
(2006) 05 AHC CK 0199

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 22382 of 2004

Anand Kumar Rai

APPELLANT

Vs

Vice Chancellor, Banaras Hindu University and Others

RESPONDENT

Date of Decision : 01-05-2006

Acts Referred:

Citation : (2006) 4 AWC 3501 : (2006) 3 UPLBEC 2991

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Advocate : Ravi Kant and Arvind Srivastava, for the Appellant; R.K. Jain, Pankaj Naqvi, V.K. Upadhyaya and Rahul Jain, for the Respondent

Final Decision : Allowed

Judgement

Arun Tandon, J.—Banara Hindu University has been declared to be an Institute of national importance and accordingly included in Entry 63, List 1, (Union List) of Seventh Schedule to the Constitution of India commonly known as Central University. The aforesaid university has established an Institute of Medical Science (hereinafter referred to as Institute). The number of undergraduate seats sanctioned for the Institute (M.B.B.S.) is 56, while the number of post graduate seats sanctioned for the Institute (M.S./M.D.) is 84. Thus the number of postgraduate seats in the Institute like in All India Medical Institute of Sciences, New Delhi is higher viz-a-viz number of seats sanctioned at the undergraduate level (M.B.B.S.).

2. Under resolution of the Postgraduate Board of the University dated 26th May, 2003 it was resolved that internal candidates would be admitted up to 60% of the total seats, 25% seats were earmarked for the All India Quota, entrance examination whereof was to be held by the D.G.H.S., New Delhi. The remaining 15% seats were to be filled by All India Entrance Examination to be conducted by the Banara Hindu University itself. Thus the break-up of the seats available at the Post Graduate level were distributed as follows:

1. 51 seats for internal candidates
2. 21 seats for All India Quota through examination to be conducted by D.G.H.S.
3. 12 seats for entrance examination to be conducted by the Banara Hindu University itself for internal/external candidates.
3. Petitioner A.K. Rai, who had passed M.B.B.S. Examination from the Banara Hindu University, was one of the candidate for being considered for admission in Post Graduate Course under the Institutional preference quota. The University authorities took a decision of ascertaining the merit by conducting a screening examination for the institutional candidates against institutional preference quota. The marks obtained in the screening examination were added to the percentage of the marks obtained in the M.B.B.S. examination for preparation of the merit list. On the basis of the merit so determined, seats available in various subjects at the Post Graduate level were offered through counseling.
4. The aforesaid decision of the University to hold a screening test, for internal seats, was subjected to challenge before this Court by the Medical Students Association (of which the petitioner was also one of the member) by means of Writ Petition No. 31623 of 2003. The writ petition has been dismissed by this Court as having become infructuous on 28.5.2004 on a statement made on behalf of the counsel for the University that each and every member of the petitioner's association has been accorded admission in Post Graduate Course. This Court further observed that all admission at Post Graduate level must be closed by 31st May, 2004.
5. The petitioner, who was willing to opt for any of the subject of General Medicine, Surgery, Ophthalmology only, was in fact offered a seat in the subject of Community Medicine having regard to the merit secured by the petitioner as an internal candidate. This has led to the filing of the present writ petition.
6. Counseling for the students, who were admitted under the All India Quota took place on 5th May, 2004. It is not in dispute that as against 33 seats earmarked for the All India Entrance Examination, only 11 students in fact obtained admission against the Post Graduate seats at Banara Hindu University. The remaining 21 seats of All India Quota were subsequently transferred to the quota of internal candidates.
7. In respect of the 12 seats, which were earmarked to be filled on the basis of an entrance examination conducted by the Banara Hindu University itself from the internal/external candidates, an information leaf-let was published by the Institute of Medical Sciences, Banara Hindu University. The date of written examination was notified as 4th April, 2004. To the leaf-let a note was added that the subjects declared in the leaf-let as available for M.D./M.S. Course could be varied depending upon various factors including seats of All India Quota being left unfilled after joining of the candidates selected through All India Test. The leaf-let did not make mention of the number of seats available under the

aforesaid admission test. However, it is not in dispute that under the resolution of the Post Graduate Board, the same was 12 only.

8. Subsequent to the D.G.H.S. Entrance examination, the open examination conducted by the Banara Hindu University as well as the screening test conducted by the Banara Hindu University for internal candidates being over in respect of the M.D./H.S. Course 2004, the Post Graduate Board vide resolution dated 10th May, 2004 resolved that in view of the judgment of the Hon''ble Supreme Court (which according to the counsel for the University refers to the judgment of the Hon''ble Supreme Court in the case of Saurabh Chaudri and Others Vs. Union of India (UOI) and Others, dated 4th November, 2003) as also in view of the letter of the SC/ST Commission, the following decisions be taken: (a) 82 seats of the MD/MS Course in the Institute be now divided as follows:

(i) 21 seats for DGHS Examination

(ii) 33 seats for All India Entrance Examination to be conducted by the Banara Hindu University.

(iii) 28 seats through Merit Screening Test for internal candidates, which according to the University represented 50% of the total MBBS seats sanctioned for the said institution.

(b) It was further resolved that there shall be 15% reservation for the scheduled castes candidates and 7.5% reservation for scheduled tribes candidates. This reservation was applied only in respect of the seats covered by item Nos. (ii) and (iii). The 21 seats of All India quota (examination whereof was held by DGHS) were kept out of reservation.

9. As a matter of fact the counseling of the candidates, selected on the basis of All India Entrance Examination conducted by the DGHS, started and was completed prior to 10.5.2003.

10. The counseling and admission against internal quota and All India Examination conducted by Banaras Hindu University was held subsequent to the resolution of the Post Graduate Board dated 10.5.2004 and in accordance with the reservation applied against the revised distribution of seats,

11. The resolution of the Post Graduate Board dated 10th May, 2004 re-distributing the seats in the aforesaid three categories, applying the reservation in a selected manner after the process of selection had commenced, is the bone of contention between the parties. By means of the amendment the petitioner has also challenged the admission of respondent Nos. 6 to 12 (who were lower in merit than the petitioner) in various subjects on the basis of the reservation applied under the aforesaid resolution of the Post Graduate Board.

12. Counsel for the petitioner, Senior Advocate Sri Ravi Kant, assisted by Arvind Srivastava Advocate, contends that it is not open to Post Graduate Board to alter the rules of selection including the distribution of seats fixed for various

categories as well as to apply reservation once the process of selection had commenced. It is further submitted that the Hon''ble Supreme Court itself by means of a clarificatory order dated 7.5.2004, passed in the case of Saurabh Chaudhari, being Writ Petition (C) No. 29 of 2003, has clarified that the direction issued under the judgment dated 4.11.2003 shall apply prospectively and the process of selection for admission which has already commenced on the date the said judgment was pronounced shall stand excluded from the direction.

13. In view of the clarificatory order of the Hon''ble Supreme Court, the controversy with regards to quota of internal candidates being confined to 50% only, as was directed in the judgment and order of the Hon''ble Supreme Court in the case of Saurabh Chaudri and Others Vs. Union of India (UOI) and Others, decided on 4th November, 2003 had no application so far as the Academic Course of the year 2004 is concerned and consequently the resolution passed by the Post Graduate Board dated 10th May, 2004, ignoring the clarificatory order of the Hon''ble Supreme Court dated 7th May, 2004 (where by the quota of internal candidates was reduced so as to bring the same in conformity with the earlier judgment of the Hon''ble Supreme Court dated 4th November, 2003) cannot be legally sustained.

14. It is submitted that respondents were under legal obligation to complete the process of section as per the rules notified, including the distribution of seats for respective categories, as well as reservation, if any, applicable as per the advertisement/procedure fixed at the time of initiation of selection proceedings. Counsel for the petitioner further submits that under the judgment of the Hon''ble Supreme Court in the case of Saurabh Chaudhari and even otherwise 50% seat earmarked for internal candidates has to be determined with reference to the total number of sanctioned seats at the Post Graduate level and not with reference to the seats available at Under Graduate level (MBBS).

15. Sri V.K. Upadhyaya, on behalf of the respondents, however, submits that in view of the judgment of the Hon''ble Supreme Court in the case of Medical Council of India Vs. Madhu Singh and Others, as well as in view of the order passed by this Court dated 28.5.2004 in Writ Petition No. 31623 of 2003; Medical Students'' Association v. Banara Hindu University, the process of selection/admission was closed for the academic session 2004 on 29.4.2004 i.e. prior to 31st May, 2004. Therefore, no effective relief can now be granted to the petitioner. It is further submitted that the Post Graduate Medical Board in its meeting dated 10th May, 2004 resolved to alter the distribution of seats for various categories so as to bring the seats earmarked for internal candidates within 50% of the total MBBS seats. The said decision was only in furtherance of the direction issued by the Hon''ble Supreme Court and therefore the same calls for no interference.

16. It is further pointed out that Banara Hindu University is a Central University. It is to be treated at par with All India Institute for Medical Sciences, New Delhi. The reservation of seats for internal candidates has to be determined for such All

India Institutions with reference to para 74 of the judgment of the Hon''ble Supreme Court In the case of Saurabh Chaudhari dated 4.11.2003. It is further submitted that the reservation for scheduled castes and scheduled tribes candidate has to be applied in accordance with law declared by the Hon''ble Supreme Court and that reservation can be made applicable in respect of the admission at Post Graduate level of Medical Courses also.

17. In view of the rival contention raised on behalf of the parties, the following issues emerge for consideration in the facts of the present case:

(a) whether it was open to the Post Graduate Medical Board to alter the distribution of seats available for admission against various categories, after the process of selection had commenced.

(b) whether reservation could have been applied in the midst of the selection process and that too selectively, by excluding the seats which had been earmarked for admission for the entrance examination conducted by the DGHS (All India seats).

(c) whether the outer limit of 50% fixed for internal candidates in light of the judgment of the Hon''ble Supreme Court in the case of Saurabh Chaudhari dated 4.11.2003 has to be determined with reference to the number of seats available at the undergraduate level i.e. MBBS Course in Central Institutions like Banara Hindu University, as the number of Under Graduate seats are much less than the seats provided for at the Post Graduate level.

(d) As to whether petitioner is entitled to any effective relief in the facts and circumstances of the case.

Issue No. (a).

18. The judgment of the Hon''ble Supreme Court in the case of N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, has been referred to in the recent judgment of the Hon''ble Supreme Court in the case of Chairman Railway Board and Anr. v. T. Vittal Rao and Ors. reported in AIR 2006 SC 933 (Para 10) and it has specifically been held as follows:

10. N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, is an authority for the proposition that the changes in the reservation policy cannot be effected retrospectively so as to affect the candidates' existing right in terms of the advertisement for selection which had been issued much prior to the change in policy.

19. Further, in view of the clarificatory order of the Hon''ble Supreme Court dated 7.5.2004 in the case of Saurabh Chaudhari, relevant portion whereof is being quoted herein below:

In our opinion, it would be appropriate to hold and direct the decision in Dr. Saurabh Chaudhari's case being made applicable only prospectively and thus exclude from the operation thereof the process of admission which had already

commenced and was nearing finalisation when the judgment came to be pronounced.

Accordingly, it is directed that the allotment of seats under All India quota, the process as to which had commenced pursuant to the advertisement dated September 16, 2003 shall remain confined to 25% only. As a consequence, IA No. 8 of 2004 filed by the Union of India and IA Nos. 9, 12, 13 and 14 seeking similar relief, and taking the same stand as has been taken by the Union of India, are allowed.

20. There is no room to doubt that the direction for restriction of institutional quota being 50% and reservation for SC/ST candidates being applied at Post Graduate level, in the facts of the case could have been applied prospectively only i.e. subsequent to the academic year 2004. In such circumstances, the resolution of the Post Graduate Medical Board dated 10th May, 2004, which was passed in the midst of the selection process (when the counseling of the candidates selected under the All India quota pursuant to the examination held by DGHS was already over) is invalid.

Issue No. (b)

21. The controversy with regards to applicability of reservation during the midst of the selection process has been subject matter of consideration before the Hon''ble Supreme Court in the case of N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, The Hon''ble Supreme Court has categorically laid down that changes in the rules laying down the procedure for selection can be effected prospectively only so that the rights of the candidates existing in terms of the advertisement for selection (which had been issued much prior to the change in policy) are not adversely affected. Relevant paragraph of the judgment reads as follow:

11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing rules and government orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention....He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature.

22. This judgment has been referred and approved to in the judgment of the Hon''ble Supreme Court in the case of Paramjeet Gambhir and Anr. v. State of M.P. and Ors. reported in (2003) 4 S.C.C. 276.

23. Thus it is now well settled that subsequent to the publication of terms and conditions regulating the admission/selections pursuant to the advertisement published cannot be altered by change in policy qua the reservation subsequent thereto and the process of selection/admissions has to be completed in accordance with the existing policy as was in force on the date of the advertisement and in terms whereof, subject however to the amendments themselves being retrospective in nature.

24. Further it is apparent from the fact of the present case that not only reservation was applied subsequent to the process of admission having been partly completed (i.e. after the seats earmarked for All India Quota admission pursuant to the test held by DGHS, New Delhi having already filled), it was also selectively applied against the seats (a) which were earmarked for the internal candidates and (b) earmarked for admission pursuant to the All India Entrance Examination to be conducted by the Banaras Hindu University itself. Selective application of the percentage of reservation, excluding a particular categories of seats, itself was wholly unjustified and without any rational basis. No justification in that regard has been disclosed by the respondents except for pointing out that on the date decision was taken by the Post Graduate Medical Board i.e. 10.5.2004, the counseling against the All India seats had already been completed. It is also to be noticed that the respondents have not disclosed as to whether the policy of reservation was applied in respect of the seats, which were left unfilled under the All India Quota and subsequently added to the pool of seats reserved for internal candidates, or not,

25. On both the aforesaid grounds namely altering of the condition of admission subsequent to the advertisement and process of admission having been partly completed, as well as on account of selective application of the reservation to certain categories of seats only the decision of the Post Graduate Medical Board dated 10.5.2004 has to be declared illegal. As a result whereof this Court has no hesitation to hold that all consequential action taken in pursuance of the decision of the Post Graduate Medical Board dated 10th May, 2004 is also rendered and illegal.

Issue No. (c)

26. With reference to issue No. 3 it would be worthwhile to reproduce the para 72 and 74 of the judgment of the Hon"ble Supreme Court in the case of Saurabh Chaudri and Others Vs. Union of India (UOI) and Others, which read as follows:

72. Having regard to the facts and circumstances of the case, we are of the opinion that the original scheme as framed in Dr. Pradeep Jain case should be reiterated in preference to Dr. Dinesh Kumar (II) case Reservation by way of institutional preference, therefore, should be confined to 50% of the seats since it is in public interest.

74. AIMS is an institution of excellence. It is a class by itself and pride. We are, therefore, of the opinion that in AIIMS and the medical colleges of the Central

university, merit should have primacy subject of course to institutional preference to the extent of 50% of the total seats in the MBBS course. In all other respects, the decision of this Court in AIIMS students' Union case shall operate.

27. The purpose of distinguishing the applicability of 50% quota to be limited to the seats available at MBBS Course in institutions like in AIIMS and Medical Colleges of the Central University wherein MBBS Course seats are much less viz-a-viz total number of seats in Post Graduate Courses is to ensure that merit has primacy i.e. the entire internal candidates do not get admission automatically to the Post Graduate Courses if 50% of the seats at Post Graduate Level are reserved in that category. For example; in the case of Banaras Hindu University where the total number of Post Graduate Courses i.e. MD/MS seats are 82, while the total number of seats available at under Graduate level MBBS are only 56, if 50% of internal quota is determined with reference to seats available at Post Graduate level, it would mean that 41 seats of Post Graduate level are available to the internal candidates, whose maximum number can be 56. Such a reservation would work out to nearly 72% of the MBBS seats, which would run contrary to the basic principle laid down by the Hon'ble Supreme Court in the case of Saurabh Chaudhari i.e. merit should have primacy. It is only for this purpose the Hon'ble Supreme Court has made a distinction in paragraph 74 between the AIIMS and other medical institutions of Central University viz-a-viz other medical colleges, for the purposes of determining the extent of 50% of the seats being reserved for internal candidates.

28. Thus this Court is of the opinion that 50% of the seats to be reserved for internal candidates, in medical institutions of Central University like Banaras Hindu University must be calculated with reference to the total number of MBBS seats available in the said institution and not with reference to the Post Graduate seats. Such calculation would be in conformity with the dictum of the Hon'ble Supreme Court in the case of Saurabh Chaudhari read as a whole.

Issue No. 4.

29. This leads us to the last issue i.e. the relief to which the petitioner is entitled. In the light of the judgment of the Hon'ble Supreme Court in the case of Madhu Singh (supra) and in view of the stand taken by the respondent University authorities to the effect that the admissions have already been closed and the students (including the petitioner) have already joined their respective courses, there can be a case for denying any effective relief to the petitioner.

30. It is true that the petitioner had been admitted to Post Graduate Course (in a discipline for which he was not willing). He has been denied admission in the subject of his choice only because of reservation being applied and persons lower in merit than the petitioner being offered the said subjects in preference to the petitioner. Even after having come to the said conclusion that the resolution of the Board dated 10th May, 2004 was illegal, as a consequent thereto the

admission granted whereof would be automatically rendered illegal, this Court is of the opinion that no purpose would be served by quashing the admission granted to other students at this stage when nearly two years have elapsed and all the students who have been admitted on the basis of the said decision of the Post Graduate Board are not before this Court, moreover their career is likely to be jeopardized, because of any such directions being issued by this Court.

31. At the same time the Court is also conscious of the fact that the petitioner has been pursuing his remedy before this Court since prior to the initiation of process of counseling itself and delay in disposal of this writ petition, was caused without any fault being attributed to petitioner. This Court would rather follow the final direction issued by the Hon"ble Supreme Court in the case of *Paramjeet Gambhir and Anr. v. State of M.P. and Ors.* reported in (2003) 4 S.C.C. 276. Relevant paragraphs 5 and 6 are being quoted herein below:

5. We have given our careful consideration to the submissions made by the learned Counsel for the parties. It is true that in a series of decisions of this Court starting from *Dinesh Kumar (Dr) v. Motilal Nehru Medical College. State of Bihar v. Dr Sanjay Kumar Sinha. State of U.P. v. Dr Anupam Gupta* and finally *Medical Council of India v. Madhu Singh* it has been held that the timetable for the course should be strictly adhered to and there is no scope for admitting students midstream which would be against the very spirit of the statute governing medical education. However, in the present case what we find is that certain seats which had been surrendered from the all-India quota even before the first counselling had been done were not included in the said counselling. The second feature is that the State Government made a provision in the 2002 Rules whereby the system of opt-for-waiting was abolished but subsequently in the counter affidavit filed in the writ petition it was pleaded that Rule 15.8 had been deleted and the old system of opt-for-waiting had been revived. In view of this stand of the State Government the appellants were entitled to participate in the second counselling wherein all the vacant seats/colleges should have been made available. The appellants filed the special leave petitions, prior to the holding of the second counselling.

6. In view of the peculiar facts and circumstances of the case and in the interest of justice the appeals are disposed of with a direction to the respondents to consider the candidature of the appellants for giving them admission in a postgraduate course in the disciplines in which seats are still lying vacant taking into consideration their rank and choice. This may be done within ten days of presentation of a certified copy of this judgment before the appropriate authority.

32. In the totality of the circumstances as noticed herein above, this Court is of the opinion that the rights of the petitioner, as have been deprived of because of application of the wrongful decision taken under the resolution of Post Graduate Medical Board, have to be redressed and the petitioner is liable to the relief as may be permissible under law. Counsel for the petitioner has further made a statement that in case he is offered admission in any of the three subjects

namely General Medicine, Surgery and Ophthalmology, he is ready and willing to forgo the loss caused to his academic career.

33. This Court feels that substantial justice would be done if the University authorities are directed to offer admission to the petitioner in any of the aforesaid three disciplines in the coming academic year provided the petitioner gives an undertaking that for the loss of academic session due to the change of discipline will be at his own sweet will and in respect thereto he would have no grievance. The issue No. 4 is answered accordingly.

34. In view of the aforesaid, writ petition is allowed and it is directed that the respondent shall offer admission to petitioner in any of the aforesaid three subject i.e. General Medicine, surgery, Ophthalmology in the coming academic year on terms and conditions specified in the body of the judgment as aforesaid.