

(2011) 05 GUJ CK 0155
In the Gujarat High Court

Case No : Special Civil Application No's. 4764 and 4765 of 2011

Danubhai Unadbhai Mori

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 10-05-2011

Acts Referred:

Indian Medical Council Act, 1956 — Section 33
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 39, 72, 9
Post Graduate Rules — Rule 37(1), 5

Citation : AIR 2012 Guj 1

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : B.M. Mangukiya and Bela A. Prajapati, for the Appellant; Krina Calla, AGP for Respondent No. 1, V.D. Nanavati and Hetvi H. Sancheti, for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—Rule. Respondents have appeared and therefore, no further notice of rule is required to be served. As common question of facts and law are involved in both the above referred writ petitions, they are taken up for hearing together and are disposed of by this common judgment and order.

2. In both the writ petitions, the prayers and the relief prayed for are verbatim the same and identical. For the sake of convenience, the relief's as prayed for in both the petitions are as under:

(A) Be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction in the nature of mandamus, holding and declaring that the physical disability assessment carried out by the Medical Board assembled on March 08, 2011, of the Petitioner is ex-facie illegal, arbitrary and ultra virus;

(B) Be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction in the nature of mandamus and direct the Respondent No. 4-

Medical Board to reconvene the medical test and to assess the Petitioner afresh for his loco-motor disability and issue a certificate accordingly;

(C) Be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction in the nature of mandamus, quashing and setting aside the admissions given in favor of Respondents No. 5, 6 and 7 and direct the Admission Committee of the P.G. Course to recall all the students and consider the admission in P.G. Course after the reassessment certificate is issued by the Medical Board;

(D) Pending hearing, admission and final disposal of this petition, this Hon'ble Court will be pleased to direct the Respondents to give a provisional admission to the Petitioner in P.G. Course of Pharmacology and/or Degree of Anesthesia;

(E) Be pleased to pass such other and further orders as the nature and circumstances of the present case may require.

3. Petitioners have challenged the legality, validity and propriety of the action of the Respondents declining to give admission in Post Graduate Course (herein after referred to as "P.G. Course") without assigning or informing any reasons in this regard on the premise that the Petitioners are not entitled to admission under the rules governing the admission to Post Graduate Degree and Diploma Medical Courses Other Than M.Ch. and D.M. at the affiliated Medical Colleges/ Institutions as the Loco-motor disability of lower limbs of both the Petitioners have been assessed less than 50%. It appears from the pleadings that the Petitioners completed their M.B.B.S. against the reserved quota of Physically Handicapped persons. It is their case that at the time of admission in M.B.B.S., the Petitioners were medically checked up by the Medical Board, Civil Hospital, for the purpose of assessment of their disability and both the Petitioners were assessed having disability of more than 50%. It is their case that after completing the M.B.B.S., both the Petitioners decided to undertake P.G. Course and therefore, they appeared in P.G. Entrance Examination. Petitioner of Special Civil Application No. 4764 of 2011 secured 220 marks out of 400 marks and was placed at Serial Number 587 on the combined merit list. So far as Physically Handicapped rank is concerned, he has been put at Serial Number 13. In the same manner, Petitioner of Special Civil Application No. 4765 of 2011 secured 234 marks out of 400 marks and was placed at Serial Number 459 on the combined merit list. So far as Physically Handicapped rank is concerned, he has been placed at Serial Number 12. It is their case that less meritorious students have been admitted in the P.G. Course and they have been left out as their physical disability has been assessed to less than 50%. It is their case that at the time when they were admitted in the first year of M.B.B.S., their physical disability was assessed more than 50% and therefore, while seeking admission in P.G. Course, the physical disability cannot be reduced. It is submitted that action on the part of the Respondents in not admitting them to P.G. Course is ex-facie illegal, arbitrary and ultra virus.

4. On behalf of the Respondent No. 3 i.e. Gujarat University, an affidavit-in-reply has been filed explaining as to why the Petitioners have not been given admission in P.G. Course. In para-3 of the reply, it has been stated as under:

3. I submit that under Rules framed by the Gujarat University on the basis of Rules and Regulations of Medical Council of India the Petitioners are found not to be eligible for consideration under reservation for physically disabled candidates. According to the rules three percent of the available seats in each category shall be reserved, for loco-motor disabled candidates of the respective category provided that a candidate having loco-motor disability of lower limbs between 50% to 70% (upper limbs being normal) "shall be eligible to apply for admission in accordance with the guidelines regulations of the Medical Council of India provided the candidate shall require to produce the certificate obtained in the Performa prescribed in the application form. The certificate shall be obtained from the Medical Board constituted for this purpose by the State Government. The Certificate shall contain disability and suitability of such candidate for undertaking the course. If any seats remain vacant, the second preference shall be given to a candidate having loco-motor disability of lower limbs between 40% to 50%.

5. In para-5 of the reply, it has been stated as under:

I submit that fifteen physically handicapped students applied for admission in Medical Faculty. All the candidates were requested to attend for clinically examination on 8.3.2011. All the candidates were examined clinically for their deformity and tested with muscle charting as per BMC guidelines for their muscle weakness. Their ROM of joints and the other daily activities were checked clinically and videographed also for records. In response of Special Civil Application preferred by the Petitioner I had sought observations from the Chairman of the Committee. The Chairman by his communication dated 20.4.2011 has stated as under;

It can also be observed from the above chart that Mr. Damubhai Unabhai Mori and Mr. Vinodkumar Babulal Shah who are the Petitioners in SCA No. 4764 and 4765 of 2011, have been clinically assessed and examined thoroughly with all tests required. Their certification from the expert committee of Gujarat University and the committee of Civil Surgeons of Government of Gujarat are identical and same and their percentage of their disability are not lower than the percentage shown in the certificates of committee of Civil Surgeons of Government of Gujarat.

6. In para-6, it has been stated as under:

I submit that Respondent Nos. 5, 6 and 7 have disability to the extent of 60%, 70% and 55% respectively.

7. On the same line, affidavit-in-reply has been filed by Respondent No. 6 who has been admitted for P.G. Course as her physical disability has been assessed

more than 50%.

8. It is evident from the affidavit-in-reply filed by Respondent No. 3, Gujarat University, that they are relying upon Rule 5 which governs the admission to Post Graduate Degree and Diploma Medical Courses Other Than M.Ch. and D.M. at the affiliated Medical Colleges/Institutions from 9.7.2010. It would be expedient to quote Rule 5 of the aforesaid rules for better adjudication of the entire controversy.

9. Rule 5 relevant for the purpose of these petitions is as under:

Three percent (3%) of available seats in each category (SC/ST/SEBC/OPEN) in Locomotor disability (PH) shall be reserved for loco-motor disabled candidates of the respective category provided that a candidate having "loco-motor disability of lower limbs between 50% to 70% (upper limbs being normal)" shall be eligible to apply for admission to Non-Surgical Medical course subjects only. Provided that in case any seat in this 3% quota remains unfilled on account of unavailability of candidates with locomotory disability of lower limbs between 50% to 70% then any such unfilled seat in this 3% quota shall be filled up by persons with locomotor disability of lower limbs between 40% to 50%. No other disability certificate except the certificate which is issued as per performa annexed to the application form from Medical board constituted for the purpose regarding disability and suitability of such candidates for undertaking the course shall be treated as final. The Candidate with a disability more than 70% will not be eligible for admission to any Post Graduate Courses on any category. No other disability will be allowed as per MCI guidelines. For allocation of seats to physically handicapped category in said year, Roster point guideline given by Govt. of Gujarat will be followed.

10. It is evident on plain reading of Rule 5 that 3% of available seats in each category (SC/ST/SEBC/OPEN) in Loco-motor disability (PH) has to be reserved for loco-motor disabled candidates of the respective category provided that a candidate must be certified having loco-motor disability between lower limbs between 50% to 70% only in such cases, person shall be eligible to apply for admission to Non-Surgical Medical Course subjects only. It is only in cases in seats 3% quota remaining unfilled on account of unavailability of candidates with locomotory disability of lower limbs between 50% to 70% then any such unfilled seat in this 3% quota shall be filled up by persons with locomotor disability of lower limbs between 40% to 50%.

11. The issue for our consideration in this matter is as to whether Rule 5 of P.G. Rules is in consonance with the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. If the answer to this is in the negative then whether the Rule 5 is ultra virus, being contrary to and amounting to altering definition of "person with disability" as defined u/s 2(t) of the Disabilities Act.

12. We have heard learned Counsel, Mr. B.M. Mangukiya for the Petitioners, Mrs.

V.D. Nanavati, learned advocate appearing for the Respondent No. 3- University, Ms. Krina Calla, learned AGP, appearing for Respondent No. 1 and Ms. Hetvi H. Sancheti, learned advocate appearing for Respondent No. 6.

13. We may not have to undertake a detailed exercise to answer this issue because the constitutional validity of a pari-materia rule was a subject matter of consideration by this Court in case of Dr. Deval R. Mehta v. Union of India and Ors. reported in 2011 (1) GLH 409.

14. In the aforesaid reported case, the Division Bench was called upon to consider the Post Graduate Medical Education (Amendment) Regulations, 2009. By way of an amendment, Sub-clause (1)(a) came to be added in Clause-9 under the heading "Selection of Post Graduate Students". The proviso came to be added after the sentence "General Category Candidates". In the first proviso to Clause 9(2)(iv), we quoted herein:

9(1)(a).3% seats of the annual sanctioned intake capacity shall be filled up by candidates with locomotory disability of lower limbs between 50% to 70%.

45% for persons with locomotory disability of lower limbs in the same manner as stipulated in Clause 9(1)(a) above.

15. Plain comparison of Clause 9(2)(iv) of the Post Graduate Medical Education (Amendment) Regulations, 2009 with Rule 5 governing the admission to Post Graduate Degree and Diploma Medical Courses Other Than M.Ch. and D.M. applicable in the present case would go to show that it is pari-materia the same.

16. In the reported decision of this Court while declaring Clause 9(2)(iv) as ultra virus, being contrary to and amounting to altering definition of "person with disability" as defined u/s 2(t) of the Disabilities Act, the Division Bench proceeded to observe as under:

Para-7 reads as under:

7. It appears that M.C.I. with approval of the Central Government published 'The Post Graduate Medical Education (Amendment) Regulations 2009 (hereinafter referred to as "2009 Guidelines", for short). By the said amendment Sub-clause (1)(a) has been added in Clause 9 under the heading "Selection of Postgraduate Students". A proviso has been added after the sentence "General Category Candidates" in the fourth line of the first proviso to Clause 9(2)(iv), as quoted hereunder:

9(1)(a). 3% seats of the annual sanctioned intake capacity shall be filled up by candidates with locomotory disability of lower limbs between 50% to 70%.

45% for persons with locomotory disability of lower limbs in the same manner as stipulated in Clause 9(1)(a) above.

17. Para-8 reads as under:

8. The Petitioner has challenged the aforesaid Amending Regulations 2009

whereby 3% seats of the annual sanctioned intake capacity has been limited only to the candidates with locomotory disabilities of lower limbs between 50% to 70%.

18. Para-10 read as under:

10. Learned Counsel for the Petitioner would submit that Petitioner having been treated as disabled was admitted in M.B.B.S. course against 3% seats reserved for disabled persons. Once he having been accepted as disabled for the purpose of studying M.B.B.S. course, he cannot be discriminated vis-a-vis other disabled persons for admission in postgraduate course on the ground that he has upper limb disability. It has no nexus with the object sought to be achieved.

19. Para 16 reads as under:

16. Section 39 of the Disabilities Act reads as under:

39. Time-limit for the notification of vacancies.-

(1) Vacancies, required to be notified to the local Special Employment Exchange, shall be notified at least thirty days before the date on which applicants will be interviewed or tested where interviews or tests are held, or the date on which vacancies are intended to be filled, if no interviews or tests are held.

(2) Vacancies required to be notified to the Special Employment Exchange notified under Sub-rule (1) of Rule 37 shall be notified at least three weeks before the date on which applicants will be interviewed or tested where interviews or tests are held, or the date on which vacancies are intended to be filled, if no interviews or tests are held.

(3) An employer shall furnish to the concerned Special Employment Exchange, the results of selection within fifteen days from the date of selection.

20. Persons with disability has been defined u/s 2(t), the meaning of which is as follows:

2(t) "person with disability" means a condition of arrested or incomplete development of mind of a person which is specially characterized by sub-normality of intelligence.

What is disability, meaning of which has been shown in Section 2(i), as defined and quoted hereunder:

2(i) "disability" means -

- (i) blindness;
- (ii) low vision;
- (iii) leprosy-cured;
- (iv) hearing impairment;

- (v) locomotory disability;
- (vi) mental retardation;
- (viii) mental illness.

From the aforesaid provisions of the Disabilities Act, it will be evident that those who have suffered from not less than 40% of any disability as certified by Medical Authority, fall within the meaning of "person with disability" for the purpose of claiming reservation against 3% seats u/s 39.

21. Para-18 reads as under:

The question arises that if Section 39 provides reservation of not less than 3% of seats for "persons with disabilities", and "persons with disabilities" means those suffering from not less than 40% of any disability, can the M.C.I. regulate the admission by making further classification between the persons with limited disabilities, one having lower locomotory disabilities against the other having upper locomotory disabilities for the purposes of admission in postgraduate course?

22. Para-22 reads as under:

The relevant provision of Section 33 of the Indian Medical Council Act, 1956, as referred to by learned Counsel for the M.C.I., do not empower the M.C.I. to limit 3% reservation of seats as provided u/s 39 within a limited disabled persons. It is true that the M.C.I. has power to frame regulations laying down the minimum criteria for admission, qualification, etc. for admission to M.B.B.S. or postgraduate medical courses. It can also lay down guidelines of fitness for such guidelines, but the question arises that if under the Central Act, viz. the Disabilities Act, "person with disability" as defined is given a meaning of 'persons suffering from not less than 40% of any disability' as certified by Medical Authority, the M.C.I. has any authority to frame a regulation, limiting the same only to persons having locomotory disabilities as done by the Amending Act, 2009 notified on 25.03.2009?

23. Para-24 reads as under:

24. The Disabilities Act was enacted pursuant to a meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002 held at Beijing on 1st to 5th December, 1992 wherein they adopted a Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and the Pacific Region. It came into effect from 01.01.1996. u/s 72 of Disabilities Act, it is made clear that the provisions of the said Act or the Rules made thereafter is in addition to, and not in derogation of any other law for the time being in force or any Rules or Order or any Instruction issued thereunder enacted or issued for the benefit of persons with disabilities. Such provisions have been made under the Central Act, viz. the Disabilities Act, defining the persons with disabilities means a person suffering not less than 40% of any disability as certified by any Medical Authority.

Any decision or regulation framed by the M.C.I. contrary to Section 2(t) shall be ultravires the said provisions. It is true that the M.C.I. has jurisdiction to frame regulations for admission in M.B.B.S. or postgraduate medical course, but no provision can be made against any Central Act, including Section 2(t) of the Disabilities Act wherein 'person with disability' has been defined. The Postgraduate Medical Education (Amendment) Regulation 2009, issued by Notification dated 25.03.2009, adding Sub-clause (1)(a) and proviso to Clause (2) (iv) to Section 9 therein being contrary to and amounting to altering definition of 'person with disability' as defined u/s 2(t) of the Disabilities Act, we hold the Postgraduate Medical Education (Amendment) Regulations, 2009 Part-I so far as it relates to addition of Sub-clause (1)(a) and proviso to Clause (2)(iv) to Section 9 relating to locomotory disability as ultravires.

24. It is settled position of law that statute can be invalidated or held unconstitutional

(I) If it is ultra virus the Parent Act,

(II) Contrary to the statutory provisions other than those content in the Parent Act,

(III) Law making power has been exercised in bad faith,

(IV) It is not reasonable and it goes against the legislative policy,

(V) Does not fulfill the object and purpose of the enabling Act.

25. The position of law has been made abundantly clear by the Division Bench of this Court in the case of Dr. Deval R. Mehta (supra) and the same principle as explained in the said judgment would also be applicable in the present case. It is not in dispute that the Petitioners became disabled much prior to their admission in the M.B.B.S. course. They were admitted in the M.B.B.S. course and have already completed such course. Petitioners being fit for admission in the M.B.B.S. course with lower limb disability cannot be said to be unfit for admission to P.G. Medical Course.

26. In this view of the matter, we hold that Rule 5 governing the admission to Post Graduate Degree and Diploma Medical Courses Other Than M.Ch. and D.M. at the affiliated Medical Colleges/Institutions from 9.7.2010 in so far as it restricts reservation of 3% of seats in locomotor disability to candidates having locomotor disability to lower limbs between 50% to 70% (upper limbs being normal) is ultra vires being contrary to and amounting to altering the definition of "person with disability" as defined u/s 2(t) of the Disabilities Act.

27. We are informed that Respondent Nos. 5, 6 and 7 have already been given admission to P.G. Course under Rule 5 of the rules governing the admission to Post Graduate Degree and Diploma Medical Courses. In view of the fact that this Court has declared Rule 5 to a limited extent as ultra vires, we direct the Respondents to undertake exercise of admission afresh so far as 3% of seats in

each category (SC/ST/SEBC/OPEN) in locomotor disability category is concerned. After excluding the criteria of admitting candidates with locomotor disability lower limbs between 50% to 70%, the relative merits of each of the candidates be assessed again and thereafter, a fresh merit list be prepared.

28. This exercise may be undertaken within a period of 15 days from the date of receipt of this order.

29. For the reasons recorded in the judgment, both the petitions are allowed to the aforesaid extent. Rule made absolute to the aforesaid extent.

30. Order

31. An oral prayer has been made by the Counsel appearing on behalf of Respondent Nos. 6 and 7 to stay the judgment pronounced today for a period of four weeks.

32. Taking into consideration the nature of the case, we stay the judgment to the extent it relates to the students who have already admitted, for a period of two weeks.

33. So far as the case of the Petitioners is concerned, they will be considered.