

(2013) 02 GAU CK 0039
In the Gauhati High Court
Case No : Writ Petition (C) No. 4624 of 2012

Benzir Rahman and Another	Vs	APPELLANT
State of Assam and Others		RESPONDENT

Date of Decision : 25-02-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 2 GLT 1002

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : S.K. Medhi, Mrs. J. Borah, Mr. D. Borah and Mr. B.P. Borah, for the Appellant; G.N. Sahewalla, for the Respondent

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J.—By way of this petition under Article 226 of the Constitution of India, the two petitioners seek a direction to the State respondents to provide them admission in the first year MBBS course in the medical colleges in the State of Assam for the session 2012-13 as per their preference by considering their merit position. Facts of the case may be briefly noted.

2. A combined entrance examination was held on 19.05.2012 and 20.05.2012 for admission into the MBBS/BDS/BAMS courses and Engineering Degree courses in the State of Assam. Both the petitioners, who are general (unreserved) category candidates, applied for and appeared in the combined entrance examination. In their applications, they gave MBBS as their first choice and BDS as their second choice as per preference. Director of Medical Education, Assam declared the results on 29.06.2012. Both the petitioners were selected. Petitioner No. 1 secured 177 marks and was placed at Serial No. 335 in order of merit Likewise, petitioner No. 2 secured 176 marks and was placed at Serial No. 344 in the list of successful candidates. It may be mentioned that the total number of seats in the MBBS course in the State of Assam is 526 (State quota-419) whereas the total number of seats in the BDS course is 40 (State quota-16).

3. First counselling was held on 10.7.2012. The petitioners, who were called to appear in the counselling, were informed by the authorities that all the MBBS seats earmarked for unreserved category candidates were filled up as per merit by candidates upto Serial No. 303.

4. According to the petitioners, they were advised by the authorities during the counselling to take admission in the BDS course. Though the petitioners had declared in their application forms that MBBS was their first choice in order of preference, as they were informed that no MBBS seats were available, they hesitantly took admission in the BDS course. After taking admission into the BDS course, which was their second choice of preference, both the petitioners started attending their classes at the Regional Dental College, Guwahati.

5. When the petitioners came to know that some MBBS seats were lying vacant, petitioner No. 2 submitted a representation dated 02.08.2012 before the Director of Medical Education requesting allotment of a seat in MBBS course as per merit.

6. Second counselling was notified and held from 15.08.2012 to 22.08.2012 for filling up of a few seats in MBBS course. According to the petitioners, unreserved category candidates upto the rank of 348 were called for the second counselling and admission. Though the petitioners' ranks were 335 and 344 respectively, they were not called for the counselling.

7. Both the petitioners submitted separate representations before the Director of Medical Education and Registrar of Srimanta Sankardev University of Health Sciences on 14.09.2012, 18.09.2012 and 20.09.2012 for allotting them MBBS seats against subsequent vacancies.

8. An admission order was published on 19.09.2012 from the Directorate of Medical Education, Assam. In the unreserved category, candidates up to Serial No. 385 were called to take provisional admission in the MBBS course. However, again, the names of the petitioners were not included. Altogether 13 numbers of candidates ranked from 350 to 385, all placed below the petitioners in order of merit, were allowed to take admission against vacant MBBS seats.

9. Petitioners filed separate appeals before the Appellate Authority i.e. Secretary to the Govt. of Assam, Health and Family Welfare Department on 21.09.2012 for allotting them MBBS seats as per their merit position though they had taken admission in the BDS course.

10. On 25.09.2012, an educational notice was published by the Director of Medical Education informing that 10 numbers of seats in BDS course for the session 2012-13 were lying vacant and that a few seats in the MBBS course for the session 2012-13 were also likely to be vacant before 29.09.2012. Accordingly, the candidates whose roll numbers were mentioned in the said educational notice were directed to report to the office of the Director of Medical Education on 29.09.2012 for spot admission. In that educational notice also, petitioners were not included though candidates placed below them in order of

merit in the unreserved category were included.

11. Aggrieved, petitioners have filed the present petition seeking the reliefs as indicated above.

12. Contention of the petitioners is that they had given MBBS course as their first choice in order of preference but were compelled to take admission in the BDS course during counselling under misleading advice of the authorities. Now persons below them in the merit list have been admitted into the MBBS course. Their merit position entitles them to admission in the MBBS course. Non-inclusion of their names in the subsequent counsellings is therefore illegal.

13. This Court by order dated 28.09.2012 had admitted the writ petition and passed the following interim order:-

In the meantime, the respondents are directed to consider the case of the petitioners for provisional admission in 1st year MBBS course, during the counseling scheduled to be held on 29.09.2012, subject to coming within the zone of consideration and also availability of the seats. The respondents may also consider the provisional admission of the candidates who would have been admitted had no interim order been passed, apart from provisional admission of the candidates against two BDS seats in which the petitioners were earlier admitted.

This order has been passed so that in case the writ petition is dismissed the persons who are entitled to get the admission are not deprived from getting the admission and no seat remains vacant.

The authority shall inform all those candidates that their admission is subject to the outcome of the writ petition.

14. Respondent No. 3 i.e. Director of Medical Education has filed counter affidavit. Stand taken is that petitioners had opted for BDS course on their own choice. It was made clear to them that once admitted in BDS course, there would be no scope for change of institution and course as per the Admission Rules. Petitioners also gave an undertaking before the Selection Board that they would not claim for MBBS seats if vacancy arises in future. Since the petitioners had opted for admission into BDS course, their names were not enlisted in the waiting list for the MBBS course. 13 numbers of seats in the MBBS course under unreserved category fell vacant and those were filled up from the candidates in the waiting list. Since petitioners had taken admission in the BDS course, their names were not included in the waiting list. It is the categorical stand of the respondent No. 3 that the petitioners were explained about the Admission Rules that once admitted in the BDS course there would be no scope for change of course and college.

15. Petitioners in their rejoinder affidavit have stated that pursuant to the order of this Court dated 28.09.2012, they had reported before the respondent authorities and by order dated 29.09.2012, the Director of Medical Education,

Assam allowed the petitioners to take provisional admission into the first year MBBS course for the session 2012-13, which was however made subject to the outcome of the present proceeding. The petitioners have stated that since their admission, they have been regularly attending their classes from 01.10.2012 in the first year MBBS course in the Gauhati Medical College. They have asserted that during their counselling, they were not properly advised by the authority and they were simply asked to sign the undertaking as part of the admission procedure. Unable to comprehend the implication of such spot admission, they had signed the undertaking. They have further stated that since all the admissions are provisional, the bar of change of college and course would not be effective till completion of the whole admission process.

16. Ms. Shramana Acharjee, who has secured 173 marks and ranked 397 in the merit list in the combined entrance examination, 2012 filed an application seeking leave to intervene in the proceeding of WP(C) No. 4634/2012, which was registered as Misc. Case No. 2864/2012. This Court by order dated 03.10.2012 allowed her prayer and permitted her to intervene in the writ proceeding.

17. Heard Mr. S.K. Medhi, learned counsel for the petitioners. Also heard Mr. D. Saikia, learned Additional Advocate General, Assam appearing for the respondents and Mr. G.N. Sahewalla, learned senior counsel for the intervenor.

18. Mr. Medhi, learned counsel for the petitioners submits that petitioners being young students eager to get admission could not have exercised a reasoned and informed decision on the spot when they took admission in the BDS course at the time of first counselling. He submits that the merit position of the petitioners justify their admission in MBBS course as candidates with lesser merit have in the meanwhile got admitted in the said course. He submits that merit has to be given primacy and all rules and procedures are to be construed in a manner which are in aid of merit and which do not defeat the cause of merit. He submits that till the admission process is complete, all admissions remain provisional and, therefore, the bar insisted upon by the State would not be enforceable till such time the admission process is complete. In support of his submissions, learned counsel has placed reliance on a decision of the Apex Court in the case of Mridul Dhar (Minor) and Another Vs. Union of India (UOI) and Others, .

19. Mr. D. Saikia learned Addl. Advocate General, submits that under Rule 3(b)(f) of the Medical Colleges of Assam, Regional Dental College, Guwahati and Government Ayurvedic College. Guwahati (Regulation of Admission of Under-Graduate Students) Rules, 2007 (2007 Rules), no change of choice as given in the application by a candidate in respect of the college or the course shall be permitted at the time of appearing before the Selection Board under any circumstances. Referring to Rule 4(b) of the 2007 Rules, he further submits that a candidate of any category once admitted in any particular Medical College or Regional Dental College or Government Ayurvedic College shall not be allowed to change the college or category. He has also referred to the amendment of the said Rules made in the year 2008 whereby Rule 4(b) has been amended to make

it very specific that a candidate of any category once admitted in a particular Medical College in Assam/Regional Dental College, Guwahati/Government Ayurvedic College, Guwahati shall not be allowed to change the college and category. He submits that the petitioners were fully aware of the Rules and despite that they took admission in the BDS course. Now the petitioners cannot turn around and claim admission in MBBS course. He, therefore, submits that the claims of the petitioners are wholly untenable and cannot be granted by the authorities. In the circumstances, he prays for dismissal of the writ petition. He however submits that notwithstanding dismissal of the writ petition, admission of the petitioners pursuant to the interim direction of the Court may not be disturbed as in that event it may lead to wastage of two precious MBBS seats.

20. Mr. G.N. Sahewalla, learned Senior Counsel appearing for the intervenor while reiterating the above contention of the learned Addl. Advocate General regarding the bar of changing course and college once admission is taken, additionally submits that the interim order of this Court is untenable being contrary to the provisions of the 2007 Rules and, therefore, petitioners cannot take advantage of such interim order. He also submits that though this Court while passing the interim order on 28.09.2012 had directed that the respondents may also consider provisional admission of those candidates who would have been admitted had no interim order been passed, the State failed to provide provisional admission to the intervenor. Learned Senior Counsel submits that in the educational notice dated 25.09.2012, the intervenor was placed 6th in the list of unreserved candidates. Five of the candidates immediately preceding the intervenor plus the two petitioners have been admitted in the MBBS course. Had the two petitioners not been admitted, the intervenor would have been eligible to take admission in the MBBS course. Therefore, in terms of the interim order of this Court, intervenor should have been provisionally admitted. In such circumstances, he submits that not only the writ petition should be dismissed but a direction should be issued to the respondents to provide admission to the intervenor in the MBBS course for the session 2012-13 against one of the two seats presently held by the writ petitioners. He also submits that orders of the Court cannot cause prejudice to any one and the Court in exercise of its powers should ensure that justice is done to all the stakeholders. In support of his submissions, learned Senior Counsel has placed reliance on the following decisions:-

1. B.C. Chaturvedi Vs. Union of India and others,
2. Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others,
3. State of Gujarat and Others Vs. Essar Oil Limited and Another,
4. Priya Gupta Vs. State of Chhatishgarh and Others,
5. Asha Vs. Pt. B.D. Sharma University of Health Sciences and Others,

21. In his brief reply, Mr. Medhi, learned counsel for the petitioners submits that

petitioners having better merit than the intervenor, they have a better claim to admission in the MBBS course and the intervenor cannot claim admission on the strength of a technical plea. Had the petitioners not taken admission in the BDS course, intervenor would not have come into the picture at all. He submits that in the case of medical admission, it is merit alone which should be the sole criteria. He also relies upon and refers to a decision of the Hon"ble Supreme Court in the case of Mabel Vs. State of Haryana and Others, .

22. Submissions made have been considered.

23. Question for consideration is whether petitioners are entitled to admission in the MBBS course after their admission in the BDS course.

24. At the outset, a brief dilation of the 2007 Rules is considered necessary. The 2007 Rules are not statutory Rules. Those are in the form of administrative orders governing admission into the MBBS and other allied courses in the State of Assam. As per Rule 3(b)(e), the Selection Board constituted for the purpose of selection of candidates, shall allot a seat to a candidate in the MBBS/BDS/BAMS courses according to the choice of the candidate as mentioned in his application form and subject to availability of seat in that particular college at the point of time of appearance of the candidate before the Selection Board. In the case of non-availability of seats in the college of his first choice, a candidate shall be allotted seat in the college of his next order of preference and so on. As per Clause (f), no change of choice as given in the application form by the candidate in respect of the college or the course shall be permitted at time of appearing before the Selection Board under any circumstances. As per Rule 4(b), which has since been amended, a candidate of any category once admitted in a particular Medical College in Assam/Regional Dental College, Guwahati/Government Ayurvedic College, Guwahati shall not be allowed to change the college and category. As per Rule 12, any candidate aggrieved by the decision of the Selection Board may prefer an appeal before the appellate authority i.e. Secretary to the Govt. of Assam, Health and Family welfare (B) Department, which shall be disposed of within a period of 7 days.

25. In the present case, petitioners had appeared before the Selection Board for counselling on 10.07.2012 for MBBS seats under the general category. When the MBBS seats got exhausted on that day, they had accepted the BDS seats in the Regional Dental College, Guwahati offered by the Selection Board. In this connection, petitioners signed undertakings dated 10.07.2012 to the effect that they would not claim MBBS seats for the session 2012 if any vacancy arises in the future.

26. The petitioners in their admission applications had given MBBS as their first choice and BDS as their second choice as per preference. As formulated above, the issue is whether the petitioners by virtue of their admission in the BDS course and undertakings given that they would not claim MBBS seats, would stand debarred from staking a claim to admission in the MBBS course, which

otherwise they would have been entitled to on the basis of their merit.

27. The Hon''ble Supreme Court in the case of Mabel (supra) was examining Clause 18 of the Information Brochure of Kurukshetra University, Haryana for MBBS/BDS entrance examination, which provided that the candidates already admitted in any medical/dental college will not be considered eligible for admission to the course. The Apex Court held that the bar of Clause 18 was intended to be operative during the period of the course in which the candidate had taken admission. After completing that course or in the event of abandoning the course and not studying for the normal period of the course, the candidate would become eligible after the end of such period of the course to seek admission in the course of his choice provided other conditions of admission are satisfied.

28. In Mridul Dhar (supra), Hon''ble Supreme Court held that if a student had already been admitted, there would be no question of such a student being permitted counselling again so as to change the medical college with a view to get admission in some other medical college. It was, however, held that the students who, as a result of the counselling already held, had taken admission in dental colleges would be permitted to participate in the counselling for getting a chance for admission in MBBS course on their merit position. But it was clarified that those admitted in the MBBS course would not be permitted to change the college and those who had taken admission in dental college would also not be permitted to change from one dental college to another dental college. However, it may be noted that the Apex Court had made it clear that the said order should not be treated as a precedent as it was observed that it may open floodgates of litigation in other cases.

29. Kalabharati Advertising (supra) is a case dealing with the effect of dismissal/withdrawal of a case on the interim relief granted. Hon''ble Apex Court held that no litigant can derive any benefit from the mere pendency of a case in a Court of law. In a case where the foundation is removed, the super-structure falls. The Court further held that no one should suffer by an act of the Court.

30. In Essar Oil Ltd. (supra) also the Hon''ble Supreme Court reiterated the principle that an act of Court cannot prejudice anyone, which principle is founded upon justice and good sense and is a guide for the administration of law.

31. B.C. Chaturvedi (supra) is a case relating to departmental proceeding of a Government servant. On the question of interference with the penalty imposed by the disciplinary authority, the Hon''ble Apex Court held that the High Court has the jurisdiction to mould the relief to do complete justice between the parties.

32. In Priya Gupta (supra), admission granted to two students in the MBBS course were cancelled by the authority on the ground that admission to those two students were given ignoring more meritorious and suitable candidates. The High Court did not interfere with such cancellation. In the facts of that case, as those two students were about to complete their course, the Hon''ble Supreme

Court allowed them to complete their professional course subject to payment of certain amount to the Medical College since by their admission other candidates of higher merit were denied admission and the professional college fee was very low compared to other private colleges.

33. In the case of ASHA (supra), the Apex Court while reiterating that 30th September is the cut-off date for medical admission beyond which no admission is permissible except in exceptional cases as explained by the Apex Court, however, held that criteria for selection in medical admission has to be merit alone. Merit, fairness and transparency are the ethos of the process for admission to such courses. Rule of merit cannot be defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the rule of merit can be compromised.

34. ASHA (supra) was a case where the candidate was not admitted to the MBBS course in the first counselling as she was lower in merit. Consequently, she took admission in the BDS course on that very day. Thereafter, in the second counselling when candidates ranked below her in the merit list were given admission to the MBBS course, the candidate moved the High Court. Though the Single Bench directed admission of the candidate to the MBBS course without cancelling the admission of other students lower in merit, the Division Bench reversed the said judgment. In the contextual facts of that case, the Apex Court held that the appellant (candidate) was entitled to the relief prayed for but directed her admission in the next academic session.

35. The present case relates to admission to MBBS course. There is a great deal of competitiveness amongst the meritorious students for getting admission to MBBS course. As observed by the Apex Court in ASHA (supra), every candidate of higher merit would always aspire admission to the course which is more promising and undoubtedly, a more meritorious candidate would prefer the MBBS course over the BDS course given the high competitiveness in the present times. The entire life/career of a student depends upon his admission to a particular course. In ASHA (supra), the Apex Court has held that it is one of the primary obligations to see that a candidate of higher merit is not denied seat in the appropriate course and college as per his preference. While acknowledging that process of admission is a cumbersome task, the Apex Court observed that it per se cannot be a ground for compromising merit.

36. Both the two petitioners and the intervenor belong to general category. Admittedly, the petitioners are placed higher than the intervenor in the merit list. While the petitioners position in the merit list are 335 and 344 respectively, the position of the intervenor is 397. It is not disputed that candidates with lesser merit placed below the petitioners in the merit list in the unreserved category have been given admission in the MBBS course in the subsequent rounds of counselling. Had the two petitioners not taken admission in the BDS course, they would have certainly got admission in the MBBS course in the subsequent rounds of counselling as persons below them in the merit list were called for and given

admission in the MBBS course, in which case the intervenor would not have come into the picture at all. To that extent, the case of the intervenor is based on a negative claim.

37. In the back ground facts of the case and considering the above decisions, let us now examine the interim order passed by this Court on 28.09.2012. This Court had directed the respondents to consider the case of the petitioners for provisional admission in the first year MBBS course during the counselling scheduled on 29.09.2012 subject to their coming within the zone of consideration and also subject to availability of seats. This Court further directed the respondents to also consider provisional admission of the candidates who would have been admitted had no interim order been passed, apart from provisional admission of the candidates against the two BDS seats in which the petitioners were earlier admitted. This Court had clarified that this order was passed to ensure that in the event the writ petition is dismissed the persons who are entitled to get admission are not deprived from getting admission and no seat remains vacant.

38. During the hearing, Mr. Saikia, learned Addl. Advocate General informed the Court that while the petitioners were given provisional admission in the MBBS course, against the resultant vacancies in the two BDS seats, two candidates have been provisionally admitted. But no provisional admission has been given to candidates in the MBBS course who would otherwise have been eligible to get admission but for the admission of the two petitioners. From the educational notice dated 25.09.2012, it is evident that the two candidates having Roll Nos. 170354 (intervenor) and 180009 should have been given provisional admission in terms of order dated 28.09.2012. This is obviously a lapse on the part of the respondents. But in view of the conclusions and finding being arrived at by the Court, it may not have the consequential effect.

39. The intention of the authority in framing Rule 4(b) of the 2007 Rules appears to be to ensure that a candidate who has already secured admission with his free will in any course of MBBS/BDS should complete that course and should not change his mind in the midstream. A careful scrutiny of the 2007 Rules, which do not have statutory character and are administrative in nature, would indicate that the prohibition to change the college and category after a candidate takes admission in a particular college and course would become operative once the admission process is complete. Till the admission process is complete on 30th September, all the admissions are to be understood as provisional in nature and the bar of Rule 4(b) would come into play once the admission is finalized. The 2007 Rules have been framed to streamline admission to the MBBS and other allied courses, which is based on the rule of merit. Rules and procedures are the hand maid of justice. They cannot be applied in a manner where merit becomes the casualty. As pointed out by the Hon'ble Supreme Court in ASHA (supra), the rule of merit cannot be defeated by technicalities. Criteria for admission within the various categories is merit alone, which is an absolute rule without any

exception.

40. That being the position, the petitioners by virtue of their merit position in the unreserved category cannot be denied seats in the MBBS course when admittedly candidates placed below them in the merit list in that category have been given admission in the MBBS course.

41. In view of above, provisional admission given to the petitioners in the first year MBBS course for the session 2012-13 in terms of interim order of this Court dated 28.09.2012 is upheld. Consequently, the provisional admission of candidates in the two BDS seats against which petitioners were earlier admitted is also upheld. Accordingly, writ petition stands allowed. However, looking into the facts and circumstances of the case, there shall be no order as to cost.