

(2024) 03 SHI CK 0075
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 8678 Of 2023

Dr. Deeksha Sharma

APPELLANT

Vs

State Of H.P. And Ors

RESPONDENT

Date of Decision : 28-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 21

Citation : (2024) 03 SHI CK 0075

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : K.B. Khajuria, Y.P.S. Dhaulta, Vishal Mohan, Praveen Sharma, Aditya Sood

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. By way of instant petition, petitioner has prayed for following substantive reliefs:-

i) That the impugned communication dated 28.10.2023 may kindly be quashed and set aside.

ii) That the respondent No.4 may kindly be directed to declare the result for the post of Senior Resident/tutor specialist in the department of Pharmacology pursuant to the final merit list contained in Annexure P-4.

2. Respondent No. 4 issued an advertisement inviting applications from eligible candidates for the post of Resident Doctor/Tutor in Rajinder Prasad Government Medical College, Kangra at Tanda, H.P. with the following schedule.

Date for starting to apply for the post of SR/ Tutor specialist - 26.08.23.

Last Date for submission of application form-11.09.2023.

Date of Displaying of tentative merit list - 10.10.2023.

Date of objection by the candidates (if any) - 12.10.2023 to 13.10.2023.

Date of remove of objection - 17.10.2023 to 18.10.2023

Date of showing final merit list - 21.10.2023

Date of counseling – 27.10.2023”

3. Petitioner, respondent No. 5 and one more candidate applied for the post of Resident Doctor/Tutor, in the Department of Pharmacology. In the tentative merit list issued by respondent No. 4, petitioner was shown at serial No.1 and respondent No. 5 was second in the merit. Though, as per schedule provided in the advertisement, objections, if any, by the candidates were to be submitted from 12. 10.2023 to 13.10.2023. Respondent No.5 did not submit any objection till 13.10.2023, but submitted the same belatedly on 20.10.2023 i.e. just before when final merit list was to be displayed.

4. Respondents No. 2 to 4 after taking cognizance of the objection raised by respondent No.5, allowed her objection and as a result respondent No. 5 has gained the first position in the merit list and petitioner has slid to second position.

5. Petitioner has approached this Court on the ground that since the respondent No. 5 had not raised any objection within the time prescribed in the schedule, she could not raise the objection subsequently and respondents No. 2 to 4 also could not take cognizance on such belated objection.

6. I have heard learned counsel for the parties and have also gone through the record of the case carefully.

7. The Government of Himachal Pradesh has issued 'Resident Doctor Policy', dated 24.12.2021, for regulating the appointments of Senior Resident/Tutor Specialist and Junior Residents/Tutor General in the Department of Medical Education.

The advertisement, which is subject matter of this petition, was also issued in terms of the aforesaid policy as is evident from the contents of the advertisement.

8. It will be relevant to notice following salient features of the policy for adjudication of issue involved herein:-

“7.2 Method of Recruitment:

7.2. The Senior Resident/ Tutor Specialist shall be selected on the basis of application invited by the Principal concerned of Government Medical College/ Institution of the State.

7.2.2. The recruitments will be conducted thrice in every year as per the following schedule:

First Round

Second Round

Third Round

Posts will be advertised by the Principal concerned of the institution

End of November

End of March

End of July

The details of vacancies to be published

Vacancies as on date + vacancies anticipated (on the basis of completion of tenure of incumbents occupying the posts) till end of January

Vacancies as on date + vacancies anticipated (on the basis of completion of tenure of incumbents occupying the posts) till end of May

Vacancies as on date + vacancies anticipated (on the basis of completion of tenure of incumbents occupying the posts) till end of September

Advertisement | of Post in

Second week | of Decembe

Second week o? April

Second week of August

Personal appearance for verification of documents to be conducted in

First fortnight of January

First fortnight of May

First fortnight of September

Note:-

(1) Dates for physical verifications (institution-wise) shall be fixed by the DME&R-HP for which each college will make correspondence/ request with the DME&R-HP well in time.

(2) The candidate shall apply only in one Government Medical College/ Institution during each round of recruitment/ counselling/selection.

7.2.3. The interested and eligible candidates as per the advertisement shall apply to the Principal of the concerned institution within the time period as stipulated by the advertisement on application form as prescribed at Annexure-1.

7.2.4. The Principal concerned shall send the list of all the candidates (including GDOs and Direct candidates) who have applied for the post(s) to the Director

Health Services, Himachal Pradesh for issuance of No Objection Certificate with regard to the completion of the mandatory peripheral service/one year Senior Residency in new. Government Medical College/ Institution and to scrutinize any discrepancy in status of a candidate with respect to being a GDO or a direct candidate. Such information shall be furnished by the Director Health Services within a week of the issuance of demand letter by the concerned Principal. The Principal concerned shall simultaneously draw provisional specialty-wise merit list based on the documents submitted at the time of making applications keeping the following general principles in mind: EC

(a) The distribution of marks for drawing up of merit shall be as under:-

Sr. No

Detail

Marks

1

MBBS Marks (Cumulative total marks of Ist 2nd and 3rd Professional Examination

Total marks obtained/ maximum marks x 30

2

PG (MD/MS/MDS/DNB) Degree/Diploma Marks (in concerned specialty)

Total marks obtained/maximu m marks x 40

3

Period of service of State

As per Annexure -2

4

Publication of papers in Indexed Journals as 1st author 2nd author or corresponding author (Published papers of papers in respect of which letter of acceptance has been issued shall be counted)

2 marks for each published work subject to maximum of 20 marks.

(b) The candidates who have done MD/MS/DNB/MDS in a particular subject shall be higher in merit then the candidates who have done PG Diploma in that particular specialty. irrespective of the marks earned. Similarly, for the non-clinical subjects, candidates belonging to non-medical side shall always be placed below in the merit to candidates of the medical side irrespective of the marks earned and the inter se merit of the candidates from non medical background shall be determined on the basis of marks obtained in the Essential Qualification examinations like M.Sc. (Medical) etc. as per essential qualification prescribed at

clause 7.1 *ibid*.

(c) In case, the PG (MD/MS/DNB/MDS) marks are not available in respect of even one candidate in a particular specialty, the PG (MD/MS/DNB/MDS) marks shall not be taken into account while drawing up the merit of that particular specialty.

7.2.5. The physical appearance/ counselling date for verification of documents shall be fixed by the DME&R-HP which shall be intimated by the Principal concerned through college website for wide publicity amongst the candidates. The candidates shall be required to be mandatorily present during the verification of documents, otherwise their candidature shall be deemed rejected. However, in case candidate is unable to be present in the counselling in person due to unavoidable circumstances, then he/she may authorize any person to represent him/her alongwith his/her original educational/ academic and other supporting documents for verification.

7.2.6. After the verification of documents and after issuance of NUC Dy the Director Health Services, the Principal concerned shall allot the post of Senior Resident/ Tutor Specialist in order of merit in the concerned specialty/ department.

7.2.7. The Principal concerned shall forward the result/selection list alongwith waiting panel to the DME&R-HP within one week after completion of selection/ counselling process (in confidential manner). The DME&R-HP shall work out the entire result/ selection list of the college/ institution and recommend the names of selected candidates to the Government for appointment to the post of Senior Resident/ Tutor Specialist; and on the basis of approval conveyed by the Government, the DME&R-HP will issue appointment orders in this regard accordingly.”

9. The reason due to which petitioner was shown at the top of the tentative merit list was that respondent No. 4 had not correctly calculated the marks secured by respondent No. 5 in MBBS course. Respondent No. 5 has qualified her MBBS course from Foreign University. A Division Bench of this Court while deciding CWP No. 6328 of 2022 titled as Dr. Ashu Attri Vs. State of H.P. and Ors. has held that the marks obtained by a candidate in MBBS course from Foreign University constitute one of determinative parameter for selection to the post of 'Senior Resident'. On the basis of objection dated 20. 10.2023, of respondent No. 5, respondent No. 4 referred the matter to respondents No. 2 and 3, who on the basis of the decision in aforesaid judgment allowed the marks obtained by respondent No. 5 in MBBS from foreign University to be calculated as her MBBS score and as result, respondent No.5 was successful in gaining the merit over petitioner.

10. The above factual position is not in dispute. The only objection of petitioner is that the belated objection of respondent No. 5 could not have been taken into consideration as by that time, a legal vested right had accrued to the petitioner.

11. The relevant features of the Scheme, as noticed above, clearly reveal that there is no provision for any specific schedule to be incorporated in the advertisement. In other words, incorporation of a time schedule in advertisement was not a mandatory condition. What is required is that the applications are to be invited by the Principal of the College concerned, details of vacancies are to be published and personal appearance for verification of documents is to be conducted.

12. The eligible candidates have to apply in a prescribed format of application. On receipt of application, the Principal concerned is required to send the list of all the candidates including GDOs and direct candidates to the Director Health Services for issuance of NOC with regard to the completion of the mandatory periphery service/one year Senior Residency in new Government Medical College/ Institution and to scrutinize any discrepancy in status of a candidate with respect to being a GDO or a direct candidate. The Director Health Services is then required to furnish the entire information within a week. In the meanwhile, Principal is mandated to draw provisional specialty-wise merit list based on the documents submitted at the time of making applications. The criteria for drawing merit list has also been prescribed which includes MBBS marks (cumulative total marks of 1st, 2nd and 3rd Professional Examination). Thereafter, date for counselling/ physical appearance for the purposes of verification of documents is required to be fixed by Director Medical Education and Research, H.P., which is required to be intimated by the Principal concerned through College Website for wide publicity amongst the candidates. The candidates are mandated to remain present during the verification of documents with an exception when the candidate is unable to present himself/herself in person due to unavoidable circumstances, he/she may authorize any person to represent him/her alongwith original documents. It is after the verification of the documents and issuance of NOC by Director Health Services, the Principal concerned allots the post of Senior Resident/Tutor Specialist in merit in the concerned Specialty/Department. Once that is done, the Principal is required to forward the result/section list alongwith waiting panel to Director Medical Education and Research within one week, who then works out the entire result/selection list of the College/Institution and recommends the names of selected candidates to the Government for appointment to the post of Senior Resident/Tutor Specialist. Lastly, on the basis of approval conveyed by the Government, the Director Medical Education and Research, issues appointment order in this regard, accordingly.

13. In the entire above Scheme, there is no requirement to draw a specific time schedule. In any case, respondent No. 4 had drawn the schedule. The question thus arises whether any variance in time schedule as prescribed by respondent No. 4 is sufficient to deny a meritorious candidate the opportunity of appointment as Senior Resident/Tutor Specialist?

14. In *S. Krishan Sradha Vs. State of Andhra Pradesh and Ors.*, (2020) 17 SCC 465, a three judges bench of Hon'ble Supreme Court has held as under:-

"12. However, the question is with respect to a student, a meritorious candidate for no fault of his/her has been denied admission illegally and who has pursued his/her legal rights expeditiously without delay is entitled to any relief of admission more particularly in the courses like MBBS the relief of compensation as held by this Court in *Asha* (Supra). The aforesaid question is required to be considered only to the cases where (i) no fault is attributable to the candidate; (ii) the candidate has pursued her rights and legal remedies expeditiously and without delay; (iii) where there is fault on the part of the authorities and apparent breach of rules and regulations; and (iv) candidate is found to be more meritorious than the last candidate who has been given admission.

12.1. At the outset, it is required to be noted that the question is with respect to a student/candidate seeking admission in the medical course more particularly in MBBS course. For a student/candidate seeking admission in professional courses more particularly the medical course each year is very important and precious. Similarly, getting admission in medical course itself is very important in the life of a candidate/student and even a dream of man. In light of the above, the question for consideration is whether compensation for a meritorious candidate, who has been denied the admission illegally and arbitrarily having approached the court in time can be said to be just and equitable relief?

12.2. The right to equal and fair treatment is a component of Article 14 of the Constitution. As held by this Court *Asha* (Supra) that a transparent and fair procedure is the duty of every legal authority connected with admissions. In such cases, denial of fair treatment to the candidate would not only violate his/her right under Article 14 but would seriously jeopardize his/her right under Articles 19 and 21 of the Constitution of India. A natural corollary of declaring that an administrative act more particularly the denial of admission illegally and for no fault of a candidate/student violates principles of Article 14 is that the citizen injured must be put back to his/her original position. In that sense, the primary relief is restitutionary. As observed hereinabove, for a meritorious student seeking admission in medical course is very important in the life of student/candidate and denial of admission to a meritorious candidate though no fault of his/her violates his/her fundamental rights.

Compensation could be an additional remedy but not a substitute for restitutionary remedies. In case of medical admissions, even the restitutionary remedy of providing a seat in the subsequent year would lead to loss of one full academic year to a meritorious candidate, which cannot be compensated in real terms. Thus compensation for loss of year could be provided, but denial of admissions to a meritorious candidate cannot be compensated in monetary terms. Thus denial of admission in medical course to a meritorious candidate for no fault of his/her and though he/she has approached the Court in time and despite the same not granting any just and equitable relief would be denial of justice. Therefore, the question is what relief the Court can grant by which right to equal and fair treatment to a candidate are protected and at the same time

neither there is injustice to other candidate/student and even compromising with the quality education. Therefore, a balance is required to be struck. However, at the same time it can safely be said that the view taken by this Court in Jasmine Kaur (Supra) that the only relief which can be granted to such a candidate would be the compensation only is not good law and cannot be accepted. Even granting a relief to such a candidate/student in the next academic year and to accommodate him/her in the next year and in the sanctioned intake may even affect the right of some other candidate/student seeking admission in the next academic year and that too for no fault of his/her.

Therefore we are of the view that in the exceptional and in the rarest of rare cases and in case where all the conditions stipulated in paragraph 33.3 in the case of Jasmine Kaur (Supra) are satisfied, the Court can grant exceptional relief to the candidate of granting admission even after the cut off date is over.

13. In light of the discussion/observations made hereinabove, a meritorious candidate/student who has been denied an admission in MBBS Course illegally or irrationally by the authorities for no fault of his/her and who has approached the Court in time and so as to see that such a meritorious candidate may not have to suffer for no fault of his/her, we answer the reference as under:

13.1 That in a case where candidate/student has approached the court at the earliest and without any delay and that the question is with respect to the admission in medical course all the efforts shall be made by the concerned court to dispose of the proceedings by giving priority and at the earliest.

13.2 Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate and the candidate has pursued his/her legal right expeditiously without any delay and there is fault only on the part of the authorities and/or there is apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right of equality and equal treatment to the competing candidates and if the time schedule prescribed – 30 th September, is over, to do the complete justice, the Court under exceptional circumstances and in rarest of rare cases direct the admission in the same year by directing to increase the seats, however, it should not be more than one or two seats and such admissions can be ordered within reasonable time, i.e., within one month from 30th September, i.e., cut off date and under no circumstances, the Court shall order any Admission in the same year beyond 30th October. However, it is observed that such relief can be granted only in exceptional circumstances and in the rarest of rare cases. In case of such an eventuality, the Court may also pass an order cancelling the admission given to a candidate who is at the bottom of the merit list of the category who, if the admission would have been given to a more meritorious candidate who has been denied admission illegally, would not have got the admission, if the Court deems it fit and proper, however, after giving an opportunity of hearing to a student whose admission is sought to be cancelled.

13.3 In case the Court is of the opinion that no relief of admission can be granted to such a candidate in the very academic year and wherever it finds that the action of the authorities has been arbitrary and in breach of the rules and regulations or the prospectus affecting the rights of the students and that a candidate is found to be meritorious and such candidate/student has approached the court at the earliest and without any delay, the court can mould the relief and direct the admission to be granted to such a candidate in the next academic year by issuing appropriate directions by directing to increase in the number of seats as may be considered appropriate in the case and in case of such an eventuality and if it is found that the management was at fault and wrongly denied the admission to the meritorious candidate, in that case, the Court may direct to reduce the number of seats in the management quota of that year, meaning thereby the student/students who was/were denied admission illegally to be accommodated in the next academic year out of the seats allotted in the management quota.

13.4 Grant of the compensation could be an additional remedy but not a substitute for restitutorial remedies.

Therefore, in an appropriate case the Court may award the compensation to such a meritorious candidate who for no fault of his/her has to lose one full academic year and who could not be granted any relief of admission in the same academic year.

13.5 It is clarified that the aforesaid directions pertain for Admission in MBBS Course only and we have not dealt with Post Graduate Medical Course.

15. In *Asha Vs. Pt. B.D. Sharma University of Health Sciences and Others*, (2012) 7 SCC 389, Hon'ble Supreme Court has held as under:-

"38. Now, we shall proceed to answer the questions posed by us in the opening part of this judgment.

ANSWERS

38.1 The rule of merit for preference of courses and colleges admits no exception. It is an absolute rule and all stakeholders and concerned authorities are required to follow this rule strictly and without demur.

38.2 30th September is undoubtedly the last date by which the admitted students should report to their respective colleges without fail. In the normal course, the admissions must close by holding of second counseling by 15th September of the relevant academic year [in terms of the decision of this Court in *Priya Gupta (supra)*]. Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their extra-ordinary jurisdiction of admitting candidates to the courses

after the deadline of 30th September of the current academic year. This, however, can only be done if the conditions stated by this Court in the case of Priya Gupta (supra) and this judgment are found to be unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction.

38.3 Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgments of this Court and violative of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the Court shall award compensation to such students as well as direct initiation of disciplinary action against the erring officers/officials. The court shall also ensure that the proceedings under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment. Where the admissions given by the concerned authorities are found by the courts to be legally unsustainable and where there is no reason to permit the students to continue with the course, the mere fact that such students have put in a year or so into the academic course is not by itself a ground to permit them to continue with the course."

16. In *Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others*, (2016) 7 SCC 353, it has been held as under:-

"166. It is well known that study of medicine is much sought after by students in India. Due to the high demand for admission in medical colleges and limited number of seats, selection and/or screening methods have evolved to select the *crème de la crème*. Given the surfeit of academically well-qualified applicants, the selection method ought to become highly competitive by placing exceptionally high academic thresholds. It is in this context that "merit" comes into play in determining the parameters for admissions in institutions of higher education.

167. Merit is the cumulative assessment of worth of any individual based on different screening methods. Ideally, there should be one common entrance test conducted by the State both for government colleges and for private unaided educational institutions to ensure efficacy, fairness and public confidence. As rightly contended by Mr Purushaindra Kaurav, Additional Advocate General for the State of Madhya Pradesh appearing for AFRC, a common entrance test conducted by the State is more advantageous viz.:

- (i) having adhered to the time schedule as laid down in *Mridul Dhar* case;
- (ii) multiple centres of examination and counselling throughout the State and a single-window system for admission;
- (iii) standard question papers, preservation of question papers and answer books, prevention of leakage of question papers and fair evaluation; and
- (iv) minimal litigation.

That apart, procedure for preparation of merit list, counselling and allotments to

various colleges is subject to the Right to Information Act and thus ensures fairness and transparency in the entire process.”

Thus, the merit of a candidate in a selection process has been held to be of paramount importance and in appropriate cases, the reliefs can accordingly be modified to uphold the right of a meritorious candidate.

17. In the facts of the case in hand, what transpires is that respondent No. 5 has been found to be more meritorious viz-a-viz petitioner in relation to the selection process for Senior Resident/Tutor Specialist. Respondent No. 5 had raised the objection before drawl of final merit list. Otherwise also it has been noticed that in the scheme of things, the drawl of final merit list by the petitioner is not final step. There are other more importance aspects viz. the scrutiny at the end of offices of DHS/DME separately besides their being a mandatory condition for personal presence of the candidates alongwith original documents for verification on a specified date. In such circumstances, it cannot be said that respondent No. 5 by not raising objection within the time granted in the schedule had lost or waived her right to raise objection. No specific prejudice has been pleaded or proved by the petitioner. Even from the material on record, no such prejudice can be made out. The selection process was still undergoing. The call was yet to be taken by DHS and DME at their end, therefore, the cognizance of the objection raised by respondent No. 5 on 20.10.2023 by respondents No. 2 to 4 cannot be termed to be wrong or illegal.

18. In light of above discussion, there is no merit in this petition and the same is dismissed.

19. Accordingly, the instant petition is disposed of, so also the pending application(s), if any.