

(1995) 09 AHC CK 0145**Allahabad High Court****Case No:** C.M.W.P. No. 10246 of 1995

Lalji Prasad Gupta

APPELLANT

Vs

Banaras Hindu University and
Others

RESPONDENT

Date of Decision: Sept. 26, 1995**Acts Referred:**

- Banaras Hindu University Act, 1915 - Section 5(7)
- Constitution of India, 1950 - Article 226

Hon'ble Judges: B.M. Lal, J; B. Dikshit, J**Bench:** Division Bench**Advocate:** R.G. Padia and Prakash Padia, for the Appellant; V.K. Upadhyay and S.K. Pandey, for the Respondent**Final Decision:** Disposed Of

Judgement

B.M. Lal, J.

At the very outset, without entering into the merits of the case Sri V.K. Upadhyay, learned Counsel representing Banaras Hindu University (for short "University") and Sri S.K. Pandey, learned Counsel representing Respondent No. 4, raised a preliminary objection at this stage of admission that the grounds and plea as raised by the petitioner in writ petition are available to him to be raised by means of a statutory representation to the Visitor of the University under the Provisions of Section 5(7) of the Banaras Hindu University Act (hereinafter referred to as "the Act") and it is the Visitor who has to decide the matter in issue involving orders passed by the Executive Council or any other authority empowered under the Act. Therefore, it is submitted that the writ petition as framed and wed suffers from the doctrine of exhaustion of alternative remedy.

2. To appreciate the preliminary objection as raised by the learned Counsel appearing for the University and Respondent No. 4, it is necessary to give short facts

leading to this writ petition.

3. By this writ petition under Article 226 of the Constitution, the Petitioner, Lalji Prasad Gupta has challenged order dated 19.5.1995 (Annexure-5 to the writ petition) whereby the Respondent No. 4 has been appointed on the post of Reader and order dated 20.12.1994, contained in Annexure-6 to the writ petition, whereby the Respondent No. 4 has been given appointment as Reader with a retrospective date, i.e., 27.7.1983 in the University.

4. In nutshell, the Petitioner's case is that he being B.Sc., A.B.M.S. and Ph.D. is fully qualified to be appointed as Head of the Department in the institution concerned, being run and managed by the University. He was initially appointed as Lecturer in August, 1968 and subsequently he was promoted as Reader under merit-cum-promotion scheme on 5.3.1984. However, by the order dated 19.5.1992, contained in Annexure-5 to the writ petition, which is under challenge, abruptly and without any opportunity of being heard to the Petitioner, Respondent No. 4 was given appointment to the post of Reader with retrospective date. In this respect, it is submitted that the University had no Jurisdiction to pass the Impugned order appointing and giving seniority to Respondent No. 4 with retrospective effect from a very early date. It is also contended that without any notice or opportunity of hearing to the petitioner and without giving any reason whatsoever, another impugned order was passed on 20.12.1994 according to which Respondent No. 4 has been given appointment as Reader w.e.f. 27.7.1983.

5. Dr. Padia, learned Counsel appearing for petitioner in reply to the preliminary objection, submitted that both the orders referred to above, which are under challenge in this writ petition, have been passed by way of review by the authorities and, as such, are without jurisdiction, inasmuch as in the absence of any statutory provision a statutory authority cannot review its order. For this proposition of law, the learned Counsel cited numerous decisions of this Court and the Apex Court and in this background, he submitted that the orders impugned being without jurisdiction, alternative remedy, if any, is not an absolute bar for exercise of jurisdiction under Article 226 of the Constitution.

6. The argument advanced by Dr. Padia as a proposition of law that in the absence of any statutory provision a statutory authority has no power and jurisdiction to review its order and if such an order is passed, the same renders a nullity has no two opinion. This being a settled principle of law, no precedent in this regard needs to be mentioned and discussed.

7. However, in the light of Dr. Padia's argument, it is to be examined whether orders referred to above, which have been sought to be quashed by this writ petition, have been passed without any authority of law or they have been passed well within the authority of law.

8. This factual position is not disputed that the impugned orders contained in Annexures 5 and 6 to this writ petition are outcome of the decisions rendered by this Court in Writ Petition No. 3396 of 1985 decided on 22nd December, 1987 against which SLP was filed before the Supreme Court and the Supreme Court on 24.1.1992 dismissed Civil Appeal No. 1626 of 1988 Banaras Hindu University, Varanasi and another Vs. Dr. Indra Pratap Singh. Thus, in the instant case, it is not that the authority concerned has exercised its power of review rather it has acted in accordance with the directions of this Court and the Apex Court referred to above and it derived the power to do so from the orders of the court, therefore, it cannot be construed that the university authorities have reviewed order without any authority of law and, therefore, the same renders a nullity. To this effect, the submission made by Dr. Padia has no force and is hereby rejected.

9. Learned Counsel Dr. Padia contended that without affording any opportunity of being heard to the Petitioner, the seniority of Respondent No. 4 has been determined and fixed over the petitioner with effect from a retrospective date which is not admissible in law. To support this proposition of law, he referred to numerous decisions of this Court and the Apex Court. He contended that no retrospective promotion can be granted for which he referred to N. Nagaraja Vs. Vasant K. Gudodagi and others, and, therefore, he submitted that the plea of alternative remedy raised by learned Counsel for Respondents be repelled and the writ petition be decided on merits after hearing respective parties.

10. So far as the submission on points of opportunity of being heard and granting promotion with retrospective effect are concerned, it appears that the University authorities had no option except to proceed in accordance with the orders passed by this Court and the Apex Court and that persuaded the University authorities to pass impugned orders contained in Annexures 5 and 6 to the writ petition. Indeed this has been pointed out by Dr. Padia that the petitioner was not even a party to the writ proceedings before this Court and before the Supreme Court. However, since these points go to the root of the matter touching merits of the case, it would not be proper at this stage to express any opinion in this regard as it may prejudice the case of either party. Therefore, this Court refrains from giving any finding on it.

11. At this stage, we are only concerned with the preliminary question as to whether alternative remedy is available to the petitioner and same has been exhausted by him before coming to this Court invoking writ jurisdiction?

12. Dr. Padia relying on Dr. Dayanand Tyagi v. B.H.U. Varanasi, (1993) 3 UPLBEC 1786 submitted that provisions of Section 5 (7) of the Act have no application. In that case, reference made before the Visitor could not be decided by the Visitor and on that basis, it was presumed that the remedy provided under the Act is not efficacious because such a representation is normally not decided. No doubt, if representation is not decided for a considerably long time, then this Court is not lagging behind in entertaining the writ petition and deciding it on merits, but all the same simply for

the reason that the representation is not" decided expeditiously in another case, it cannot be said that the statutory provision for making representation has become redundant. In Dr. Dayanand Tyagi"’s case (supra), the representation was made but the same could not be decided. In the instant case till date no representation is made, therefore, Dr. Dayanand Tyagi"’s case (supra) has no application to the facts of the present case. Had it been a case that present petitioner has made a representation and the same has not been decided by the authority concerned, the position would have been otherwise. In the instant case, the petitioner has not Invoked at all the statutory provision of Section 5(7) of the Act.

13. No doubt, the rule requiring exhaustion of statutory alternative remedy before invoking writ jurisdiction is a self-imposed limitation and a rule of policy, convenience and discretion rather than a rule of law, but this legal position cannot be lost sight of that the power under Article 226 of the Constitution is discretionary one in exercise of which the High Court will take into consideration the availability of the adequate alternative statutory remedy to the petitioner and if statutory remedy is indeed available, the petitioner must exhaust that remedy before Invoking extraordinary jurisdiction of this Court. In the instant case, u/s 5(7) of the Act actually efficacious alternative remedy is available to the petitioner where all possible grounds, which have been raised in this writ petition, also can be raised before the Visitor and, therefore, on the ground of alternative remedy no writ can be entertained. See *Chandrama Stngh v. Managing Director* 1991 AWC 1005 (FB) and *H. B. Gandhi v. Gopi Nath and Sons* , wherein the Apex Court relied that where the hierarchy of appeal is provided by the statute, the statutory remedy must be exhausted. Thus, this being a settled principle of law, under the circumstances of the case, in our opinion, the petitioner must exhaust the statutory alternative remedy available to him u/s 5(7) of the Act.

14. From the discussions aforesaid, we hold that this writ petition is premature as the petitioner has not exhausted the statutory alternative remedy available to him u/s 5(7) of the Act. Thus, we direct the petitioner to approach the Visitor by invoicing the provisions of Section 5(7) of the Act. We hope and trust that the Hon"ble Visitor shall decide the Petitioner"’s statutory representation expeditiously within a reasonable time.

With this direction, this writ petition is finally disposed of.