
(2000) 07 BOM CK 0068
In the Bombay High Court
Case No : Writ Petition No. 3367 of 2000

Dr. Bharat Sharad Kulkarni	Vs	APPELLANT
State of Maharashtra and Others		RESPONDENT

Date of Decision : 25-07-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2001 Bom 7 : (2000) 4 ALLMR 633 : (2001) 2 BomCR 187 : (2000) 4 MhLj 684

Hon'ble Judges : Vijay Daga, J;A.P. Shah, J

Bench : Division Bench

Advocate : G.S. Godbole, for the Appellant; S.S. Gokhale and H.D. Gole, for Respondent 4, for the Respondent

Final Decision : Dismissed

Judgement

Vijay Daga, J.—Heard the learned counsel for the parties. Rule returnable forthwith. By consent petition is taken up for hearing.

2. This petition is directed against the action of respondent No. 3 seeking to deduct 5% marks of the petitioner, while determining inter se merit for admission to the postgraduate medical course on the ground that the petitioner has taken more than one attempt to pass the third Bachelor of Medicine and Bachelor of Surgery ("M.B.B.S.") examination.

3. The facts leading to the present petition, in nut shell, are as under :

The petitioner in the month of July, 1993, after having passed the requisite examination was admitted in Bharati Vidya pith Medical College affiliated to the University of Pune in the free seat (open category). The petitioner has passed first and second M.B.B.S. examinations in all subjects in the month of October, 1994 and May, 1996 respectively. He appeared in the examination held in the month of May, 1997 for third M.B.B.S. Part I (new system), and passed the said examination. The petitioner after having passed the said examination was due to

appear for third M.B.B.S. Part II examination scheduled in the month of November, 1997. However, he fell ill. He even could not go to the examination hall. He did not appear for even a single paper. The petitioner was shown absent for the three papers, and consequently shown as failed in the marks sheet dated 17th January, 1998. However, the petitioner on 23rd January, 1998 submitted an application to the University of Pune through the Principal of the College indicating therein that he could not appear in the examination due to ill health and hence his absence to the examination should not be considered as an attempt.

4. The petitioner thereafter applied through the Principal of the college to the University for inclusion of his name in the list of the candidates who were to appear for the examination which was scheduled to be held in the month of May, 1998.

5. The petitioner, accordingly, in the month of May, 1998, appeared for third M.B.B.S. Part II examination and passed the remaining three subjects. Accordingly, the petitioner was declared to have passed Third M.B.B.S. degree examination on 25th June, 1998.

6. At this juncture, without tracing the history, we may mention that in view of the judgment of the Full Bench of this Court, the State Government has framed rules for admission to the post-graduate courses. Rule 7 of the said rules provides for basis of selection, the text of which is reproduced hereinbelow ;

"7. The basis of selection the selection of all students will be on merit as laid down in Rule 5 i.e. No. of marks of the subject at University examination modified as under :

(a)

Passing of all subjects at first attempt.

No deduction

(b)

Passing of the subject concerned at first attempt and other subject at 2nd attempt.

3% deduction

(c)

Passing the subject concerned at IInd attempt and passing of remaining subjects at Ist attempt

3% deduction

(d)

Passing all the subjects at IInd attempt

5% deduction

(e)

Passing the subjects concerned at IInd attempt and the passing the remaining sub. at IIIrd attempt

6% deduction

(f)

Passing the subject concerned at 3rd, attempt or subsequent attempt and passing the whole examination at 4th or subsequent attempt

Not eligible for admission to the post graduate registration

(Emphasis supplied)

7. The respondent No. 3 the Dean. B. J. Medical College, Pune and the competent admission authority for the post-graduate medical courses, for the area of University of Pune, relying upon the aforesaid rule 7 of the Rules while fixing the inter se merits for admission to post-graduate medical course deducted 5% of the marks secured by the petitioner in the third M.B.B.S. examination on the ground that the petitioner has taken more than one attempt to pass the said examination. The said action of respondent No. 3 is a subject-matter of challenge in this petition on the three grounds which are being dealt with in seriatim.

8. Firstly, the petitioner contended that the petitioner cannot be deemed to have failed to pass the examination as he never appeared for the said examination. Since he did not fail as such respondent No. 2 could not have deducted 5% of the marks secured by the petitioner in the third M.B.B.S. examination.

9. The perusal of the aforesaid Rule 7 would show that the said rule provides for index as to how and on what basis the marks are to be calculated. However, the rules framed by the State Government do not define the word "attempt". Thus, in order to find out the meaning of the word "attempt", it would be necessary to examine the rules framed by the University of Pune in this regard. The University of Pune has framed rules for the course of M.B.B.S. Rules 34 to 51 deal with third M.B.B.S. examination. Relevant part of Rule 37 reads as under :

"37.

Candidates shall be deemed to have failed to pass an examination under the above clause, if their names have been submitted by the Principal of the college for inclusion in the list of candidates appearing for the examination, and if the candidates have failed to pass the examination because they have not attained the prescribed standard of passing."

Reading of the aforesaid part of the rule makes it clear that if the name of the candidate is submitted by the Principal for inclusion in the list of candidates appearing for the examination and if the candidate has failed to pass the

examination because he has not attained the prescribed standard of passing, such candidate shall be deemed to have failed. If the name of the candidate has been submitted by the Principal of the College for inclusion in the list of candidates appearing for the examination and thereafter the candidate decides not to appear because he feels that he has not attained prescribed standard of passing, this by itself, is sufficient to treat that the candidate has failed to pass the examination. Had it been the intention of the framers of the rules to bring within its sweep only those candidates who have appeared and failed to pass the examination, then in that event it was not necessary for them to add words "appearing" as "because they have not attained prescribed standard of passing". The use of said expression shows that the intention was to cover cases where the candidate desired to appear but did not appear because in his belief he did not attain prescribed standard of passing. In our opinion, this Rule 37 would bring within its scope the candidates who have applied through the Principal of the college for inclusion of their names in the list of candidates appearing for the M.B.B.S. examination.

10. This Court in *Rajkumarsingh v. Amravati University* 1996 (2) M LJ 627, while dealing with expression "examinee" under clause 16 of the Ordinance 55 of the Amravati University held that examine means a person who presents himself for an examination to which has been admitted. Admission to examination means the issuance of admission card to a candidate in token of his having complied with all the conditions laid down in the relevant Ordinance. A person who is not issued an admission card for admission to an examination cannot be considered to be an examinee under Clause 16 as per the said judgment of the Division Bench. It is no doubt true that clause 16 of Ordinance 55 was not identical with that of the present Rule 37 but more or less it dealt with the same situation in which present petitioner has been placed. The Division Bench of this Court, while dealing with the similar situation thus observed :

"In view of the aforesaid construction of Clause 16 of Ordinance 55, when we turn to the facts of the case, there is no dispute that the petitioner could not appear in the examination which were held in Winter 1992, because he was detained for want of requisite attendance. Naturally, when the petitioner was detained for want of requisite attendance, he could not apply for admission in examination and no admission card was issued and, therefore the examinations in winter 1992 could not be considered as an examination having been taken or the examination in which the petitioner did not pass or failed to present himself. The examination of winter 1992, therefore, cannot be considered while considering whether the petitioner has failed to present himself or did not pass the four consecutive examination inclusive of first."

In the aforesaid backdrop, the contention of the petitioner, that in view of Rule 37, the petitioner cannot be deemed to have failed, holds no water.

11. Secondly, it is contended by the petitioner, without prejudice to his above contention, that while calculating the deductions, 1% of 283 marks i.e. only 2.83

marks or at the highest 1% of the total 400 marks i.e. 4 marks could have been deducted from the marks of the petitioner. The said contention is devoid of any substance. The preamble of the Government resolution dated 3rd March, 1997 clearly shows that the said resolution is applicable to the inservice candidates only and not to the candidates like petitioner.

12. Thirdly, the petitioner contended that he has secured 283 marks in Surgery and if at all 5% marks are to be deducted then in that event 5% of the marks secured should have been deducted and not 5% of the total aggregate marks. In other words, 5% of 283 marks i.e. only 14 marks ought to have been deducted from 283 marks secured by the petitioner. In his submissions, the deductions contemplated are not out of total maximum number of marks but the deductions ought to be from the number of marks obtained by the candidate in the concerned subject. In short, the contention of the petitioner was that the action of deducting 20 marks out of 283 marks was illegal. At the most 14 marks could have been deducted. This submission was advanced by the petitioner without prejudice to his earlier submissions that no marks were liable to be deducted and further contention which was based on Government Resolution dated 3rd March, 1997 as already discussed hereinabove. The interpretation sought to be canvassed by the petitioner in this behalf will result in a situation wherein the persons securing higher marks would suffer more and the persons securing lower marks would be placed in a beneficial position. The Government resolution cannot be interpreted in the manner in which the petitioner wants this Court to interpret. The calculation of the 5% has to be of the total number of maximum marks and not of the marks actually secured by the candidate in the concerned subject.

13. Under these circumstances, we do not find any merit in any of the contentions of the petitioner in the petition. With the result, the petition is dismissed. Rule stands discharged with no order as to costs.