

(2002) 05 J&K CK 0016

In the Jammu And Kashmir High Court

Case No : OWP No's. 16, 366, 479, 549 and 555 of 2001

Deeba Farhat, Juzia Ali, Basharat Manoor, Farya Khalid, Birjis
Ayub Khan and Others

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 16-05-2002

Acts Referred:

Citation : (2003) 1 JKJ 509

Hon'ble Judges : R.C. Gandhi, J; Muzaffar Jan, J

Bench : Division Bench

Advocate : Z.A. Shah, for the Appellant; M.H. Attar and J.A. Kawoosa, AAG's,
for the Respondent

Judgement

Muzaffar Jan, J.—Number of writ petition were submitted challenging the order of respondent No. 1, cancelling the State Government

Order No: 951-HME of 2001 dated 01.03.2001 and communication No: U-12012/23/ 90-ME(P) dated 26/28-2-2001 of the Central

Government.

2. As it was felt that important question of law and public importance are involved, which require determination by a larger Bench, the writ

petitions were referred, under the directions of Lord Chief Justice, to this Division Bench for adjudication.

3. In order to understand to controversy, facts which are identical and almost similar in all the writ petitions are reflected from OWP No: 366 of 2001.

4. Record reveals that state Government had established two Medical Colleges, one at Srinagar and the other at Jammu. In the year 1988-89

Jehlum Valley College of Medical Sciences (hereinafter JVCMS) in the private sector was started at Srinagar and almost on same footings another

Medical College, also in the private sector was established at Jammu under the name "Acharya Shri Chander Chinar College of Medical Sciences

(hereinafter ASCOMS). After these Medical Colleges were set up in the private sector, the promoters of "Public Research Institute of Multiplex

Education" (hereinafter PRIME) also took steps for starting a Medical-cum-Dental College in District Budgam of Kashmir Valley and admitted 60

students in MBBS and 19 students to BDS Course in the years 1995. This constituted the first batch of the students in the said college. The

promoters/management of all the three Medical Colleges made admissions in the same manner as way generally done by the other private

Medical/Dental Colleges of India.

5. Apex Court in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , formulated a scheme, applicable from the

session 1993-94, providing for procedure for admission to the professional courses and required the respective state Government/ affiliated

Universities to pass follow-up and consequent orders in compliance to the directions contained in the judgment.

6. The State Government did not pass any consequential order in terms of the Judgment. It was during the pendency of the legal proceedings,

initiated against ASCOMS, by the students seeking admission in the said college, that for the first time SRO 43 dated 5.2.1996 was issued.

7. While the issues, which emerged consequent to the decision of the Supreme Court in Unni Krishnan's case, were being considered and discussed

at various levels, the Private Medical Colleges in the State continued to make admissions, cognizance of which was suo-moto taken by this court in

writ petition OWP No: 1419/1996 and general directions were issued vide order dated 28.8.1997 consequently students of all the private

Medical Colleges were not put up for examination.

8. The State Government took over the management of the JVCMS under J&K Charitable Endowment Act, 1989, and transferred the

management of the college to Sher-i-Kashmir Institute of Medical Science difficulty of the students, although their admissions were made on the

same pattern and in the same manner as the admission of students in private

Medical Collages.

ASCOMS was granted affiliation by the University of Jammu and in due course recognized by the Medical Council of India and accordingly the

problem of this college were also settled. The students of the Technical Institutions, admitted in the same manner as the petitioners, were allowed

to appear in various examinations as a consequence of the stay of the judgment of the Division Bench by the Supreme Court vide order dated

17.12.1997. The problems of the students of Technical Institutions was also resolved.

9. The petitioner asserting to be a distinct class by themselves, approached the State, Central Government and the Medical Council of India for

settlement of their problem. The University of Kashmir accorded affiliation to PRIME Medical College vide communication

No:DC/KU/98/PB/379 dated 07-10-1998 and the State Government constituted a high level committee to ascertain the status of PRIME Medical

College. The report of the Committee, after inspection, was considered but the students of the college were not put up for the examination.

PRIME College was not permitted to continue and the college was closed and pursuant to this decision of the State Government, the Chief

Minister, as one time exception, in order to safeguard the career of the students, through Ministry of State for Health and Family welfare

Government of India, recommended for adjustment of 53 MBBS and 14 BDS students of PRIME College in other existing Medical College of the

State within the approved intake capacity. The communication was followed by DO No. ME/CM-171/ 95 dated December 8,2000 projecting

similar situations and seeking consent with the clarification that the increase in intake capacity as a consequence of admission of petitioners can be

neutralized in next ten years. The Central Government, in consultation and approval of the Medical Council of India, agreed and issued

Communication No : U-12012/23/99-ME (P) dated 26/28-2-2001 to the State Government, where under 30 MBBS students were permitted to

be admitted in SKIMS, 12 MBBS students in Government Medical College, Jammu and 12 student in Government Dental College, Srinagar.

Consequently, upon satisfaction of eligibility, admission for the academic year 2001-2002 were made in pursuance of Government order No: 951-

HME of 2000 dated 20.12.2000. The petitioners reported in the respective Medical Colleges in Decembers of 2000, completed prescribed

formalities, deposited their fees and were formally admitted to Ist year MBBS Course in these Medical Colleges.

After admission of the petitioners, political parties, like Akhil Bhartiya Vidayarathi Parishad and Rashtriya Sewak Sangh, protested against the

admission of the petitioners in Jammu region by blockade of roads, bands and instigating the students. The State Government, in view of the

disturbance, approached the Central Government for cancellation of the admission, which was approved by the Central Government on 26/28-2-

2001 and order No: 159-HME of 2001 dated 10.03.2001, cancelling was issued. It is the legality of the order dated 01-03-2001 and

communication No: U12012/23/99-ME (P) dated 26/28-2-2001 which have been challenged in these writ petitions.

10. The main submission made in the writ petitions are that in terms of Government order No: 951-HME of 2000 dated 20.12.2000 the

petitioners were granted admission, they reported in the respective Medical College, completed all the formalities required under rules, paid the

fees and then actually attended the classes and in these circumstances the petitioners acted upon the order of admission before its cancelation. No

notice was served before the cancellation of the Order which had been given effect and acted upon. Although the petitioners were entitled to

hearing and hearing having been denied, rules of natural justice had patently been infringed. Denial of opportunity of hearing has resulted in serious

prejudice to the petitioners. Had an opportunity been granted to them, petitioners would have demonstrated that there was no resentment by the

student community; the agitation was manipulated by a particular community admission made by the competent authority Entrance Examination is

only in respect of the notified seats available in the Colleges and that the procedure adopted by the said authority does not apply to the seats which

are over and above the intake capacity of respective college. The petitioners constituted class by themselves and their admission would not cause

any prejudice to other students. The Central Government also did not issue any notice before according approval to the withdrawal of the earlier

request of the State Government, as a basis for passing of the impugned order, therefore, the Central Government was also bound to hear the

petitioners. The cancellation of admission of the petitioners, on the basis of agitation of political parties, is totally Un-constitutional and illegal. The conscious decision of the Government to admit the petitioners was, after consultation with the concerned authorities and justified in the interest of the students on the same analogy as had been done in case of students of P.C Dental College, Karnataka. It was further submitted that in the year 195, when the petitioners were admitted, SRO 43 was not in existence and the Competent Authority had the jurisdiction, at that time, to select the candidates for admission to Government Medical Colleges at 'Srinagar and Jammu. In the absence of SRO 43, petitioners could not seek their selection through Competent Authority Entrance Examination. No right of any candidate has been infringed because the admission of the petitioners is over and above the intake capacity. The order of cancellation dated 01.03.2001 has not been passed on account of any legal disability and when it was allowed to be kept in existence for more than two and a half months time. The order was cancelled simply to appease the agitating political parties of one region. Cancellation of the order of admission, on account of the agitation, as such, merits to be set aside and the writ petitions deserves to be allowed.

11. While admitting that the State Government had, in consultation with the Central Government passed the impugned order, the stand and submissions of the respondents are that the selection of the petitioners have not been through Competent Authority Entrance Examination, to the MBBS/ BDS Course at the time of their initial admission and as such, it was contrary to the decision of the Apex Court delivered in *Uni Krishnan's* case and would effect the rights of the meritorious candidates whose number would be reduced. The Government in its wisdom, cancelled the order of admission to encourage selection of meritorious candidates and, as such, no rule of natural justice requires to be followed to rectify an illegal and unconstitutional order. The agitation against the admission at Jammu was not the basis to cancel the admission, but the order was cancelled on account of the illegality in the initial admission of the petitioners. On these grounds it is submitted that the writ petitioners be dismissed.

12. Heard learned counsel for the parties perused the record and considered the submissions of learned counsel for the parties.

13. The facts, which are not denied but are admitted, are that there are two Medical Colleges one at Srinagar and one at Jammu. In the year 1988

steps were taken up for affiliation with the University and recognition by the Medical Council of India, for Medical College Since the Medical

Council of India had no control over private Medical Colleges, except recognition, the jurisdiction of Medical Council of India in itself was limited.

The admissions in the Private colleges were made on donation basis and the merit was followed as prescribed by the management of the colleges.

The admissions in JVCMS were also made on the same norms and the college was affiliated with the University of Kashmir. It is also admitted that

in the year 1993-94 ASCOMS was set up at Jammu and admissions to this College were also made by the management writ petition was filed in

the year 1995 by the students of ASCOMS seeking some directions against the respondents therein. The direction issued were appealed against

before the Divisions Bench and during the pendency of the appeal before the Division Bench the State Government issued SRO 43 of 1996 to

implement the decision of the Apex Court delivered in Uni Krishnan's case. PRIME Medical College was set up in the year 1995 and admissions

were made, as was done in case of JVCMS and ASCOMS. The writ petition filed by the students of ASCOMS was decided by the Division

Bench which was appealed in the Apex Court and decided vide judgment dated September 11, 1996. In the year 1996, this court, suo-moti, took

congnizence in OWP No: 1419/ 1996 of a Press Note and restrained the examining authority from conducting the examination of those students

who had been granted admission in contraventions of direction contained in Uni Krishnan's case. The students of PRIME and other technical

institutions could not take examinations.

Record reveals that ASCOMS received affiliation with the University of Jammu and was duly recognised. The students of Technical Institutions

filed SLP before the Apex Court in which, on interim orders, the competent Authority took the examinations of the students and allowed them to

purse the course. By 1996-97 no admissions were made by the management of any Medical Colleges and all colleges sought affiliations

recognition registration where ever they were required.

PRIME Medical College failed to get recognition with the Medical Council of India

although it was affiliated with the University of Kashmir. This Court felt, in OWP No:1419/1996, that affiliation alone was not sufficient and that what was essential was recognition by the Medical Council of India and consequently the student of PRIME College were not permitted to be put up for examination. The students of PRIME College seem to have prevailed on the State Government and order No: 951-HME of 2000 dated 20.12.2000 was passed in favour of 1995 batch of the students.

The order was implemented and acted upon and the students attended the classes. In 1995 PRIME College granted admission as per merit at 53 students in MBBS and 14 students in BDS Course, when the college was neither affiliated to any University nor recognised by the Medical Council of India. SRO 43 of 1996 was issued on 5/2/1996 for the first time, and for the first time, the admission in private College were brought without the jurisdiction of Competent Authority Entrance Examination. In terms of the directions of this court in OWP No: 1419/1996 the students of PRIME College were not put up for the examination and in these circumstances the State Government came to their rescue and passed the order , admitting them in various Medical Colleges vide Order No: 951-HME of 2000 dated 20/12/2000. It is also admitted that Government order No: 159-HMEof2001 dated 01-03-2001, cancelling the admission granted vide order No : 951 - HME of 2000 dated 210/12/2000, was passed without providing the petitioners opportunity of being heard, in violation of principles of natural justice. The question for consideration would be that, whether an order, assuming it to be void, can be recinded by an authority, without hearing the beneficiary of that order. The law on the point is settled by a Coordinate Bench of this Court in Fayaz Ahmad v. State of J&K, reported as 1989 SLJ 654, where it has been held as under:-

The principles of natural justice are the blood and soul of our constitutional system, which cannot be taken away by any authority on any pretext.

A person getting a benefit even on the basis of a so-called void order or an order without jurisdiction has the right to be heard before the order conferring benefits upon him is varied or altered. The authority proposing the action cannot be conferred with the jurisdiction to decide itself as to whether the order sought to be revised, modified or altered was void and without

jurisdiction without even affording an opportunity to the effected of being heard.

Support to hold this view is also given by judgment of the Apex Court, reported as 1971 (2) SCC 121.

We find ourselves in respectful agreement with the view taken by this court.

It is a settled proposition of law that an administrative or quasi judicial order, which creates right in a party, can only be recinded if the party likely to be effected by the cancellation of said order, is heard.

In the instant case the petitioners were admittedly granted admission vide Government order dated 20.12.2000 and the said order was cancelled

without any prior notice and only on the consideration that the admission were viewed by a section of public and few students as unfair and

discriminatory, as the admissions had not been made by the competent Authority. It is the positive case of the petitioners, that has they been

granted an opportunity of being heard, they would have show that agitation by a handful of interested political parties was manipulated and aimed

together with a different political objective. The petitioners would also have demonstrated that the admission by the Competent Authority Entrance

examination are mandatory only in respect of the seats which are notified. Since the admission of the petitioners were made over and above the

intake capacity and the admissions of the existing candidates was not disturbed, thus the admissions did not violate any SRO.

Having regards to the facts and circumstances of the case and on consideration of the submissions of learned council for the petitioners, it is

manifestly clear that the consideration, under which PRIME College was established and the students of PRIME College, after closure of the

college, were adjusted by way of admission which were subsequently cancelled, would require application of the principles of natural justice,

before the cancellation of the admission by the Government. Had it been followed, it was open for the Government to consider the representations

which the effected parties would have made, against the proposed action. This having not been done, we are of the view that the action of the

Government, being violative of principles of audi-alteram-partem is impermissible. On this analogy alone the impugned order is required to be

quashed.

14. The next question for consideration would be, whether the order of the Government dated 20.12.2000 was illegal unconstitutional and liable to be reviewed by the Government, as contended by the learned Additional Advocate General.

Mr. M.H Attar, learned AAG, has projected that the order of admission was purely illegal and un-constitutional because the Government order had made admission in the Government managed Medical Colleges of those students who had not competed through CAEE nor had followed the procedure under relevant SRO. The submission, though attractive is neither impressive nor can be sustained. The Government granted admission vide Order dated 20.12.2000 and in passing the said order, it can be safely inferred that the order was passed by the Government in fullawareness of its constitutional and legal duties and after consideration of all the aspects of the matter. The matter was considered, resolved and settled at the highest level and all relevant agencies were involved in the decisions making process, to find out a solution to the problems faced by the students of PRIME Medical College. Government order dated 20.12.2000 has obviously been passed to come to the rescue of the students of the PRIME Medical College and it is, in these circumstances, irrational to say that the Government subsequently found its action to be illegal and unconstitutional.

15. Before the 42nd amendment to the constitution of India the power to regulate admission vested exclusively in the State Government. By amending the constitution the Central Government acquired power to legislate with regard to Medical Education and as a consequence thereof, provisions of Medical Council Act came to be amended. 42nd amendment to the Constitution has not been extended to the State of Jammu and Kashmir. Article 370 of the constitution prescribes procedure for extending the provisions of the constitution of India to the State of J&K and on this account also the petitioners have joined issue with regard to this aspect of the matter and have maintained that since, the 42nd amendment does not apply to the State of J&K, therefore, the state Legislature and the State Government continue to possess same authority and power which it had before 42nd amendment. We however, do not propose to go into that question because of our considered opinion that the State

Government, under its plenary executive power granted admission to the petitioner as, one time exception, in the Government managed Medical Colleges, over and above their respective intake capacity. In doing so, the Government, in law, exercised its jurisdiction in a certain manner. No student has challenged Government order dated 20.12.2000 on the ground that his rights under the constitution have been violated. It is the Government itself, which has on its own cancelled the admission on self perceived grounds, as reflected above. The Government as respondent in the present proceedings, wants a finding that its initial order of admission dated 20.12.2000 was illegal and unconstitutional, therefore, cancellation of the said order was justified. The Government cannot seek such an adjudication in view of the fact that the issue in question before this court is the validity of order of cancellation dated 01.03.2001 and not the earlier order of admission. Public resentment shown in the order as a ground for cancellation is all together different from the basis on which the order of admission was passed. The Court, in the facts and circumstances reflected from record, cannot ignore the development and sequence of events subsequent to the order of admission of the students. By issuance of SRO 43 of 1996 the Government has not exhausted its constitutional jurisdiction of passing order with regard to the admissions in professional course. Admittedly the manner of exercise of power has been provided by the said SRO, but the Government itself in the order of admission, has made it clear that admission were being made as one time exception because of special circumstances in which the students of first batch of PRIME Medical College were placed.

16. We are aware that it is not the College before us which has been closed. It has not instituted the legal action. It is the students of a closed College who have suffered all these years, seeking justice. Several decisions, brought to our notice, make distinctions in the cases where the college itself seeks adjudication, want to continue as a college and want justification of its cause. In cases where professional colleges have been closed, for one reason or the other, on the disability of lack of affiliation or recognition, the balance of justice has always tilted in favour of the students. It is disturbing that the students, rightly or wrongly, admitted to the 1st year of MBBS course, in the private college way back in the year

1995, after period of seven years have still to be put up for examination of Ist year MBBS course.

17. There seems to be substance in the submissions of learned counsel for the petitioners that the order of cancellation was passed only because a

group of students had reacted adversely against the admissions made of some of the students of PRIME Colleges in Government Medical College

Jammu. Press reports, representations, communications have been placed on record in support of the said submissions. The motive or the

immediate cause for passing the impugned order may or may not be to appease the agitators, but public resentment has been stated as a ground

for cancellation of the order. It cannot be said to be wholly without basis that the alleged illegality and unconstitutionality of the initial order of

admission was found as a recluse by the Government to rescind the order. Public resentment is incapable of judicial standards and is in our view,

arbitrary and subjective. An order or an administrative decision which creates rights, can be cancelled only on relevant and proper grounds of

appeasement. It is nowhere explained in the objections nor was it explained during submissions, as to how the admission of the petitioners, made

by the Government few months earlier, was illegal and unconstitutional. If the intention of the Government, as was urged by the learned council for

the respondents, was to accommodate the petitioners on humanitarian grounds and their admission was brought about with the object to solve all

the problems of the students of PRIME College, how did the object change after few months. The government by treating the students of the said

college as a class by themselves, had acted in accordance with the recognized course as was adopted at Karnataka, to meet one time extra

ordinary situation.

The Courts have by and large always leaned in favour of the students community moreso, where the concerned students are following professional

course. There are several decisions of the Apex court where the professional College have been closed or could not seek affiliation or recognition

but had made admissions, in such situation cause of justice has been served by passing directions in the interest of justice least the students suffer in

their career. The latest decision on the point, delivered by the Apex Court is *Asheesh Pratap Singh and Others Vs. Union of India and Others*,

The Apex Court in a situation where a Medical College was closed after having granted admission to the students, observed that as a result of the closure of the college since a large number of students would be effected and teh career of the students jeopardised, this aspect of the matter constituted more part of consideration. The Apex Court accordingly, in the facts and circumstances of that case and in the interest of justice, directed Medical Council of India and other concerned authorities to initiate necessary steps to accommodate the students in different Medical Colleges in the State.

In the instant case, however, there is no difficulty as regard the accommodation of the students, since in terms of their order of admission the students were accommodated in different Medical Colleges consequent to the closure of PRIME Medical College.

18. From perusal of the affidavits and the objections it is manifestly clear that the Government, in its affidavits, has stated several grounds in support of the impugned decision, which grounds have not been stated in the impugned order. Relying upon a judgment of the Apex Court, delivered in case titled Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , it is impermissible in law to support an order on a ground stated in the impugned order. Be that as it may, we are inclined to consider the material on record and also the objections and do not wish to exclude any grounds stated by the first respondents in its objections.

19. We now proceed to notice some of the provisions of India Medical Council Act and the Regulations framed thereunder. The First regulation to be noticed and 'Establishment of new Medical Colleges, opening of higher course of study and increase of admission capacity in medical colleges Regulations 1993.

According to these regulations, qualifying criteria has been prescribed for a medical college in case the number of admission in MBBS course in the existing medical college are to be increased. According to these regulations a college which is recognised by Medical Council of India can seek increase in the number of admission which can be granted, provided that the requirement is certified by the respective State Government, permission of the University with which the college is affiliated, is obtained and a

time bound programme is indicated within which additional equipment and infra-structure faculties will be provided subject to the condition that maximum number of admission in MBBS course do not exceed 150 seats. Where the applicant is state Government no Bank guarantee is required to be furnished to ensure availability of additional infrastructural facilities. To us, it appears that these regulations apply only where the college itself is desirous of increase its capacity permanently. These regulations have no application where the capacity is increased only once. Medical council of India has also framed regulations know as 'Medical Council of India (Criteria for identification of students admitted in excess of admission capacity of Medical College) Regulations 1997.

Regulation 8 provides as under:-

Matter relating to excess admission to be decided by the Council all matters relating to excess admission of students shall be decided by the council taking into account the list furnished to the council by a competent authority and the admission capacity fixed for the Medical college. After it is found by the council that excess admissions have been made, the students lower down in the list shall be treated to be admitted against the increase in admission capacity to the extent of excess admissions. The students admitted through All India Entrance Examination/Central Pool

Quota/ Mandatory Reservation for Scheduled Caste/ Scheduled Tribes etc. Shall be included within the fixed admission capacity.

Under Regulation 9 the council has the jurisdiction to deny recognition to the medical qualification obtained by an identified student who comes under the excess admission. If there is any dispute in the matter of identification of excess admission of students in a Medical Institution, the same has to be referred to the Central Government for decision.

20. Having regard to the consultations between the state Government and the central government and also with Medical Council of India, we are of the opinion that increase in admission capacity, to the extent of excess admission made in various government colleges as one time exception does not run counter to these regulations. The admission of the petitioners is in fact with the consent of the concerned authorities. The increase in the admission was only for the session 2000-2001. The sanctioned intake capacity of the respective college is not altered for future sessions. In

fact, under the existing arrangement, the excess admission are to be neutralized in the next ten years. The view taken by the Central Government is

to prevail in terms of the regulations, since their decision is final. The Central Government has, in substance, not treated the admission of the

petitioners as a case of excess admission. The admission of the petitioner, therefore, is protected under the regulations.

21. Relief:

Having regard to our findings in the peculiar facts and circumstances of the case we allow these petitions with following directions :-

a) That by a writ of certiorari Government order No; 159-HME of 2001 dated 01.03.2001, impugned in these petitions, is hereby quashed.

b) By writ of mandamus respondents are hereby directed to forthwith admit the petitioners to Ist year MBBS/BDS course, as the case may be,

and treat them as regular students. They shall be allowed to appear in first professional examination in accordance with the relevant University

Statutes, with which the respective Colleges are affiliated.

c) Our directions at (a) and (b) above, however are restricted only to such writ petitioners who have approached this court till the date of delivery

of our judgment.

d) We also consider it appropriate to leave it entirely to the concerned respondents to adjust the petitioners in any Medical College, in Kashmir

Division irrespective of their initial admission and pass appropriate order of shifting with all consequential directions.

2. No order as to costs.

Judgment is announced by me in terms of Rule 138 (4) of Jammu and Kashmir High Court Rule 1999.