

(2013) 11 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : S.W.P. 1378, 1457 Of 2013 and Cont. 449 Of 2013

Basharat Mujtaba

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 02-11-2013

Acts Referred:

Citation : (2014) 1 JKJ 311

Hon'ble Judges : Muzaffar Hussain Attar, J

Bench : Single Bench

Judgement

Muzaffar Hussain Attar, J.—Sher-i-Kashmir Institute of Medical Sciences (SKIMS)-Deemed University, issued Advertisement Notification

on 06-06-2013, whereunder applications were invited from eligible candidates for seeking consideration for being selected to undergo training

course in DM/M.Ch. in different disciplines. Notification No. SIMS/Acad-76 of 2013 dated 15-07-2013 was issued, whereunder list of 17

candidates was published, who, on the basis of their merit obtained in the entrance examination (theory and practical) conducted by SKIMS, were

selected to undergo DM/M.Ch. degree courses (03 academic years) at SKIMS, deemed University for the session 2013. Petitioners were also

selected to undergo various courses. From amongst the petitioners, this writ petition survives only for petitioner No. 2 and petitioner No. 4 as

other petitioners have been admitted to undergo courses for which they stand selected.

2. Besides other conditions in the Selection Notification, one of the conditions, which was part of the Advertisement Notification also, was that the

selected candidate shall submit No Objection Certificate (NOC) from his/her

employer in case he/she is working in Government/Semi Government

Department. It was also provided in the Selection Notification that the selected candidates shall join and complete all necessary formalities in

Academic Section, SKIMS and submit original certificates required in this behalf along with requisite fee, latest by 25-07-2013, failing which, the

seat, falling vacant, shall be offered to the next candidate, if any, figuring in the merit list.

3. The petitioners, being in-service Assistant Surgeons, approached the competent authority with the request that in view of their selection to

undergo higher training courses in SKIMS, deemed University, they be relieved. The Competent Authority, however, did not relieve the

petitioners, which necessitated them to file a representation before the respondent No. 3, requesting him to extend time for production of NOC

from their employer. Time was extended upto 31-07-2013. When the employer did not accede to the request of the petitioners for issuing NOC

and relieving them, they approached this Court by filing SWP 1378/2013. The Court, on 26-07-2013, while issuing notice in the said writ petition,

directed the respondents therein to relieve the petitioners so as to enable them to undergo higher training courses. This order was, however, made

subject to objections of the other side.

4. It may not be out of place to mention here that the petitioners, immediately after issuance of Selection Notice, submitted their joining reports

before the authorities of SKIMS, deemed University but, because of non issuance of NOC by their employer, it appears that their joining reports

were not entertained. The petitioners could not join because of non availability of NOC from the employer.

5. The SKIMS, deemed University, issued Notification No. SIMS/Acad/78 of 2013 dated 03-08-2013, whereunder selection of the petitioners

and one other doctor was withdrawn as they had failed to join their respective courses within the stipulated time. In terms of the same Notification,

private respondents 4 & 5, who were next in merit in the waiting list, were selected to undergo higher training course in DM, Gastroenterology and

Neurology. Petitioner No. 2, in terms of Notification dated 15-07-2013 was selected to undergo training course in DM, Neurology and petitioner

No. 4 in DM, Gastroenterology.

6. The petitioners, however, have been relieved by the Directorate of Health Services, Kashmir, vide Communication dated 05-09-2013, at their own risk and responsibility, till instructions were received from the Administrative Department. After having been relieved on 05-09-2013 by the employer, excepting for petitioners 2 & 4, all other writ petitioners were permitted to join their respective training courses. Petitioners 2 & 4 were not permitted to join their courses on the ground that the waiting list in these two disciplines was prepared and candidates figuring therein were selected to undergo higher course after withdrawing selection of the said petitioners. The petitioners, feeling aggrieved of the Notification dated 03-08-2013, challenged the same in this writ petition.

7. The relief sought in this writ petition, being of significant importance for determination of the rights of the parties, is taken note of:

...That by issuance of a writ of certiorari the order No. SIMS/Acad/78 of 2013 dated 03.08.2013 whereby the admission of the petitioners' herein

DM/M.Ch courses has been withdrawn may be quashed and respondents especially the SKIMS Soura be directed to allow the petitioners to join

the said Courses, as same shall be in the interest of justice.

8. The Court, on 05-08-2013, while issuing notice in SWP 1457/2013, CMP 2339/2013, directed that operation of Notification No.

SIMS/Acad/78 of 2013 dated 03-08-2013, issued by respondent No. 1, shall remain $\hat{A}\pm n$ abeyance.

9. Respondents 3, 4 & 5 have filed objections/Reply Affidavit. Respondent No. 3, in his objections, has resisted the writ petition on the principal

ground that after 30th of September, the admissions cannot be granted, in view of the law laid down by the Hon'ble Supreme Court in various

judgments as also the Medical Council of India Regulations. Respondents 4 & 5 in their objections, besides taking other objections for dismissing

the writ petitions, have also pleaded that their selection has not been called in question in the writ petition.

10. Mr. R.A. Jan, learned Senior Advocate, appearing for the petitioners, submitted that the petitioners, who were selected on the basis of having

secured superior merit to undergo DM in the discipline of Neurology and Gastroenterology respectively, cannot be denied admission in SKIMS as

they have taken all the steps, which were within their control to ensure that NOC

is issued by their employer and they are relieved by the said authority within the prescribed time limit. Mr. Jan, while referring to the material placed on the writ record, submitted that when the efforts of the petitioners to obtain the NOC from their employer, did not bear any fruit, they were constrained to approach this Court and the Court directed the respondents to relieve them. The direction was issued on 26-07-2013 in respect of all the writ petitioners. Learned counsel submitted that the petitioners, however, were relieved on 05-09-2013, viz. after filing of present writ petition. Learned counsel submitted that excepting for petitioners 2 & 4, all other petitioners were permitted to join and pursue their courses of study, notwithstanding the fact that along with the petitioners, their selection to undergo higher courses was also withdrawn. Learned counsel further submitted that petitioners have been subjected to discrimination. Learned counsel, in support of his contention, referred to and relied upon judgment of the Hon'ble Supreme Court in case titled *Asha Vs. Pt. B.D. Sharma University of Health Sciences and Others*, . Learned counsel, more particularly, referred to paragraph 33, 38.2 and 38.3 of the judgment and submitted that the Hon'ble Supreme Court, after considering the entire case law on the subject, ruled that even after the last date for grant of admission, the College/Institution, in rare and exceptional circumstances, can be directed to admit the meritorious candidate, who was left out. Learned counsel also referred to Regulation 12(4) of the Post Graduate Medical Education Regulations, 2000 (for short Regulations of 2000), which is reproduced herein below, and submitted that besides the already two selected candidates from the waiting list, the petitioners can also be accommodated by granting them admission:

(12)

4/The ratio of PG teacher to the number of students to be admitted for super specialties course shall be 1:2 for Professor/Associate Professor and 1:1 for remaining cadre covered by the general note following this rule in each unit per year subject to a maximum of 5 PG sets for the course per unit per academic year provided the complement of 10 teaching beds per seat is added to the prescribed bed strength of 20 for the unit. The Strength of 20 beds per unit as prescribed in the present regulations, will be considered adequate upto total 4 postgraduate seats in D.M./M.Ch.

courses.

Further in case of full fledged dedicated departments of medical oncology and surgical oncology the ratio of PG teacher to the number of students

to be admitted shall be 1:3 for Professor, for Associate Professor 1:2 and 1:1 for remaining cadre covered by the general note following this rule in

each unit per year subject to a maximum of 6 PG sets for the degree per unit per academic year provided a bed strength of 30 for the unit for

super specialties.

Provided that against the very same units, leaching personnel and infrastructure, no other postgraduate courses under any other body like National

Board of Examinations, College of Physicians & Surgeons etc. are permitted.

11. Mr. Jan submitted that the Regulation 12(4) of Regulations of 2000 supra provide that ratio of Post Graduate Teachers to the number of

students to be admitted for Super Specialty course, shall be 1:2 for Professor/ Associate Professor and 1:1 for remaining cadre. Learned counsel

submitted that in view of cadre strength of the Departments of Neurology and Gastroenterology, besides respondents 4 & 5, petitioners can also

be accommodated by granting them admission. Learned counsel submitted that if this method is adopted, then respondents 4 & 5, who have been

admitted to undergo super specialty course will also continue to pursue their studies. Learned counsel submitted that the Hon'ble Supreme Court

has, in unequivocal terms, stated that there cannot be any compromise on merit. Mr. Jan further submitted that the notification dated 03-08-2013

was directed to remain in abeyance by the Court vide order dated 05-08-2013. He further submitted that in view of the interim order of the Court,

the respondent No. 3 could not allow respondents 4 & 5 to join and these respondents, in their own right also, could not seek admission after the

aforementioned interim order of the Court. Learned counsel submitted that respondent No. 4 had filed a Caveat and his counsel was also present

at the time interim order dated 05-08-2013 was passed by the Court. Learned counsel, while referring to paragraph 6 of the writ petition (SWP

1457/13), submitted that the petitioners submitted their joining reports collectively on 25-07-2013 to ensure that they do not lose the admission as

the last date for joining was fixed on 25-07-2013. The petitioners, in this behalf, did not wait for issuance of relieving order from their employer.

This averment made in the writ petition has remained uncontroverted. Learned counsel, accordingly, prayed for allowing these writ petitions.

12. Mr. M.I. Dar, learned counsel appearing for respondent No. 3, while referring to the judgments of the Hon'ble Supreme Court, more

particularly, in case titled Mridul Dhar (Minor) and Another Vs. Union of India (UOI) and Others, , submitted that respondent - SKIMS, which is

a deemed University, cannot grant admission beyond 30th of September. Learned counsel also referred to the Schedule, which has been

reproduced in the said judgment in this behalf and submitted that the respondent - SKIMS, thus, in no circumstances, can permit the petitioners 2

& 4 to join after the date, i.e. 30/09/2013. Learned counsel, while responding to the submissions of Mr. Jan, about Regulations of 2000, submitted

that in view of the available cadre strength and faculty members available, though more students can be accommodated for undergoing super

specialty training course, but in view of the law laid down by the Hon'ble Supreme Court in number of judgments including Mirdul Dhar's case,

respondent No. 3 is not in a position to grant admission to the petitioners 2 & 4. Learned counsel further submitted that the Candidates, whose

selection was initially withdrawn and who were petitioners with petitioners 2 & 4, were permitted to join as there was no waiting list prepared in

the disciplines they were selected and after withdrawing of their selection, no other candidate was selected to undergo training in those courses. In

the case of petitioners 2 & 4, waiting list having been operated, candidates (respondents 4 & 5), selected and also permitted to join on 05-08-

2013, no such benefit could be extended to them (petitioners 2 & 4). Learned counsel submitted further that respondents 4 & 5 were permitted to

join on 05-08-2013 and the Court order dated 05-08-2013 was received in the Office of respondent No. 3 on 07-08-2013. Learned counsel,

accordingly, prayed for dismissal of the writ petition.

13. Mr. Z.A. Qureshi, learned counsel appearing for respondents 4 & 5, submitted that in the writ petition (SWP 1457/2013), no relief can be

granted against his clients, as their selection to undergo superior specialty course has not been called in question in the writ petitions. He further

submitted that in view of the terms and conditions of the Advertisement Notice and Information Brochure, it was the duty of petitioners 2 & 4 to

take all steps for getting relieved by their employer well in time. Learned counsel submitted that these petitioners having not challenged the terms

and conditions of the Advertisement Notification and Information Brochure, are precluded from maintaining the writ petition. He further submitted

that in case, in view of the mandate contained in Regulations of 2000, the petitioners 2 & 4 are also given admission without disturbing admission

of respondents 4 & 5, he will have no objection for adopting such a course. Learned counsel further prayed that if the aforesaid submission is not

accepted, then writ petitions merit dismissal. It was also submitted by Mr. Qureshi that in terms of order of the Court dated 05-08-2013, the

impugned Notification dated 03-08-2013 was kept in abeyance, which would mean that the Notification has only been suspended.

14. Admittedly, the petitioners on the basis of their merit, were selected by respondent No. 3 to undergo DM/M.Ch. Degree courses. The writ

petitioners, who were selected candidates, were not relieved by their employer and NOC was not issued in their favour. Despite extension of time

upto 31-07-2013 for fulfilling the requisite formalities, they could not complete the same, which resulted in withdrawal of their candidature as

selected candidates in terms of impugned Notification dated 03-08-2013. However, in the meanwhile, the petitioners were relieved by their

employer but excepting for petitioners 2 & 4, the order of withdrawal of candidature of other petitioners/selected candidates was revoked by

respondent No. 3. The petitioners 2 & 4 were not permitted to join the SKIMS for undergoing training courses as in their place, respondents 4 &

5 were selected, who, in the meanwhile, had joined and are pursuing their respective courses.

15. Petitioners 2 & 4 had neither shown any negligence nor slackness in getting themselves relieved by their employer and in obtaining NOC

Besides filing applications before their employer, they also approached respondent No. 3 for extension of time for production of requisite

documents including NOC. They approached this Court and the Court directed the respondent for issuance of NOC in their favour. The

petitioners had done all that was within their control so as to enable themselves to get admission in SKIMS (deemed University) for undergoing

super specialty courses.

16. The Hon'ble Supreme Court at paragraph 38.2 in aforementioned Asha's case has observed as ""30th September is undoubtedly the last date

by which the admitted students should report to their respective Colleges without fail. In the normal course, the admissions must close by holding of

second counseling by 15th September of relevant academic year (in terms of decision of this Court in Priya Gupta). Thereafter, only in very rare

and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may

preferably be exercised by the Courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or process of

law would stand frustrated that Courts should exercise their extra ordinary jurisdiction of admitting the candidates to the courses after the dead line

of 30th September of the current academic year. This, however, can only be done if the conditions stated by this Court in Priya Gupta and this

judgment are found to be unexceptionally satisfied and reasons therefor are recorded by the Court of competent jurisdiction.

17. Testing the case on hand on the touch stone of conditions laid down in paragraph 38.2 of Asha's case aforementioned, the petitioners do

satisfy the conditions mentioned therein by the apex Court. This is said, inter alia, for the reason that; the petitioners, on the basis of their superior

merit, were selected to undergo super specialty course; it was not within the competence and control of the petitioners to get themselves relieved

from their employer; the petitioners, when they were not relieved within the prescribed time limit and when NOC was not issued to them, initially

approached the employer/authority and respondent No. 3 and thereafter this Court: the Court issued interim order directing the employer/authority

to relieve them but despite that, they were not relieved till 05-09-2013; they had submitted joining report on 25-07-2013, which, however, was

not entertained. The directions, thus, can be issued for granting admission to the petitioners 2 & 4 and for allowing them to pursue their courses.

However, the directions, which would result in annulling the selection/admission of respondents 4 & 5, cannot be issued, for the reason that

petitioners have not sought quashment of their selection to undergo super specialty course. The impugned Notification has been challenged to the

extent it withdraws the selection of petitioners only.

18. The interim order dated 05-08-2013, by virtue of which the impugned Notification dated 03-08-2013 was kept in abeyance, in view of

expression ""abeyance"" used in the said order would, in law, mean that the state of affairs created by the impugned order is not in existence.

Respondents 4 & 5, until such time the interim order was either vacated or modified, could not derive any benefit from the selection/Notification

dated 03-08-2013. The difficulty, however, in this case is that such a view, in law, cannot be taken to the detriment of the legal rights of

respondents 4 & 5, for the reason that, as already stated, their selection has not been called in question by the petitioners. The interim order cannot

be stretched beyond the main relief sought for in the writ petitions as that is not countenanced in law. The interim order would, thus, maintain the

position in respect of petitioners 2 & 4, which was existing prior to issuance of impugned Notification dated 03-08-2013 and will not affect the

selection/admission of respondents 4 & 5 to undergo super specialty course. This can be only a legal corollary and consequence of the interim

order passed by the Court on 05-08-2013, in view of the main relief sought for in the writ petition. The selection/admission of respondents 4 & 5,

thus, will remain undisturbed and they will have right to pursue their courses in accordance with law and rules.

19. Question now arises as to whether petitioners 2 & 4 can be granted any relief and if answer is in affirmative, what that relief can be.

20. In the admitted fact situation of these cases, the petitioners 2 & 4 have been subjected to incalculable sufferings for no fault of theirs. They have

been deprived from reaping the benefits of their hard work, which resulted in their securing highest merit on the basis of which they were selected

to undergo super specialty course. As already stated, petitioners 2 & 4 exhibited complete urgency in taking all necessary steps for seeking

admission for super specialty course within the prescribed time limit. Issuance of NOC in their favour and relieving them was not within their

control. They made all sincere and honest efforts to get themselves relieved by their employer. They even approached this Court. Furthermore, in

view of the interim order dated 05-08-2013, the state of affairs in respect of petitioners 2 & 4, which existed prior to issuance of impugned

Notification dated 03-08-2013, whereunder their selection was withdrawn, would continue to exist and their selection is intact.

21. This is a rarest of rare cases and in case relief is not granted to the petitioners, that would result in ""frustrating the process of law"" and subverting the ends of justice"".

22. In view of mandate contained in Regulations of 2000, the petitioners 2 & 4 can be granted admission even at this stage. For the above stated reasons, these writ petitions along with connected IAs are disposed of in the following manner:

a) Selection/admission of respondents 4 & 5 to undergo Super Specialty course shall remain undisturbed and they shall be allowed to pursue their

courses in their respective disciplines in accordance with law and rules;

b) The impugned Notification No. SIMS/Acad/78 of 2013 dated 03-08-2013, issued by respondent No. 1, to the extent it withdraws the

selection of petitioners 2 & 4, is set aside;

c) The respondent No. 3 -- Director, Sheri Kashmir Institute of Medical Sciences (Deemed University), is directed to consider and admit the

petitioners 2 & 4 in their respective disciplines for undergoing Super Specialty Courses in view of the mandate contained in Regulation 12(4) of the

Post Graduate Medical Education Regulations, 2000. The said authority to report compliance within one week to the Registrar Judicial of this

Court.

CONTEMPT 449/2013:

In view of judgment passed in the writ petitions supra, this contempt petition has become infructuous. It is, accordingly, dismissed along with

connected CMPs.