joined service in the year 2006, he was a teacher at the inception under the bylaws, but going by the terms of the advertisement, as it seems, and the appointment letter, he accepted the salary of a member of the non-teaching staff without demur. He did not raise objection that his letter of

appointment or the advertisement, pursuant to which he was recruited, was contrary to the bylaws of the Society governing the Institute, which would prevail. He ought have asserted his right then and claim both his status and emoluments. He did not do that.

45. The earliest that this issue arose was at a time when the Director of the Institute *vide* his letter dated 27.05.2015, close in point of time to the incorporation of the Institute as a University, asked for the petitioner's re-designation as an Assistant Director, Physical Education and Games. In response, the Government objected and disapproved. The disapproval came on 09.07.2015, when a Joint Secretary to the Government in the Department of Technical Education declined to re-designate the petitioner, like a government servant as a Lecturer, Physical Education.

46. We think that the Government and the petitioner were both at fault – the petitioner in not claiming his rightful status, including emoluments, that a member of the teaching staff of the Institute was entitled to when appointed, and the Government in not taking cognizance of the amended bylaws of the Society governing the Institute, an aided institution, that classified a Physical Training Instructor as a teacher way back in the year 1990. The issue should have been taken note of by the Government at that stage and appropriate measures taken, settling the controversy either way. Now, that the Institute has graduated into a University under a statute incorporating it, Section 3(5) of the Act of 2016 read with bylaw 2(b) vii) of the bylaws of the Institute, would bind the Government into regarding the petitioner a teacher.

47. At the same time, the petitioner having never claimed the

emoluments of a teacher, there is clearly an acquiescence on his part in asserting his status and entitlement to be regarded as one under the bylaws while still in the employ of the Institute before its incorporation. It would, therefore, be rather inequitable to straightaway extend the benefit of Section 3(5) of the Act of 2016, read with bylaw 2(b) vii) of the bylaws of the erstwhile Society, governing the Institute, for the purpose of granting the petitioner all financial and other benefits of a teacher that he himself did not claim. But, what cannot be denied to the petitioner is the status of a teacher and consideration of his case as such under the CAS, which is a direct consequence of Section 3(5) of the Act of 2016 read with bylaw 2(b) vii) of the bylaws.

48. More than anything else, since the petitioner has all along been treated as a member of the non-teaching and non-academic staff, it would be necessary for the State Government to re-classify the petitioner's post as a teaching post in order to extend to him the benefit of the CAS. We make it clear that we have not at all pronounced about the rights of employees, who were appointed after incorporation of the Institute into the University under the Act of 2016. Not speaking about the rights of employees, who were appointed after incorporation of the Institute into the University under the Act of 2016, the petitioner, who has since long been included under the amended bylaws of 1990 in the academic staff and grouped along with other teachers of the Institute *vide* bylaw 2. (b) vii) of the bylaws, must be regarded as a teacher in view of all that we have said about his rights, upon transition of harness from the Institute to the University.

49. In the result, Writ-A No.6849 of 2022 succeeds and is **allowed**. The impugned order dated 19.04.2022 passed by the

Vice Chancellor of the University, to the extent it declines to call the petitioner for interview under the CAS is **quashed**. A *mandamus* is issued to the University as well as the State Government to extend the benefit of the CAS to the petitioner, treating him as a member of the academic staff and a teacher of the University, after re-classifying his post in such manner as under the Rules might be appropriate. The re-classification will not entitle the petitioner to claim any higher emoluments or financial benefits for his past services, either with the Institute or the University.

50. In view of the orders made in the leading writ petition, no orders are required to be made in connected Writ-A No.14778 of 2019, which stands consigned to record.

51. There shall be no order as to costs.

52. Let a copy of this judgment be communicated to the Principal Secretary, Technical Education, Government of U.P., Lucknow, the Vice Chancellor and the Registrar of the Harcourt Butler Technical University, Kanpur by the Registrar (Compliance).

Order Date :- 07.7.2025
Anoop

(J.J. Munir)
Judge