
(1995) 02 BOM CK 0002
In the Bombay High Court
Case No : Writ Petition No. 32 of 1995

Dr. Manish Prabhakar Khanolkar	Vs	APPELLANT
The Dean, Goa Medical College and Others		RESPONDENT

Date of Decision : 23-02-1995

Acts Referred:

Admission to Post Graduate Medical Courses in Goa Rules, 1988 — Rule 3(3)
Constitution of India, 1950 — Article 226
Goa University Act, 1984 — Section 22, 23

Citation : (1996) 5 BomCR 542

Hon'ble Judges : T.K. Chandrashekhara Das, J; E.S. Da Silva, J

Bench : Division Bench

Advocate : F. Rebello, for the Appellant; V.B. Nadkarni, A.G. and A.P. Lawande, A.G.A., for respondent Nos. 1 and 2A, R.M.S. Khandeparkar and A.N.S. Nandkarni, for the Respondent

Final Decision : Dismissed

Judgement

T.K. Chandrashekhara Das, J.—Rule. By consent heard forthwith.

2. A simple but very subtle question arises in this petition. Whether the grace marks awarded by the University to a candidate for his proficiency in sports could be added to the total aggregate marks obtained by him in the M.B.B.S. examination for the purpose of admission to the Post-Graduate medical course in the Goa Medical College.

3. The Goa Medical College by a notification called for applications of eligible candidates who obtained degree in M.B.B.S. for admission to the Post-Graduate Medical courses in various streams for the year 1995. The petitioner and the third respondent who are holders of M.B.B.S. degree applied for admission to the Post-Graduate Medical Course pursuant to the said Notification. As notified by the first respondent, the admission to Post-Graduate Medical courses are being regulated by the Rules notified as No. 43/6/80/PHD dated 2-3-1988. The relevant rules with which we are concerned is Rule III(3) which says that the

admission to Post-Graduate courses will be purely based on merit. Rule III(3) reads as follows:---

"III(3) Order of Merit:

The order of merit shall be determined by computing the marks in the following manner:

i) The merit shall be arrived at by obtaining the sum of the percentage of aggregate marks and the percentage of marks in the subject related to the Degree/Diploma in which the candidate seeks the registration.

ii) Aggregate Marks: The percentage of aggregate marks shall be arrived at by totalling the marks obtained in the 1st, 2nd and 3rd M.B.B.S. examination. (viz. Anatomy, Physiology, Biochemistry, Pharmacology, Pathology, Microbiology, Forensic Medicine, Medicine Surgery, Eye and E.N.T. Obstetrics & Gynaecology and Preventive and Social Medicine) and reducing it to a percentage after the following deductions:

a) 21/2 per cent of the maximum marks shall be deducted for every failure from the marks of the subject failed, except in the case of the subject related to Diploma/Degree of registration.

b) 21/2 percent of the maximum marks shall also be deducted as above, if the student takes a drop in any subject (does not appear / is absent at the examination) at the scheduled time.

iii) Subject Marks: This refers to the percentage of marks in the subject related to Degree/Diploma in which the candidate seeks registration i.e. Medicine, Surgery, Eye and E.N.T., Obstetrics and Gynaecology and Preventive and Social Medicine. The percentage of subject marks shall be arrived at after deducting 5% of the maximum marks for each failure or drop.

Note: +While computing the aggregate marks, however deduction indicated in 3(ii)(a) and (b) above, shall not be made in the subject, where 5% deduction has already been made for failure under subject marks at 3(iii) above.

iv) If two or more candidates secure the same marks in the merit list as drawn above, the subject marks should decide the merit. In case the subject marks are also the same, the total marks secured by the candidate in the Final M.B.B.S. examination or total marks of IInd M.B.B.S. examination, depending on whether the candidate is seeking registration in a clinical, paraclinical or pre-clinical subject."

Based on this Rule, the first respondent published the merit list of candidates for admission for Post-Graudate Medical course. In evaluating the merit of the candidate on the basis of the marks obtained in M.B.B.S. examination the third respondent got 130.14 marks and the petitioner got 130.07 marks. Taking into account the limit of the seats available, the authority had to restrict the admissions in the order of priority arranged on the basis of merit. Accordingly the

respondent No. 3 stood last among the eligible candidates to be admitted and the petitioner was not at all included in the list of eligible candidates to be admitted. The petitioner's contention is that the first respondent has done a serious miscarriage of justice while evaluating his merit as he has excluded the 10 marks he got by virtue of his being proficient in sports which was shown separately in the marks obtained by him in M.B.B.S. Degree. Had this 10 marks been included to the marks obtained by him in the M.B.B.S. examination his total would have risen to 130.17, whereby he would have been found eligible for admission to the Post-Graduate Medical course in place of the third respondent.

4. At the initial stage of this proceedings, we have granted interim stay of admitting the third respondent to the Post-Graduate medical course till further orders that may be passed by this Court.

5. Counsel for the petitioner based his argument mainly on three points; firstly, that 10 marks awarded to the petitioner taking into account his proficiency in sports which has been awarded to him under Ordinance framed under University Statute and the first respondent ought to have added these marks to the petitioner's aggregate marks as the University Ordinance automatically binds the Government. His second contention is that the Notification under which the admission to Post-Graduate course has been regulated as extracted above is only executive instructions which have neither the legal status nor a status of a subordinate legislation and therefore the Ordinance issued under the University Statutes overrides these instructions. Consequently, therefore, the petitioner's counsel argues that the 10 marks awarded as separately shown in the M.B.B.S. mark list of the petitioner should have been taken into account for evaluating his merit. Lastly, the petitioner's counsel contended that the act of exclusion of 10 marks awarded by the University to the petitioner in preparing the order of merit by the first respondent is per se arbitrary and therefore liable to be quashed.

6. The learned Counsel for petitioner drew our attention to various provisions of the University Act, Statute and Ordinance governing the award of grace marks. Section 22 of the Goa University Act, 1984 deals with Statutes and section 23 deals with how Statutes should be made. Sub-section (2) of section 23 says that the Executive Council may, from time to time, make new or additional Statutes or may amend or repeal the Statutes referred to in sub-section (1). Section 24(2) says that the first Ordinance shall be made by the Vice-Chancellor with the previous approval of the Government and the Ordinance so made may be amended or repealed or added to at any time by the Executive Council in the manner prescribed by the Statutes. Statute No. 49.1(n) states that the colleges shall give an undertaking that it shall comply with all the provisions of the Act and the Statutes, Ordinances, Regulations and Rules made thereunder. Then we come to the relevant Ordinances namely Ordinance 5.18 which deals with "the instructions relating to the grace marks at the University Examination". As indicated in the marginal Note of this Ordinance, Ordinance 5.18 deals with various circumstances and contingencies under which the grace marks could be

awarded to a candidate and at what rate. It is unnecessary to go into every detail of the Ordinance. However, the relevant portions of Ordinance 5.18 are extracted below:

(5) A candidate whose marks are graced in any head/heads/subjects under this Ordinance shall not be eligible for any University scholarships, prizes, medals, order of merit unless he is eligible to it even otherwise. Similarly, a candidate whose marks are graced in any head/heads/subjects under this Ordinance in order to pass the examination shall not be eligible for gracing for award of class.

.....

(6) (b)

will be entitled, at their option to the gracing of ten marks under any one or more of the conditions mentioned below, at their first appearance for the examination in addition to the benefit of Ordinance 5.18(1), (2), (3), (4) and (5).

iv)

The grace marks under this Scheme will not be counted for purposes of award of scholarships, prizes and medals or of other awards.

(7) Relating to the award of grace marks to participants in the sports events held at University/Inter-University/Inter-State/National/International level.

Candidates appearing at a University examination and having to their credit participation in sports event, as specified under (I) and (II) below, shall be entitled at their option to the gracing of 10 marks in addition to the benefit of grace marks, as envisaged under Ordinance 5.18 at their first appearance at the examination subject to their fulfilling the eligibility criteria prescribed for the purpose.

I.

N.B.----The benefit envisaged in Clauses 1 and 2 above be made available to students on their producing the necessary certificate in that behalf.

II.

(4) A candidate who is not graced under any of the conditions mentioned above will be graced by 10 marks which will be added to the grand total.

The grace marks under this ordinance will not be counted for the purpose of award of scholarships, prizes, and medals, or for other awards.

Note:---1. The rules relating to the gracing under this scheme shall be applied first.

2. The marks graced under this scheme shall be shown separately in the candidate's mark sheet.

3. Candidates who will be getting the benefit of grace marks under ordinances will not be entitled to avail of the benefit of grace marks under the provisions of Ordinance 5.18-6 and vice versa."

Based on the above executive instructions of the Government of Goa extracted above and also the Ordinance issued by the University the learned Counsel for the petitioner has vehemently argued that the provisions contained in the Executive instructions issued by the Government of Goa which ex-facie excludes the 10 marks awarded by the University on the basis of proficiency of the petitioner in sports contrary to the provisions of the Ordinance, to that extent it is repugnant and therefore liable to be set aside.

7. Before examining the legality of the contentions raised by the petitioner's counsel, we would like to examine the legal effects of the Government instructions and the Ordinance. It is needless to say that the admission to Post-Graduate Medical course in the Goa Medical College is entirely left to the responsibility of the State Government. Every authority or institution can formulate their own Rules and Regulations to govern their affairs. Each statutory authority can wheel round on their respective axis in exercising their rights and performing their obligations. In doing so, any provisions of the Bye-laws or Regulations formulated by an authority may likely come in conflict with the provisions of the Bye-laws or Regulations of another authority. But solution of conflicts of provisions of various statutes could be resolved firstly by relying on the subjects by which it was governed. On a closer examination of the above provisions in the instructions issued by the Government and the Ordinance issued by the University of Goa, we do not feel it difficult to tackle the problem posed in this writ petition as pointed out by the counsel for the petitioner. Even going by mere grammatical reading of the Ordinance, we do not see any merit in the contention of the petitioner's counsel that the petitioner is entitled to add 10 marks to his aggregate marks for the purpose of his admission to Post-Graduate Medical course. We have seen that the Ordinance provides for guidelines or instructions to the staff of the University for awarding grace marks to the students under different contingencies and circumstances. As rightly pointed out by the counsel for the University, it is not a statutory Rule or Regulation or a Statute. These are only instructions to the University teachers, invalidators and the examiners for alerting them as to how and in what manner the grace marks could be awarded and how it should be shown in the mark-list. More importantly, the Ordinance itself has laid down the restrictions where these marks could not be used for assessing the academic excellency of a candidate. Ordinance 5.18(7), II(4) has specifically laid down the rider as to how the grace marks should be utilised. Ordinance 5.18(5) clearly says that "a candidate, whose marks are graced, is not eligible for the purpose of University scholarships, prizes, medals, order of merit....". Similar guidelines can be seen from sub-clause (4) of II of Ordinance 5.18 also. In other words, as pointed out in the Ordinance, the grace marks could be used only for passing or for getting First Class or for getting distinction and that too at the option of the candidate. The

Ordinances relating to awarding grace marks are so formulated that any grace marks awarded to a student cannot be used to prejudice other students. In other words, the Ordinance tacitly lays down that where the comparative merits are examined, these grace marks are to be excluded. It is clear from the above Ordinance that the scholarships prizes, medals, order of merit, all these instances are the instances signifying the excellence of the student. Wherever the excellence of the student is compared the grace marks have to be excluded. Therefore, we have come to a position that while assessing the academic merit of a student the grace marks have certainly to be excluded. Going by the well-known rule of interpretation *ejusdem generis* the academic merit also can be added to the categories of the scholarships, prizes, medals, orders of merit, etc. shown in the Ordinance. Therefore, wherever the academic merits of the candidates are to be graded or ascertained the grace marks should not be added. Therefore, the contention raised by the learned Counsel for the petitioner can be rejected even on a mere reading of the Ordinance and the Government regulations.

8. But in this case, the learned Counsel for the petitioner's argument is that one rule formulated by the affairs of their institution is repugnant to the other rules passed by another authority. We cannot agree with this sort of argument. Repugnancy or *ultra vires* of a rule can be examined only against the provisions of the Constitution and/or the provisions of a parent Act. It is true that every rule, act or for that matter every action of an executive or legislative body has to be judged in the background of the parameters fixed by the Constitution and not by examining the conflicting provisions of different statutes. In other words our Constitution is like a boiler. It is in that boiler that every act or omission of a statutory body, and sometimes of private individual has to be treated, heated and tested to survive such action or omission in the eye of law. Therefore, the instructions issued by the Government governing the provisions of the admissions to Post-Graduate Medical Course in its college cannot be said to be unconstitutional or illegal simply because it comes into conflict with Ordinance under the University Act. The learned Counsel for the petitioner enforced his argument by citing decisions in *Rajashri Yeshwant Jadhav and etc. Vs. State of Maharashtra and Others*, *Sanjay Ahlawat v. M.D. University and others*, *J.T. 1995(1) S.C. 26*, *Ajay Kumar Singh and Others Vs. State of Bihar and Others*, and lastly in *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, . All these decisions, except the last one concern the awarding of marks in extra curricular activities or sports or regarding the reservation of seats on the basis of regions or territory, etc. All these decisions deal with the constitutional validity of awarding of such extra marks or preference or reservation shown by the Educational Institutions. But in our case the question is in reverse position. In fact in this case we are called upon to examine the validity of the exclusion of grace marks from arriving at the aggregate marks in tune with the instructions issued by the Government. Therefore, we see that these decisions will not be of any help to the petitioner's case.

9. Coming to the last decision cited by the learned Counsel for the petitioner in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , we are at a loss to understand how this decision is relevant to the problem posed before us. It is a case where, the Supreme Court has identified the right to education is one of the fundamental rights. But the said decision in unmistakable terms recognised the right of a party to run an educational institution with their own rules and bye-laws. At this juncture it is profitable to note certain observations of the Supreme Court contained in that decision. The said decision has declared that higher education or technical education of course cannot be given status of a fundamental right. In fact that decision recognises the right to establish the educational institution and govern those institutions by its own Rules and Regulations. In paragraph 151(h) at page 2236 the Supreme Court observed thus:---

"..... It has been well recognised by this Court that one who pays for the education is also entitled to stipulate the manner in which he will admit students."

Then in paragraph 168 at page 2245 it is observed:---

"For the purpose of these cases, we shall proceed on the assumption that a person or body of persons has a right to establish an educational institution in this country. But this right, we must make it clear, is not an absolute one. It is subject to such law as may be made by the State in the interest of general public."

The learned Counsel for the petitioner in order to support his argument relied on paragraph 169 which reads as follows:---

"We must, however, make it clear, and which is of crucial importance herein, that the right to establish an educational institution does not carry with it the right to recognition or the right to affiliation. ... Similarly, affiliation may be granted either by the University or any other academic or other body empowered to grant affiliation to other educational institutions. In other words, it is open to a person to establish an educational institution, admit students, impart education, conduct examination and award certificates to them."

This position also will not help the petitioner. On the other hand in this decision, in unequivocal terms the Supreme Court recognised the right of an institution or an individual to establish an educational institution and admit students, according to the rules framed by them. But in our case the first respondent being a State the only test that could be applied is whether that rule is within the parameters as laid down by the Constitution. Counsel for the petitioner could not point out any such defect in the rules framed by the Government of Goa for admission to Post-Graduate course. Therefore, as argued by counsel for the petitioner, that the Ordinance which provides for addition of 10 marks because of proficiency of the petitioner in sports cannot insist the Government to add those marks in evaluating the aggregate marks in academic merit in the selection or

admission to Post-Graduate Medical course. In other words, the learned Counsel for the petitioner could not point out the illegality or repugnancy to the provisions of the Constitution as far as the implementation of the instructions issued by the Government for admission to the Post-Graduate medical course in college is concerned. As pointed out earlier we also see no conflict between the Ordinance and the instructions issued by the Government for the purpose of admission. As rightly pointed out by the counsel for the University the Ordinance has been formulated with a specifically purpose of instructing its staff for awarding grace marks to the students in certain contingencies. The very words "grace marks" imply that it is not in any way related to merit.

10. In the affidavit-in-reply filed by the first respondent it is stated that the instructions are strictly in consonance with the directions issued by the Medical Council of India which is a body that is controlling and guiding the entire medical education in India. Therefore the test of reasonableness of the act of exclusion of grace marks is based on merit alone. Such an act cannot be said to be unreasonable in order to attract the vice of discrimination under Art. 14 of the Constitution of India nor can it be called arbitrary.

11. Defending the action of the first respondent, the learned Advocated General has relied upon the decisions in V.R. Potdar Vs. State of Maharashtra and Others, , Kerala Hotel and Restaurant Association and others Vs. State of Kerala and others, , Dr. Ram Lal Chaturvedi Vs. State of Rajasthan and Others, and Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, . All these decisions in uniform terms have laid down that the condition for admission to educational institutions should be based mainly on merit. At this juncture we must point out to a very illuminating paragraph in the decision of the Supreme Court in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, it has been observed thus:---

".....So much for admission to the M.B.B.S. Course, but different considerations must prevail when we come to consider the question of reservation based on residence requirement within the State or on institutional preference for admission to the post-graduate courses, such as M.D., M.S. and the like. There we cannot allow excellences to be compromised by any other considerations because that would be detrimental to the interest of the nation."

In Dr. Jagadish Saran and Others Vs. Union of India (UOI), , the Supreme Court declared thus:---

"If equality of opportunity for every person in the country is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks."

In view of this pronouncement of the Supreme Court in unequivocal terms that merit and merit alone would be the criteria, for admission to higher education, and any other consideration will definitely render the very object of the medical

education nugatory. Therefore we have no hesitation to hold that the instructions of the Government framed by them for regulating the admissions to Post-Graduate Medical course which excludes all other considerations except that of merit of a candidate namely, marks obtained in M.B.B.S. degree, cannot be said to be illegal or repugnant to any provisions of any law or ultra vires to any Act or Statute or Ordinance of the University.

12. In the result, Rule discharged. The writ petition is dismissed. We hereby vacate the interim order passed on 2-2-1995.

13. We also direct the respondent No. 1 to see that the admission of the third respondent shall not be affected in any way by the interim order passed by this Court and the University is directed to register the third respondent to Post-Graduate Medical course.

In the circumstances there shall be no order as to costs.