
(2011) 06 DEL CK 0049

In the Delhi High Court

Case No : Writ Petition (C) No. 1671 of 2011

Dr. Manohar Singh Rathore

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 5 ILR Delhi 762

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : Avneesh Garg, for the Appellant; Sumeet Pushkarna, for the Respondents 1 and 2 and Rakesh Gosain, for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.

1 By this petition filed under Article 226 of the Constitution of India, the Petitioner seeks a direction to direct the Respondent No. 2 hospital to quash the selection made for the single seat of DNB(secondary) in Radiodiagnosis for January 2011 session and allow the Petitioner to join the course in question.

2. Facts shorn of unnecessary details relevant for deciding the present petition are that the Petitioner applied in the stream of Radiodiagnosis in response to the Respondent No. 2 hospital's advertisement/notification published on its website inviting applications for the DNB Secondary seats for January 2011 session where the selection of the shortlisted candidates was to be made on the basis of marks obtained in the Post Graduate course and the admission was to be granted at the time of counseling on the appointed date. The grievance of the Petitioner is that in the shortlisted candidates, the Petitioner had the first rank owing to his marks in the post graduation and Respondent No. 4 was third in the said list and at the time of counseling, instead of there being counseling, an interview took place and in the impugned result, Respondent No. 4 was declared selected for

the single seat in DNB(secondary) RadioDiagnosis instead of the Petitioner. Being aggrieved with the aforesaid act of the Respondent No. 2 hospital in not following the guidelines of the Respondent No. 3 National Board of Examinations, the Petitioner has preferred the present petition.

3. Mr. Garg, learned Counsel appearing for the Petitioner argued that the Respondent hospital has not followed the criteria laid down by the Respondent No. 3 NBE whereunder for DNB (Broad Specialty) Secondary Seat, the Respondents 1 and 2 could have conducted a counseling and not the aptitude test/interview. Counsel also submitted that the Petitioner had scored the highest marks in Diploma in Radio Diagnosis out of the 24 candidates to secure admission in the said DNB Specialty Course. Counsel further submitted that the Respondent hospital had no authority to frame their own guidelines and that too in violation of the guidelines framed by the NBE. Counsel also submitted that the report filed by the NBE pursuant to the directions given by this Court is contrary to their own guidelines and unjustifiably they have gone to the extent of endorsing the said illegal conduct of the Respondent hospital. Counsel also submitted that the NBE guidelines permit the Respondent hospital to devise a mechanism of allocating 100 marks by allocating 75% marks to P.G. Diploma, 2.5% marks for experience, 2.5% for academic and 20% for interview. Counsel also stated that even the aptitude test was not conducted by the Respondents 1 and 2 in terms of the criteria laid down under the NBE guidelines. Counsel also submitted that even the selection committee was not constituted by the Respondent in terms of Clause 1 (c) of the "Standard Procedure to be followed" of the NBE guidelines.

4. Counsel further submitted that as per the report submitted by the NBE, the same clearly shows that there was only one expert as an external member although the requirement as per the NBE is equal ratio of experts; external as well as internal. Counsel further submitted that no waitlist was prepared by the Respondent in terms of Clause 1(f) of the standard procedure laid down under the NBE guidelines. Counsel invited attention of this Court to such similar result declared by the Max Super Specialty Hospital wherein they have declared the waitlist of the candidates in order of merit. Counsel also submitted that the Respondent hospital also failed to furnish the information to the NBE in terms of Clause 2 of NBE guidelines which requires furnishing of every information right from the stage of advertisement till the completion of the process within a period of 10 days from the completion of the admission process. Counsel also submitted that some of the candidates possibly did not participate in counseling on the assumption that the candidate who has scored highest marks in the diploma course would automatically get the seat and had those candidates been aware of the fact that the interview would take place then certainly they would also have participated in that process.

5. Opposing the present petition, counsel for the Respondent Nos. 1 and 2 submitted that the Petitioner is estopped by the doctrine of estoppel and

acquiescence to challenge the selection process once he had participated in the interview without protest. Counsel also submitted that the Petitioner was well aware of the fact that he was to appear in the interview which is the practice prevalent in all the hospitals despite the fact that in the advertisement the term "counseling" was used and therefore counseling must be read in terms of the prevalent practice and not independent of that. Counsel also submitted that the Petitioner had appeared in similar such interviews in other hospitals as well wherein he had failed. Counsel further submitted that the process of selection was broad based and absolutely transparent and the entire record was not only placed before this Court but was also placed before the NBE. Counsel also submitted that the Selection Committee duly comprised of two experts from the hospital i.e. HOD and Senior Consultant and one external medical expert who was a professor from G.B. Pant Hospital and one DDG from the Ministry as observer. Counsel also submitted that similar process was adopted by the hospital to select the candidates for other broad specialty courses. Counsel also placed reliance on the similar patterns adopted by the other hospitals as placed on record along with the short affidavit. Counsel also submitted that the interview is necessary to assess and rationalize the suitability of the candidates who have qualified diploma course from different institutes of the country.

6. Dr. Rakesh Gosain, learned Counsel for the Respondent No. 3 NBE submitted that for counseling, determination of merit is essential. Counsel submitted that now the NBE has introduced CET for DNB primary and secondary seats and there will be no scope of any such controversy. Counsel also submitted that out of the seven candidates, four candidates came to participate in the counseling at random and it is not that only four top candidates in order of merit came to participate in the said counselling.

7. Counsel for the Respondent No. 4 submitted that if the counseling was mentioned in the advertisement, the same was meant for all the candidates and not for the Petitioner alone and therefore the Petitioner cannot claim that he was taken by surprise. Counsel further submitted that the Petitioner cannot claim that he was treated differently than the other candidates and therefore he cannot find fault with the decision making process which was uniformly applied to all the candidates. Counsel also submitted that the Respondent No. 4 had already joined the said course after resigning from Chirayu Medical College, Bhopal and thus now cannot be made to suffer.

8. I have heard learned Counsel for the parties and given my thoughtful considerations to the submissions made by them.

9. The principal grievance raised by the Petitioner was that the Respondent No. 2 i.e. Safdarjung Hospital and Vardhman Mahavir Medical College had devised its own selection process, completely contrary to the procedure laid down by the Respondent No. 3-National Board of Examinations for selecting the candidates for DNB (Broad Speciality) secondary seats in the field of Radiodiagnosis. The Petitioner has also raised a grievance that the selection procedure adopted by

the Respondent No. 2-hospital was not transparent besides being totally arbitrary.

10. The Diplomate of National Board (DNB) courses are prestigious and highly specialized advanced courses. So far DNB (Broad Specialty) primary seats are concerned, the selection is now done through a centralized test known as the CET and therefore admission to DNB (Broad Specialty) course for the primary seats is now strictly based on the performance in the said test which is to be followed by centralized counseling conducted by the Respondent No. 3-NBE Board. As regards DNB (Broad Specialty) secondary seats are concerned, the same system of centralized test through CET will be in force w.e.f. June, 2011 with follow up of single window centralized counseling system for allocation of seats and, therefore, from June, 2011 the selection of candidates for both DNB primary and DNB secondary seats will be done through a centralized test followed by centralized counseling.

11. This Court in the present case is concerned with DNB (Broad Specialty) secondary seats and that too for January, 2011 session. The core issue to be examined by this Court in the present case is whether in the NBE guidelines the selection of the candidates for DNB (Broad Specialty) secondary seats was to be conducted based on the marks obtained by the candidates in their diploma courses followed by the aptitude test or in place of aptitude test it was to be done through the process of counseling.

12. It is not in dispute between the parties that as per the public notice issued by the Respondents No. 1 & 2 inviting applications for admission in DNB (Broad Specialty) secondary seats for the session January 2011 in the stream of Radiology, the method of selection was prescribed through counseling and not through the aptitude test. The date of counseling announced in the public notice for the said course i.e. DNB (Broad Specialty) seat in Radiology and four other courses was 18.02.2011. There was only one seat for the general category in the stream of Radio diagnosis. At the footnote of the said public notice, it was reiterated that the counseling for the Broad Specialty (secondary seat) will be held on 18.02.2011 at 11 a.m. in the Committee Room. It is also not in dispute that instead of conducting the counseling, the Respondents No. 1 & 2 had conducted the clinical aptitude test, which they claim was conducted by them strictly as per the NBE guidelines and not in violation of the same.

13. Because of the aforesaid contrary stands taken by the Petitioner as well as the Respondent No. 2-Hospital, this Court vide order dated 07.04.2011 directed the Respondent No. 3-NBE to examine the entire issue and to report as to whether the selection/admission of the Respondent No. 4 is in accordance with the criteria laid down by the NBE or not. Pursuant to the said directions, the National Board of Examinations had submitted their report dated 21.04.2011 which is signed by a Committee comprising of five experts in their respective fields. As per the said report, the NBE has taken a categorical stand that in order to determine the merit of the candidate the Respondent-Hospital had conducted an aptitude test in accordance with the guidelines of the National Board of

Examinations and its own guidelines dated 10.12.2009. In the concluding remarks, the said Committee has clearly taken a view that no deviation was made by the hospital in the selection process from the guidelines laid down by the National Board of Examinations for selection of DNB candidate for the secondary seat.

14. As per the guidelines for admission to DNB programme as placed on record, the following procedure has been laid down to be followed by the Respondent-hospital for selecting the candidates for DNB (Broad Specialty) in secondary seats course. The same is reproduced as under:

(a) The Aptitude Assessment shall be done in a transparent manner i.e. wide publicity shall be given by the Institution for invitation of the applications, as per the time framed defined by the Board (stated in the accreditation agreement letter).

(b) The concerned Institute shall maintain a complete record of all applicant candidates along with their contact details, which shall be submitted to the Board's office at the end of a selection process (as per format enclosed).

(c) The selection committee/panel of experts appointed by the concerned institutions shall comprise of at least 50% of external members i.e. faculty members not related to the Institute, the panel shall comprise only of subject experts i.e. those specialists who are associated with practice and teaching of the concerned specialty.

(d) Consultants/Administrators/Promoters of the concerned Hospital cannot be associated with the Hospital's selection process, if any of the close relatives or known person is appearing in the said aptitude assessment test.

(e) The Institute concerned shall evolve objective skills for assessing the professional aptitude of candidates (the model scale for assessment of skills is proposed along with at annexure 9).

(f) The Institute concerned shall prepare a subject wise merit list based on the performance of the candidates equal to the number of seats available & an equal number of candidates in order of merit in the wait list panel.

(h) All candidates shall be treated alike and on equal grounds. There shall not be any kind of preferential weightage (example Institute/state of Graduation, Domestic Candidate etc.) to be given to any kind of candidate on any reason or ground.

15. As per the Respondent-hospital, the procedure was strictly adhered by them for selecting the candidates for different streams of DNB (Broad Specialty) secondary seats. The hospital has taken a stand that the same method is being adopted by the hospital for the last several years and even other hospitals accredited with the NBE are following the same process to select the candidates through the said process i.e aptitude test. The documents placed on record by

the Respondent-hospital clearly show that similar aptitude test/interview test to select the candidates for DNB (Broad Specialty) secondary seats was adopted by Manipal University, Manipal; Northern Railway Central Hospital, New Delhi; RML Hospital, New Delhi; L.V. Prasad Eye Institute, Hyderabad; Rajiv Gandhi Cancer Institute and Research Centre, New Delhi and Holy Spirit Hospital, Mumbai. The public notice dated 31.12.2010 issued by the NBE also clearly states that the process for selecting the candidates for DNB secondary seats will be strictly on the basis of guidelines of NBE and the accredited centres shall have to ensure complete transparency and objectivity in the process. Relevant Clause-(C) of the said public notice is reproduced as under.

(c) Secondary DNB seats Since a CET for DNB secondary seats shall be conducted wef June 2011, the NBE accredited hospitals may advertise for DNB secondary seats for Jan 2011 session, however, the selection process and joining of secondary DNB candidates shall be undertaken only after the primary candidates have joined the DNB course. This process shall be strictly on the basis of guidelines of NBE. The accredited centres shall have to ensure complete transparency and objectivity in the process.

16. As per the Respondent hospital, they have constituted a Committee of DNB under the Chairmanship of Dr. K.T. Bhowmik, Medical Superintendent which consisted of seven members and 13 course coordinators and in the meeting the said Committee held on 2.12.2009 had decided that the shortlisted candidates will be interviewed by the Interview Board comprising of (i) Medical Superintendent as the Chairman (ii) HOD or the nominated person of the specialty in Safdarjung Hospital (iii) external expert of the concerned specialty from another teaching institute/hospital, preferably from a government teaching institute of Delhi and (iv) a representative from the reserved category. The said Committee further decided that the candidates could apply only for one specialty and they would be called for interview to maintain the ratio of 1:7 depending upon the number of vacancies available. The Committee further decided that the selection in the aptitude test will be comprised of 100 marks and breakup of the same was decided as under:

4. Regarding Secondary Seats in Broad Specialities:

a) Diploma marks, speciality experience and achievements to be considered as for short listing and final selection.

b) Selection will comprise of 100 marks. The break of these marks shall be as follows:

Diploma -75 marks Experience & Academic Achievements - 5 marks (Gold, Distinction, Publications) Interview - 20 marks

The NBE guidelines also prescribe for a scale for assessment of aptitude of the candidates which is reproduced as under:

S. No.

10experience - 0 Marks

(Evidence attended at least one conference /CME in sub-specialty concerned)

17. There were in all seven candidates who were shortlisted by the Respondent-hospital to participate in the counseling/aptitude test as per the said ratio of 1:7 and out of seven candidates only four candidates turned up for the said counseling/aptitude test. The Respondent-hospital has not disputed the fact that the Petitioner having secured 66% marks in his P.G course was top in the merit list amongst all the said four candidates who had participated in the said counseling/aptitude test, but since the Respondent No. 4 had secured more marks in the aptitude test, therefore, he surpassed the Petitioner in the said selection.

18. Thus, the aforesaid background of facts would clearly show that the Respondent-hospital has not deviated from the guidelines laid down by the NBE in selecting the candidates for DNB (Broad Specialty) secondary seats through the process of aptitude test/interview. There also cannot be any dispute that once the ultimate selection of a candidate is through an interview/ aptitude test, then the candidate who is possessing higher marks in the diploma course may not necessarily be selected and the candidate with the lower marks in the diploma course in comparison may ultimately get selected. Once the Respondent-hospital has followed the procedure laid down by the NBE then the disturbing question is where did the things go wrong and who is responsible for the same. The surprising part is that once it is laid down in the NBE guidelines that the selection process will be through the aptitude test/interview then how in the public notice the Respondent-hospital could have notified the criteria of selection through counseling.

19. Vide order dated 16.05.2011, a direction was given to the Respondent No. 2-hospital to categorically name the officer who was responsible for committing such a lapse or mistake in the public notice calling for the candidates to appear in the counseling instead of aptitude test/interview. Instead of complying with the said direction disclosing the name of the official/officer due to whose negligence or lapse the said public notice did not carry the correct procedure of calling the candidates for selection, the Respondent No. 2-hospital in their affidavit has made an attempt to justify and explain that the term "counseling" in the advertising must necessarily and contextually as per prevalent practice to be read with the applicable regulations as including the "interview" for the purpose of assessment/suitability. Such an absurd explanation given by the Respondent No. 2-hospital deserves outright rejection. Counseling as per the prevalent system was introduced as a single window system of admission based on the merit or rank achieved by a candidate. Counseling in admission process is nowhere defined as such but is the most common and prevalent practice today in almost all educational institutions throughout the country. A day and time is allotted to the candidate according to his rank and at the time of counseling, a student is allowed to choose his choice of stream in the seats on offer on

showing of the requisite documents like proof of date of birth, certificates of eligibility, etc to establish his claim and on the spot admission is granted on deposit of money. Now interview is on the other hand is a totally contrary phenomenon; an evaluation based on questions asked and answers given by the candidate. The two terms however much diluted cannot be by any stretch of imagination be interchangeably used. In this modern age, keeping in view the rapid strides made in the sphere of Information and Technology, the process of online counseling through a centralized system is being undertaken. There are also Post Graduate Medical Courses, admission to which is done by counseling for which in case of an emergency or any exigency is allowed to be attended by any representative of the candidate. If the contention of the counsel for the Respondent hospital is accepted that the aptitude test was implicit in the term counseling then how do the prevalent practice of online counseling and attending of the counseling by a representative can take place, is a question which is beyond the comprehension of this Court to answer. Had the Respondent No. 2-hospital issued a proper public notice strictly in terms of the NBE guidelines, then the present imbroglio would not have arisen. This Court thus does not subscribe to the stand taken by the Respondent-hospital that the aptitude test or interview is implicit in the term "counseling".

20. It is not dispute that the Petitioner is a well qualified Doctor possessing the Diploma in Medical Radiodiagnosis and was seeking admission in the specialized course of DNB (Broad Specialty) in secondary seat in the Respondent hospital. It seems that the Petitioner wants to take undue advantage of the said mistake committed by the Respondent No. 2-hospital in the said advertisement as an aspirant who wants to pursue a DNB course would apply in not one but many other hospitals accredited with the NBE and it is not fathomable that he was so naive that he was not aware of the fact that he would be required to appear in the aptitude test/interview. Hence, even if the Respondent hospital committed an error in using the wrong term in the public notice, the Petitioner cannot be allowed to take advantage of the same.

21. Another fact which cannot be ignored is that the Petitioner at no stage had lodged any protest, not only with the hospital, but even with the NBE and it is only when he came to know about his result of being unsuccessful in the said selection, he in utter desperation sought to challenge the selection process by way of filing the present writ petition before this Court. It is a settled legal position that the correctness of the selection procedure cannot be challenged by an unsuccessful candidate who had fully participated in the selection process without any protest or demur. The Hon'ble Apex Court in the case of Madan Lal and Others Vs. State of Jammu and Kashmir and Others, , while dealing with the similar situation, held as under:

9. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be

kept in view that in this petition we cannot sit as a Court of appeal and try to re-assess the relative merit of the concerned candidates who had been assessed at the oral interview nor can the Petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee.

There is also no dispute with the legal position that it is not the function of the Court to sit over the decisions of the Selection Committee and to scrutinize the relative merit of the candidates unless there is illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. In *Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others*, it was held as under:

9. It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the Court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its jurisdiction.

22. Taking into consideration the aforesaid legal principles, this Court does not find that the Respondent No. 2-hospital did not adhere to the laid down criteria as prescribed by the National Board of Education for selecting the candidates for DNB (Broad Specialty) secondary seats and the Petitioner cannot be put to any advantageous position simply because an error or lapse was committed by the hospital in the public notice calling the candidates for counseling instead of

appearing for the aptitude test/interview.

23. Another objection raised by the counsel for the Petitioner was that the selection committee was not constituted by the Respondent in terms of Clause 1(c) of the Standard Procedure of the NBE guidelines. The said clause of the NBE guidelines envisages that the selection committee/panel of experts to be appointed by the concerned institute shall comprise of at least 50% of external members and such a panel shall comprise only of subject experts. In the report filed by the NBE, the stand that has been taken is that to make the admission process transparent, Vardhman Mahavir College and Safdarjung Hospital had framed the guidelines dated 10.12.2009 for conducting the aptitude test in accordance with National Board of Examinations guidelines. As per the Respondent hospital, the said guidelines were framed by the hospital in its meeting held on 2.12.2009 under the chairmanship of Medical Superintendent, wherein the decision was taken that shortlisted candidates will be interviewed by a Board comprising of (i) Medical Superintendent, Chairman (ii) H.O.D. or nominated person of the specialty in SJH (iii) An external expert of the concerned specialty from another teaching institution/hospital preferably from a Govt. teaching institute of Delhi (iv) A representative from reserved category.

24. Counsel for the Petitioner has not disputed the fact that the selection committee comprised of two external members and two experts from the hospital. Counsel for the Respondent hospital has also not disputed the fact that only one external member was the expert in the concerned specialty while the other external member was in the capacity of observer. The said Clause 1(c) does provide that the interview board should comprise of two external experts and two internal experts but so far the panel constituted by the Respondent hospital was concerned, the same comprised of one expert and one external member as an observer. It has also come on the record that the said panel was constituted by the Respondent strictly in terms of their own guidelines decided by the hospital in their meeting held on 2.12.2010. The NBE has also taken a stand that the aptitude test was conducted by the Respondent hospital strictly in accordance with the guidelines of the NBE and the guidelines of the hospital dated 10.12.2009. 25. In the light of this factual position, not much can be seen gathered to say if one external member was an external expert or not. It is not the case of the Petitioner that the Respondent hospital had violated its own guidelines or committed any act targeting the Petitioner to oust him from the selection. It cannot be lost sight of the fact that all other DNB candidates be it of primary seats or secondary seats were interviewed by the interview board constituted by the hospital in terms of the above guidelines and therefore in the absence of any specific allegation of malafides or bias, the plea raised by the counsel for the Petitioner attacking the constitution of selection committee in violation of the NBE guidelines does not cut any ice.

26. There are also certain other objections raised by counsel for the Petitioner castigating the selection process, but considering the fact that in the petition

there are no clear allegations of malafide or arbitrariness against the members of the Selection Committee and also the fact that other candidates had also passed through the same process of selection as was undergone by the Petitioner in the stream of Radiodiagnosis, therefore, the said objections in the absence of any extraneousness, allegations of malafide or bias do not deserve any attention. Once there was a complete uniformity in the selection process and highest number of marks i.e. 75% marks were allocated to the PG diploma course, 2.5% for experience and 2.5% for academic, this Court does not find allocation of 20% marks for interview in any case on higher side when there was also a detailed scale of assessment of the aptitude as has been reproduced above. Written examination assesses the man's intellect and the interview tests the man himself and the twain shall make the selection proper and no suspiciousness can be attributed to the selection process if in the aptitude test the Respondent No. 4 secured higher marks than the Petitioner, although in the diploma course he might have secured lesser marks.

27. Hence, In the light of the above discussion, this Court does not find any merit in the present petition and the same is hereby dismissed.

28. However, a cost of Rs. 50,000/- is imposed upon the Respondent-hospital for the negligence committed by them in notifying to the candidates the procedure of selection as counseling instead of aptitude test/interview. Cost shall be paid by the Respondent-hospital to the Petitioner within a period of two weeks from the date of this order. After payment of the said cost, the hospital shall recover the same from those officers/doctors who were responsible for committing such a lapse/mistake by insertion of the said wrong information in the public notice. Compliance affidavit shall be filed by the Respondent No. 2-hospital within a period of two months from the date of this order.