

(2010) 03 J&K CK 0050

In the Jammu And Kashmir High Court

Case No : IP A No. 246 Of 2009 & CMP No.375 Of 2009 c/w IP A No.245 Of 2009
CMP No.374 Of 2009

Alisha Kour & Anr.

APPELLANT

Vs

State & Ors.

RESPONDENT

Date of Decision : 01-03-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2010) 2 JKJ 863

Hon'ble Judges : Ghulam Hasnain Massodi, J and Mohd.Yaqoob Mir, J

Bench : Full Bench

Advocate : Z.A.Shah, J.A.Kawoosa, R.A.Jan, Advocates appearing for the Parties

Judgement

Mohammad Yaqoob Mir, J.—Under the category Sports both appellant Alisha Kour as well as respondent No.3 Umar Jan applied for

admission to the MBBS Course so competed in the entrance examination held by the Board of Professional Entrance Examination (BOPEE). The

appellant Alisha Kour in the entrance test as conducted by BOPEE had obtained 122 marks whereas respondent Umar Jan had obtained 109

marks out of 225 marks.

2. In terms of the Jammu and Kashmir Certification of Outstanding Proficiency in Sports Rules, 2008 (hereinafter for short referred to as ("the

Sports Rules"), 40 points have been distributed relatable to the 'level of participation' out of which 20 points have been kept for international

event/games and 20 points for national events/games and the allotment of points is governed by the 'level of participation'.

3. The appellant Alisha Kour has obtained 1 point out of 40 whereas respondent Umar Jan has obtained 4.5 points out of 40.

4. In terms of Rule 3 of the Sports Rules, for determination of the merit in sports category for selection to professional courses at Post

Graduate/Graduate/Diploma level etc. 60% weightage has to be given to the merit obtained by the candidates in the test conducted by the

selection agency and 40% weightage has to be given to the level of sports participations.

5. The BOPEE has adopted the aforesaid method and thereafter has worked out the merit of the appellant Alisha Kour and the respondent No.3

Umar Jan which is as under:

Merit of the appellant Alisha Kour:

GET (60%) = Marks obtainedx60 = $122 \times 60 = 32.53\%$

Total Marks 225

SP(40%) =Points obtainedx40 = $1 \times 40 = 1\%$

Total points 40

Total Weightage = (GET 60 Units + SP 40 units=33.53) Merit of the respondent Umar Jan:

GET (60%) =Marks obtainedx60= $109 \times 60 = 29.07\%$

Total Marks 225

SP (40%) =Points obtainedx40= $4.5 \times 40 = 4.5\%$

Total points 40

Total Weightage = (GET 60 Units + SP 40 units=33.57) As per the said method, the appellant Alisha Kour has secured 33.53 points whereas the

respondent Umar Jan has secured 33.57 points. This position is admitted by the BOPEE.

6. The grievance of the respondent Umar Jan was that in the Sports category for admission to MBBS five seats were available. First four seats in

equal shares have gone to male and female candidates whereas fifth seat being odd seat should have been given to him because according to the

Information Brochure for Common Entrance Test, 2009 issued by the BOPEE, odd number of seats in a particular category shall go to the

candidate with higher merit irrespective of sex. The relevant portion

of the brochure is reproduced hereunder:

In the Government Medical and Dental College, 50% of seats are reserved for

female candidates under all categories. In case of odd number of seats in a particular category, the last seat will go to the candidate with higher merit irrespective of sex.

7. In breach of the terms of the Brochure, the odd seat in Sport category for admission to MDBS course has been given to the appellant Alisha

Kour when the respondent Umar Jan has a superior merit so irrespective of sex was entitled to the same. By accommodating Alisha Kour merit of

the respondent No.3 has been ignored and has been provided admission for perusing BDS course.

8. The learned Writ Court in the judgment impugned dated 15.10.2009 has allowed the writ petition of the writ petitioner (respondent Umar Jan)

whereunder BOPEE has been directed to take appropriate steps in allocating appropriate discipline to the Petitioner (respondent Umar Jan) and

respondent No. 3 (appellant Alisha Kour) on the basis of merit obtained by them.

9. Aggrieved thereof, two LPAs, one by Alisha Kour and another by BOPEE have been filed, so both the appeals are taken up for disposal

together.

10. Learned counsel for the appellant Alisha Kour contended that the matter has not been correctly appreciated. According to him appellant

Alisha Kour had secured 122 marks out of 225 in the entrance test whereas respondent Umar Jan had secured only 109 marks, therefore,

appellant Alisha Kour has been correctly given admission for MBBS course. The points as allotted for level of participation in sports has not to be

accepted so as to tinker with the merit determined in the competitive examination.

11. This contention is without substance. The Sports Rules have been framed in compliance to the directions of the Hon'ble Supreme Court issued

in SLP No.4669 of 2006 captioned State v. Harleen Singh & Ors. It is under Rule 3 of the said Rules, 60% weightage and 40% weightage has

been provided and also the points have been distributed as per the criteria contained therein. The said rules have not been challenged by either of

the parties instead both the candidates along with other candidates in sports category have been considered and inter se merit among the sports

category candidates has been maintained by the BOPEE. Therefore, it is not now open for the appellant Alisha Kour to say that the method of

60% and 40% weightage is not permissible.

12. This position is all the more supported by the BOPEE itself as the BOPEE in the appeal has categorically stated that they have adopted the method of 60% weightage and 40% weightage visavis merit obtained in the test and the points obtained as per level of sports participation. The inter se merit as maintained by the BOPEE is not now open to be tinkered with.

13. The contention of learned counsel for the appellant Alisha Kour accordingly fails.

14. The next contention of the learned counsel for the appellant Alisha Kour is that the BOPEE for advancing the object of Section 9 of the Reservation Act have selected the appellant Alisha Kour for pursuing the MBBS course because in terms of the second proviso to subsection 2 of Section 9 of the Reservation Act, 50% of the seats in each category including open category for admission to MBBS and BDS courses have to be selected from amongst the female candidates belonging to such category.

15. This submission of the learned counsel for the appellant Alisha Kour is also supported by the learned counsel for the appellant BOPEE by stating that for maintaining balance of 50% ratio between male and female candidates, the odd seat has not been allotted to the candidates only in the sports category but other categories like children of defence personnel (CDP), Scheduled Tribe Leh (STL), Scheduled Tribe Others (STO) and J&K Para Military and State Police (JKPM). If the odd seats would have been allotted on the basis of merit, then 50% ratio for the female candidates could not be maintained.

16. Learned counsel for the BOPEE would contend that the allotment of odd seats to the female candidates was decided by the BOPEE. The decision so taken in a sealed envelope has been produced for perusal which would indicate that a proposal has been mooted wherein it has been mentioned that for MBBS course in Government colleges, there are 249 seats out of which 124 are reserved for female candidates. Out of 11 reserved categories, 50% seats are for female candidates. Out of 11 reserved categories, 10 have odd seats. In case all the odd seats are allotted to the candidates having higher merit irrespective of sex, then the male candidates will get 66 seats and female candidates will get 58 seats. So for maintaining the balance, it had been proposed that 0.5 fraction seats in reserved

categories (STOJKPM and ALCCDP) will be clubbed and

allotted to female candidates of clubbed categories having high merit. At relevant time merit list of sports category had not been prepared as sports

points were not received, so out of the categories of CDPSP balance of 50% can be maintained by allotting odd seats in these categories to female

candidates, accordingly a roaster for next year will be prepared. This proposal has been approved by the Chairman of the BOPEE, based on

which among others the odd seat in sports category has been allotted to appellant Alisha Kour irrespective of merit.

17. The method adopted appears to be totally arbitrary. The number of seats allotted to the categories and the position of merit of both male and

female candidates has been recorded in the appeal which is reproduced hereunder:

Category Male merit No. Seats Female merit No. seats

STGB 128 8 108 7

STL 104 2 99 3

STK 127 3 99 2

STO 141 1 128 1+(1) either

OSC 146 3 134 2

RBA 143 25 121 24

ALC 130 4 120 3

SP 139 2 122 3

JKPM 155 1 144 1+(1) or

CDP 143 3 133 4

18. The question during the course of selection as arose before the BOPEE was visavis odd seats. The said position is taken care of by the

brochure, the relevant portion of which has been referred to hereinabove, suggesting that the odd number of seats in a particular category shall go

to the candidate with higher merit irrespective of sex. It is a hard fact that in each category 50% of seats shall go to the male and 50% to the female

candidates based on respective merit but so far as odd seat is concerned, that has to go in any case to the candidate having higher merit

irrespective of sex.

19. This is the method as was adopted by the BOPEE in terms of its Information Brochure otherwise also such position should not have been

determined by the BOPEE itself because resort should have been had to Rule 36 of the Reservation Rules which is quoted hereunder:

36. Interpretation: if any question of interpretation of any of the provisions of the rules arises, the decision of the Government thereon shall be final:

Provided that the Social Welfare Department shall be consulted before the decision

20. BOPEE had no powers to take decision visavis allotment of odd seats. The matter in fact should have been referred to the Government in

terms of Rule 36 and whatever decision would have been taken by the Government visavis odd seats, that was to be followed. The BOPEE has

neither adhered to its own brochure nor has opted to have recourse to Rule 36 of the Reservation Rules. BOPEE in fact has an onerous duty of

making selection based on merit of the candidates who have to pursue very important courses, in a way that transparency in their actions must be a

hallmark, by having resort to arbitrary methods, that too when Rule 36 of the Reservation Rules was available, selecting odd seats in three

categories, that too starting from bottom of the categories has an element of arbitrary exercise of discretion. Such discretion is not available in view

of the phraseology used in Rule 36. They have not adhered to Rule 36, first odd seats out of various categories going to the candidates with highest

merit irrespective of sex and then seats going to the candidates irrespective of merit based on sex, is totally arbitrary, which should not have been

done.

21. Confronted with this position, learned counsel for the appellant BOPEE would contend that all this has been done bonafidely. No element of

malafide is there nor has been pleaded or attributed to the BOPEE. Whatever has been done has been done with the object of maintaining balance

in between male and female candidates as was required in terms of Section 7 of the Reservation Act.

22. Learned counsel in this context further contended that the main writ petition was disposed of without formally having been admitted to hearing,

so pleadings have remained deficient.

23. Now the question as to whether action of the BOPEE in allotting the odd seat

i.e. fifth seat to the female candidates irrespective of merit is

tenable. It is a matter which can be decided only after the matter is referred to the Government for decision in terms of Rule 36 of the Reservation

Rules. This aspect of the matter has not been noticed in the judgment impugned.

24. The next contention of the learned counsel for the appellant Alisha Kour as well as of the BOPEE is that in terms of the judgment Mridul Dhar

& anr. v. Union of India and others (2005 Vol.2 SCC 65), it has been provided that after expiry of last date prescribed for closure of admission,

no further admission shall be made.

25. According to the learned counsel, the admission to the MBBS course as well as BDS course has been completed in the month of September,

2009, therefore, now in view of the judgment of the Hon'ble Apex Court there is no scope for providing admission to MBBS course.

26. This contention in the background of the peculiar facts and features of the instant case has no bearing at this stage because after all when the

time schedule is not strictly adhered to, in case a candidate has a genuine grouse of having been excluded on flimsy grounds, then his case has to be

considered appropriately.

27. Learned counsel for the BOPEE further contended that in the merit of Sports category another candidate, namely, Shahid Shabir, had a

superior merit i.e. he had 33.80 marks in sports category, who had been allotted admission for BDS course but he left when he was selected for

B.E. course and it is because of that development the respondent Umar Jan got the seat in B.D.S course.

28. From the aforestated facts and position of law, what emerges is that the matter has not been correctly appreciated; therefore, both the appeals

succeed. The impugned judgment is set aside. Matter remitted back with the request to the learned Writ Court to decide the writ petition afresh

after permitting the parties to supplement their pleadings in accordance with the procedure in vogue. The sealed envelope as produced by learned

counsel for respondents be returned to him.

Disposed of as above.