

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO.2906 OF 2018

Shramik Utkarsh Sabha & Ors.

... Petitioners

Vs

State of Maharashtra & Ors.

... Respondents

Mr.P.M. Palshikar with Shraddha Chavan i/b Mahendra Agvekar for the Petitioners

Mr.H.S. Venegavkar, Addl. G.P., for Respondent No.1

Mr.Mihir Desai, Senior Advocate, with Shriya mehta i/b Ajay Patil for Resp. No.2

Dr.Milind Sathe, Senior Advocate with Mr.Ameet Mehta i/b M/s.Solicis Lex for Resp. No.3

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

DATED: JULY 31, 2019

P.C.:

1. We had heard the learned Counsel for the parties for final disposal of the petition yesterday. At the end of the hearing, we wanted to peruse original files of respondent No.2 – Institute, whose Director's position is in question before us in this petition. The learned Senior Counsel Shri Desai for Respondent No.2, had made available such files. He had also provided a copy of the letter dated 9.1.2018 written by respondent No.3 to the Secretary,

Medical Education, Government of Maharashtra, which contained an accompaniment of original as well as proposed recruitment rules for the post of Director of the Respondent No.2, which the Counsel submitted was the point of origination of the proposal before the Governing Council of Respondent No.2. Such a letter is taken on record and marked 'X' for identification.

2. The petitioners have challenged the amendments to the recruitment rules, for the post of Director of Respondent No.2. They have also challenged the appointment of respondent No.3 as an Assistant Director of the said Institute.

3. These challenges arise in following background:

The petitioner Nos.1 and 2 are the associations of the officers and employees of Respondent No.2. Petitioner No.3 was subsequently joined who is an individual presently discharging duties as a Senior Scientific Officer of Respondent No.2 – Institute.

4. Respondent No.2 is the Institute registered under the Societies Registration Act, 1860, which is functioning under the direct control and supervision of the State Government and is engaged in the activities of bio-medical research. It is undisputed

that by virtue of its constitution, administrative control of the government and its funding by the government, it is the State within the meaning of Article 12 of the Constitution of India.

5. Respondent No.3 is the acting Director of Respondent No.2 – Institute. She was appointed as an Assistant Director under order dated 12.5.2015. Respondent No.2 could not fill up the post of Director for a long time on account of non-availability of eligible candidates. Respondent No.3 was, therefore, given additional charge as the Director of Respondent No.2 w.e.f. 7.4.2017, which charge she continues to hold on even at present. The case of the petitioners is that her initial appointment on the post of Assistant Director itself was illegal since she did not fulfill the requisite educational qualification of having Doctoral Degree in the relevant subject prescribed in the recruitment rules. The petitioners would point out that these rules required the candidate for the post of Assistant Director to have a Doctoral degree in Biology or any of the other subjects specified in the rules. Respondent No.3 had a Doctoral Degree in applied Biology which according to the petitioners, is not equivalent. They contend that Biology and applied Biology are different subjects.

6. The petitioners' main challenge, however, is with respect to the amendments in the recruitment rules for the post of Director. The petitioners would point out that previously, original recruitment rules prescribed two modes for appointment to the post of Director namely, either by promotion or by direct recruitment. For direct recruitment, one of the eligibility criteria was a Doctoral Degree in specified subjects such as Microbiology, Bacteriology, Virology, etc., which did not include any reference to the subject to Biology or applied Biology. According to the petitioners, Respondent No.3 being acting Director, initiated the proposal for amendment of these recruitment rules by enlarging the field of subjects so as to include the Doctoral Degree in applied Biology as one of the eligibility criteria. The petitioners would point out that such amendments were proposed to the Governing Council of Respondent No.2 by the respondent No.3, the proposals were approved and forwarded to the Government for making such amendments. The Government in turn subject to minor modifications approved the amendments which were thereafter implemented by Respondent No.2. By virtue of these amended rules, the field of eligibility for direct recruitment to the post of

Director got enlarged. Respondent No.3 who was hitherto ineligible, was made eligible. According to the petitioners, all along, it was Respondent No.3 who was the brain behind these changes, these amendments would benefit her and she has played a crucial role in bringing about these changes.

7. The case of the respondents, in particular, respondent Nos.2 and 3, is that since a long time, despite several attempts, the post of Director of the Institute could not be filled up. It was not desirable to keep such an important Institute without a permanent Director. Significant changes in recruitment rules were, therefore, made. This has nothing to do with Respondent No.3 alone. These respondents would point out that the amendments were much wider in repercussions than merely adding a subject of qualification. It is further pointed out that ultimately, it is the Government which had sanctioned the amendments and the Governing Council of Respondent No.2 – Institute merely implemented the changes.

8. The State Government pointed out that pursuant to the amended rules, advertisement for direct recruitment to the post of Director was issued on 27.7.2018, in response to which, several

applications have been received. Such applications are under the scrutiny of the Government for eligibility of the candidates.

9. The learned Counsel for the petitioners submitted that Respondent No.3 was appointed to the post of Assistant Director without possessing necessary qualifications. Her appointment should, therefore, be cancelled. He further submitted that respondent No.3 is the acting Director of Respondent No.2. She has ensured amendments in the rules to suit her qualifications. This has been done wholly malafide. The Counsel further submitted that the minimum quorum of Governing Council's meetings is prescribed as 3 members. In the meetings, in which the draft recruitment rules were recommended for sanction by the Government and in the meeting in which after receiving sanction from the Government, the amendments were adopted for implementation, there were only three members of the Governing Council present, one of them was Respondent No.3 herself. Discarding Respondent No.3 thus, quorum of neither of these two meetings was complete. The Counsel, therefore, argued that the entire proposal, recommendations to the Government as well as implementation of the amendments to the rules was made without

following the mandatory procedure. The Counsel submitted that the decision making process has been tainted on account of bias.

10. On the other hand, the learned Counsel for Respondent No.2 opposed the petition contending that Respondent No.3 was duly qualified when she was appointed as an Assistant Director. Her application for appointment was scrutinised by the Scrutiny Committee which comprised of three members, one of them happened to be the Chairman of the petitioner No.1 – association. Additionally, our attention was drawn to the affidavit in reply filed on behalf of Respondent No.2 pointing out that a conscious decision was taken to hold that the Degree in applied Biology would be included within the prescription of a Degree in Biology. The Counsel further submitted that the entire decision making process for amendment in the Rules was undertaken in a transparent manner. Despite several attempts and advertisements, no qualified candidate for the post of a Director could be found and appointed. The Governing Council, therefore, recommended amendments in the rules. The role of the Council was only recommendatory. It was the Government which authorised the amendments in the rules. Respondent No.3 being

the acting Director was merely incidental. As an acting Director, she is the ex-officio member of the Governing Council. Her participation in the meetings of the Governing Council, therefore, cannot be objected. The Counsel further submitted that which scientific subject should be prescribed for eligibility criteria for the post of a Director of a scientific institute, must be left to the discretion of such institute.

11. The learned Counsel for Respondent No.3 also opposed the petition contending that she was duly qualified at the time of her appointment as an Assistant Director. In any case, her appointment made in the month of May, 2015 was challenged after a long delay. Initially, the petition was filed by only two associations. Only in order to maintain the challenge to the appointment of Respondent No.3 as an Assistant Director, petitioner No.3, an individual, was joined much later. With respect to the amendments in the rules, the Counsel submitted that the amended rules are not limited to adding the eligibility of Doctoral in applied Biology but are much wider in their implications. Respondent No.3 was not the sole beneficiary of these amendments.

12. Insofar as the petitioners' challenge to the appointment of respondent No.3 as an Assistant Director is concerned, the same is possible of a summary despatch. Such appointment was made as far back as on 12.5.2015. The present petition was filed some time in September, 2018 i.e., more than 3 years after the appointment of Respondent No.3. Initially, the petition was filed only by two associations. The petitioner No.3 was joined later on. For over three years, none of the petitioners were aggrieved by the appointment of Respondent No.3 to the post of Assistant Director. Very clearly, their challenge to the appointment of Respondent No.3 is only in order to indirectly knock her out of contention from the post of Director. Be that as it may, even on merits, we are not convinced that the petitioners have made out any case. The recruitment rules for the post of Assistant Director prescribe minimum educational qualifications as under:

“Qualification:

Candidate should possess MBBS degree of a recognized university with a post graduate degree in Life Sciences including Health Sciences in Parasitology, Microbiology, Pathology, bacteriology, Virology, Entomology, Pharmacology, Biochemistry or an allied branch of Health Science.

Or

A Doctoral Degree either in Microbiology, Bacteriology & Virology, Clinical Pathology & Biochemistry, Human Pharmacology & Toxicology, Epidemiology & Zoonosis. (Biology** / Engtomology / Parasitology / Veterinary Sciences)”.**

13. As per these qualifications, a candidate could either be a MBBS degree holder with additional qualifications as provided or could be a doctoral degree holder in any of the various subjects provided in the said rules, one of them being Biology. The petitioners have not produced any material to enable us to hold that the subject of Biology would not include applied Biology. Respondent No.2 – Institute in an affidavit in reply dated 8.2.2019, in this context, has pointed out that -

“.. Conclusively, applied Biology is a science which covers various aspects of Biology even those which were already there as a subject in the educational qualification. I say and submit that applied Biology is currently at forefront & technological development and instead of adding exhaustive list of subjects included in it. Therefore, the applied Biology was added so that it covers larger span / fields than some subjects, earlier mentioned in the educational qualification criteria. I say and submit that there was a proper selection process and procedure which was followed for recruitment at different levels from Advertisements to Interviews by Selection Committee. I therefore deny that these circumstances would establish beyond doubt that for appointment of the Respondent No.3 on the post of Assistant Director the age limit was changed to 55 years without changing corresponding service rules and regulations on the alleged ground that no suitable person is available for

appointment though at that time also there were applicants having qualification for appointment on the said post within specified age limit.”

14. Thus, Respondent No.2 which is an Institute engaged in scientific research, had after full application of mind, held that the degree of applied Biology would be included in the prescription of a Degree of Biology. This controversy, therefore, must be closed.

15. The crucial question, however, is with respect to the validity of amendments in the rules for the post of Director. In this context, we would refer to certain materials on record. The recruitment to the post of Director of Respondent No.2 – Institute is governed by the Director, Haffkine Institute (Recruitment) Rules, 2011 (for short, hereinafter referred to as the “said Rules of 2011”). These Rules were framed by the Government in consultation with the Governing Council of the Institute in exercise of powers under clause 48 of the Memorandum of Association of the Institute. The said Rules prior to the impugned amendments, provided the following modes of filling up the post of Director:

“3. Appointment to the post of “Director” in the Haffkine Institute shall be made either:

- a. By promotion of a suitable person on the basis of Seniority Subject to fitness amongst the person holding

the post of Deputy Director in Haffkine Institute having not less than 5 years continuous regular service in that post and possess the qualification prescribed for an appointment by nomination.

OR

b. If no candidate is available to fill the post by promotion & if Governing Council decides then the said post shall be filled by Nomination / Deputation from the candidates who:

i. are not more than 50 years of age open category (The upper age limit is relaxed upto 55 year, in exceptional cases, considering their qualification and experience) and 55 years for reserved category or any other age limit decided by the Government from time to time, unless already in the Government/Semi Government service.

ii. possess M.B.B.S. degree of recognized university with a Medical Council of India recognized post graduate degree in Parasitology, Microbiology, Pathology, Bacteriology, Entomology, Pharmacology, Bio-chemistry.

OR

iii. **Doctoral degree either in Microbiology/ Bacteriology/ Virology / Clinical Pathology / Biochemistry / pharmacology / Epidemiology/ Zoonosis.**

c. The candidate should have at least 15 years' experience in research and teaching. Preference shall be given to candidate already recognized as Post Graduate Teacher of a Statutory University and/or who has passed the Diploma in Hospital Management.

d. The candidate should have published 15 original research papers in indexed scientific journals.

e. At least 15 year's experience in Administration of a Research Institute / medical College in organizing and guiding advance research."

16. It appears that on 9.1.2018, Respondent No.3 wrote letter which we have referred earlier, to the Secretary, Medical Education, Government of Maharashtra, pointing out that the post of Director of the Institute has remained vacant since 1.4.2012 and is managed by giving additional charge. The management had given several advertisements inviting eligible candidates to apply but could not find a suitable candidate. It was, therefore, necessary to amend the rules. Alongwith this letter, she had sent the existing rules as well as the proposed rules after amendment. In these proposals, there was a suggestion for calling certain additional subjects, Doctorate holder of which would also qualify for being appointed as a Director by way of direct recruitment, one of them being applied Biology. The amendments also suggested reducing the experience in the field of research as well as administration.

17. In a meeting of the Governing Council of Respondent No.2 dated 17.1.2018, the proposal was approved and it was resolved to recommend such amendments to the Government. There were only three members including the respondent No.3 present during the said meeting of Governing Council dated 17.1.2018.

18. On 20.3.2018, the Government intimated to Respondent No.2 its approval for the amendments in the said Rules. This approval however, was not in the same terms as proposed made by the Council. Nevertheless, in the context of adding applied Biology as one of the subjects for eligibility, such suggestion was accepted. This communication conveyed that the amendments be placed before the Governing Council for approval / acceptance and thereafter be implemented. Thereupon, the Governing Council met again on 22.4.2018 and formally adopted the amendments in the rules. This meeting of the Governing Council was also attended by three members, including the Respondent No.3. Relevant portion of such amended rules reads as under:

“3. Appointment to the post “Director in the Haffkine Institute shall be made either:-

a. By promotion of a suitable person on the basis of Seniority subject to fitness amongst the person holding the post of Deputy Director in Haffkine Institute having not less than 5 years continuous regular service in that post and possess the qualification prescribed for an appointment by nomination.

OR

b. If no candidate is available to fill the post by promotion & if Governing Council decides, then the said post shall be filled by **Nomination/Deputation** from the candidates who;

i. are not more than 50 years of age for open category (The upper age limit is relaxed up to 55 years, in exceptional

cases, considering their qualification and experience)* and 55 years for reserved category or any other age limit decided by the Government service.

ii. possess M.B.B.S. degree of recognized university with a Medical Council of India recognized post graduate degree in parasitology, Microbiology, Pathology, Bacteriology, Entomology, Pharmacology, Bio-chemistry.

OR

Doctoral Degree in Biological Science such as Microbiology / Bacteriology / Virology / Biochemistry / Pharmacology / Toxicology / Epidemiology / Zoonosis / Applied Biology.

OR

iii. Doctoral Degree in Microbiology / Bacteriology / Clinical Pathology / Virology / Biochemistry / Pharmacology / Toxicology / Epidemiology / Zoonosis

OR

Possess M.B.B.S. degree of recognized university with Medical Council of India recognized post graduate degree in Microbiology, Pathology, Bacteriology, Entomology, Pharmacology, Bio-chemistry.

c. The candidate should have at least 15 years experience in research and teaching. Preference shall be given to candidate already recognized as Post graduate Teacher of a Statutory University and / OR who has passed the Diploma in Hospital Management.

d. The candidate should have published 10 original research papers in indexed scientific journals.

e. At least 10 years experience in Administration of Research Institute / Medical College in organizing & guiding advance research.

OR

At least 10 years experience of Research institute in organizing & guiding advance research.

...”

19. The Institute is governed by Rules and Regulations (for short, “the said rules and regulations”). Rule 39 (1) contained therein provides that the business and affairs of the society shall be carried on and managed by the Governing Council who may exercise all such powers and authorities of the Society, which as per the statutory rules are not specifically required to be exercised by the society in the general meeting. Sub-rule (2) of Rule 39 provides that without prejudice to generality of sub-rule (1), the Governing Council shall have various powers, Clause (b) thereof pertains to sanctioning of posts and appointing officers (other than Director of the Society) and employees in its office and factory and regulate terms and conditions of their services. Thus, the Governing Council has powers to regulate the appointment of the staff of such Council other than the Director of the Institute. It was, therefore, that the Institute was dependent on the Government sanctioning the amendments in the rules.

20. Rule 48 of the rules pertain to the Director of the Society, relevant portion of which reads as under:

“48(1) There shall be a Director of the Society who shall be appointed in accordance with the existing recruitment

rules, or as framed by the State Government from time to time, for the post of Director, Haffkine Institute.

(2) The Governing Council shall determine the manner in which the appointment to the post of Director shall be made under the recruitment rules.”

21. One more thing we may note at this stage is that the Rule 23 provides that the Governing Council will consist of officials and non-official members set out thereafter. Rule 24 provides the composition of the Governing Council which includes the Minister for Urban Development, Public Health as the President; Minister of State of public Health, Maharashtra State as the Vice-President; Secretary, urban Development, Public Health and Housing Department as a Member; and several other ex-officio government officials, who would be members of the Governing Council. This also includes the Director of the institute as one of the members.

22. Rule 35 provides that three members of the Governing Council present in person shall constitute a quorum at any meeting of the Governing Council. If no quorum is assembled at the time of holding of the meeting, the same would be adjourned.

23. These Rules and Regulations would thus, show that the Respondent No.3 certainly was a member of the Governing Council of Respondent No.2 in her capacity as an acting Director. Her presence in the meetings, therefore, can be of no objection. The question however is where a subject which touched her own qualifications and, therefore, had a vital bearing on her own career prospects and her future, could she have been an important votary. We may recall both the meetings i.e., the meeting of January, 2018 as well as the meeting of 24.4.2018 when the amendments in the rules were recommended and the amendments authorised by the government were formally adopted, there were only three members present in the meeting of the Governing Council. Minus the Respondent No.3, therefore, the quorum as per the rule 35 was not complete.

24. In our opinion, Respondent No.3 ought to have disassociated herself from the agenda subject which concerned the amendments in the recruitment rules to the post of Director. As per the pre-amended position, clearly, Respondent No.3 was not qualified for being considered to the post of Director. The amendments proposed by the Council substantially enlarged the

scope and specifically included a Doctoral Degree in applied Biology as one of the qualifying subjects. In the technical field such as science, essentially, it would be the institute which must have a discretion to decide the eligibility criteria and qualifications required for the top post. However, any such changes must be brought about in a transparent manner. We are not examining the correctness of the decision, but the decision making process. When the decision making process itself has been tainted on account of every possible bias, the same must be struck down.

25. We may recall, Respondent No.3 was the one, who wrote the letter dated 9.1.2018 proposing amendments in the rules to enlarge the field of eligibility since past attempts at selecting a suitable candidate had failed. She herself had proposed the fresh set of rules which included applied Biology as one of the subjects, Doctorate holder of which would now be eligible, which qualification she herself held. In the first meeting of the Governing Council after this letter, she participated. Three members of the Governing Council decided to recommend such changes to the government. Once the government returned the amendments with minor modifications, she again participated in the meeting of the

Governing Council and formally adopted the changes. At both the stages, she ought to have recused herself. Had she done so, the procedure would have been transparent and free from bias. However, her absence would have made the quorum insufficient and the meetings of the Governing Council would have fizzled out for want of quorum.

26. In the case of **J. Mohapatra and Co. and another v. State of Orissa and another**¹, the Supreme court reiterated the oft-repeated proposition that justice should not only be done but should manifestly be seen to have been done. It was observed that justice can never be seen to be done if a man acts as a judge in his own case or is interested in its outcome. It was a case in which the members of the assessment committee for selection of books were themselves the authors of some of the books which were under consideration. It was held that such members could not have participated in the assessment sub-committee. It was also held that the selection of the books for educational institutions was vitiated on the ground of bias.

1 (1984) 4 SCC 103

27. The Counsel for Respondent No.3 however had argued that there was no possibility of bias since Respondent No.2 – Institute was merely recommendatory body. The amendments were sanctioned by the Government and Respondent No.3, therefore, had no role to play at that level. He had relied on the decision of the Supreme Court in the case of E.P. Royappa vs. State of Tamil Nadu and another² to contend that the prejudice must be demonstrated. He had also argued that the decision must be saved on the doctrine of necessity.

28. In our opinion, neither of these contentions are sufficient to save the tainted decision to recommend the amendments in the recruitment rules. Firstly, the Government may be the final sanctioning authority, the proposal for amendment was made by the Institute. The Government independently would have no reason, no occasion to make any amendments. The amendments in question were recommended by Respondent No.2 but the proposal was initiated by Respondent No.3. It was Respondent No.3, who had all along been the chief architect of these changes and also its prime beneficiary. The possibility of bias was thus writ large on the face of the record. After suggesting amendments in

² (1974) 4 SCC 3

the capacity of the acting Director, had she abstained from participation in the Governing Council meetings, perhaps, we would not have carried out any further incisive scrutiny of the decision making process. In the present case, however, she showed a close association with the ultimate decision from the stage of proposing, recommending and being part of the decision to adopt the amendments.

29. The doctrine of necessity has no application in the present case. It is nobody's case that the Governing Council comprised of barely three members and therefore, had the Respondent No.3 abstained from participation, securing a minimum quorum would have become impossible. The constitution of the Governing Council refers to large number of members, majority of them government officials. In case of **Election Commission of India and another vs. Dr.Subramaniam Swamy and another**³, the Supreme Court explained the concept of doctrine of necessity, which could override a possible bias, as under:

“16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated

3 (1996) 4 SCC 104

differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.”

30. In the result, the amendments in the recruitment rules to the post of Director pursuant to the government's sanction dated 20.3.2018 and adoption by the Council under its resolution dated 24.4.2018 are set aside. Consequently, the initiation of the selection process for the post of Director on the basis of such rules is also set aside.

31. Nothing stated in this judgment would prevent Respondent No.2 from examining the entire situation concerning recruitment

rules afresh in accordance with law and bearing in mind the observations made in this judgment.

32. Writ Petition is accordingly disposed of.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)