
(1995) 02 DEL CK 0016

In the Delhi High Court

Case No : Civil Writ Petition No. 3992 of 1994

Dr. Sanjeev Dadhwal

APPELLANT

Vs

All India Institute of Medical Sciences

RESPONDENT

Date of Decision : 24-02-1995

Acts Referred:

Citation : AIR 1995 Delhi 268 : (1995) 34 DRJ 46 : (1995) RLR 379

Hon'ble Judges : Mahinder Narain, J; A.K. Srivastava, J

Bench : Division Bench

Judgement

A. K. Srivastava, J.—This petition under Article 226 of the Consti graduated India has been filed by one Dr. Sanjeev Dadhwal who has graduated from the All India Institute of Medical Sciences, hereinafter referred to as the "institute" and trying to get into the post graduate courses of the institute through the competitive examination for the January Course 1995. By this petition, following three reliefs were prayed for :

"(a) issue appropriate writ, order or direction in the nature of mandamus, or any other appropriate writ, order or direction, directing the AIIMS to accept and consider the application of the petitioner for the PG entrance examination scheduled to be held in November, 1994, or any other date (for the PG course commencing in January 1995, and also for any future PG examination, in the category of "Institute Graduate", with 33% reservation applicable to the said category, and to consider him for selection on the said basis to the post of junior resident at the monthly salary of Rs. 2,630/- p.m.

(b) In the alternative, to direct that the AIIMS will make 33% reservation applicable proportionately for each course, instead of the presently prevailing system of applying the reservation to the total number of available seats of all courses, taken together.

(c) direct the AIIMS to publish the composite result of all the candidates who appear in any PG entrance examination, along with their names and Roll

numbers, category, specialisation, mark, preference and rank/ merit and waiting list per category, per specialisation."

2. The reason for filing the writ was that the Institute was denying petitioner's claim as an institute graduate for the post graduate degree courses. As an institute graduate the petitioner would get benefit of 33% reservation for post graduate courses.

3. Along with the petition the petitioner also moved a CM 7276/94 by which, as an interim measure, he made the following 3 prayers :

(a) "Direct the respondent to accept the application form of the petitioner for admission to the MD/MS Course commencing in January 1995 and/or any subsequent examination, as an "Institute Graduate" with, 33% reservation applicable to the said category, and to consider him for selection on the said basis to the post of Junior Resident at the monthly salary of Rs. 2,630/- per month.

(b) In the alternative, permit the petitioner to submit two application forms separately as "Institute Graduate" with 33% reservation application to the said category; and second application form as outside non-institute category general candidate, and to permit him to sit for the examination commencing in mid November, 1994 or any subsequent examination for MD/MS Course, and also to be considered for selection on the said basis, pending final disposal of accompanying writ petition.

(c) Direct the respondent to declare and publish the result of all MD/MS (PG) examinations of AIIMS indicating their names, roll numbers, category, specialisation, preferences, marks and merit/waiting list per category, per specialisation;"

The petitioner had filed this petition before the competitive examination for the post graduate courses was held.

4. Notices on the main petition and the CM 7276/94 were issued on 21-9-1994. From the order-sheets of the case it appears that the CM 7276/94 was not finally disposed of. The only interim order which the petitioner could get from the Court is dated 27-9-1994 in which it was said that "the petitioner was to submit his form without prejudice to his contentions and subject to further orders from this Court." The examination was held after the application as a general candidate was filed by the petitioner.

5. The respondent the institute, has filed its counter-affidavit on 17-11-1994 and additional affidavit on 25-1-1995. It appears that reply to the CM 7276/94 was never filed.

6. According to the Roster, this petition was being dealt with by another Division Bench headed by D. P. Wadhwa, J. till 15-12-1994. After the change of the Roster this petition is now being dealt with by this Division Bench,

7. During the pendency of the writ the written examination results were declared. Since the admission in the post graduate courses of the institute commencing January 1995 had been completed by 1st February, 1995 and the petitioner's case for getting the benefit of 33% reservation available for institute graduates had not been finally disposed of, the learned counsel for the petitioner made an oral prayer that the petitioner may be permitted to attend the classes till the final disposal of this petition so that in case he succeeded he was not deprived of the classes and the minimum period of attendance required for the said course. He gave an oral undertaking that the petitioner would not claim anything in the terms of stipend etc. which is available to a graduate who is regularly admitted to the post graduate course. He further gave an undertaking that in case the petition fails the petitioner would not ask for anything for the period he studied the course.

8. Since we were of the view that in the matter before us we should, instead of giving any interim order, dispose of the petition itself finally at an early date so that whatever is available to the petitioner he gets it from the very beginning, and in case the petition has no force the petitioner knows it at an early date that his petition has failed. In this view of the matter we heard arguments on the main petition and the learned counsel for the petitioner and the institute have submitted their arguments at length.

9. During the course of arguments it transpired that the petitioner's rank in the merit list prepared on the basis of the competitive examination is 287. It has also come to light that the petitioner's application was in the general category because the institute did not permit him to apply as an institute graduate and the court's order dated 27-9-1994 goes to say that the petitioner could submit his form without prejudice to his contentions. As such even though the petitioner's application was under general category, in case the petition succeeds and the petitioner is found eligible to claim reservation as institute graduate there will be no difficulty in treating his application under the category of institute graduate.

10. During the course of arguments it also admittedly emerged that considering the rank of the petitioner in the competitive examination being 287 he would not get entry into the concerned post graduate course under the general category. It has also been informed to the Court that the results of the relevant competitive examination have been announced and the petitioner has known them. In view of that situation the learned counsel for the petitioner made a statement at the Bar that he would not press the prayers Nos. 2 and 3 made in the petition and he would only press for the first prayer made in the petition. Thus the petitioner has given up his prayer No. 2 and prayer No. 3.

11. Accordingly, prayer No. 1 alone remains to be decided. Here the petitioner claims that he is entitled to reservation of 33% available to the institute graduates. According to the published result it is also clear that, in view of the fact that the petitioner has secured 54.167% marks in the relevant competition he is within the zone of consideration, that is to say, within the numbers of seats

allotted to institute graduates as per the reservation available to them. It has also been conceded by the learned counsel for the institute that if the petitioner would have been treated as institute graduate he would, according to the marks obtained by him, have got his second choice, that is to say, admission in the post graduate course of Ophthalmology .

12. Therefore, the question which needs to be addressed to ourselves is whether the petitioner is an Institute graduate and as such entitled to 33% reservation of seats in the Post Graduate Course of the Institute.

13. The Institute issued a Prospectus for Post Graduate Course Session January 1995. The relevant portion thereof is as follows :

"M.D. & M.S.

(3 year courses)

ELIGIBILITY

1. A candidate must possess the MBBS degree of the All India Institute of Medical Sciences or of a University recognised by this Institute for this purpose and must have completed the required period of pre registration internship or rotating horsemanship (12 months) in a recognised hospital. Those who are likely to complete their internship beyond 30th January need not apply.

2. The candidate must have obtained 55% marks in aggregate in all the MBBS profess ional examinations. Candidates with more than two failures in MBBS examinations will not be eligible for admission to MD/MS/ MCh (5 Year) courses. A deduction of one per cent and three per cent respectively shall be made for having failed once or twice in any of the MBBS professional examinations for calculating the percentage of marks for eligibility determination.

RESERVATION OF SEATS

(i) 33% of the total of postgraduate seats are reserved for institute graduates.

(ii) 22,5% of the total of postgraduate seats are reserved for the candidates belonging to Scheduled Caste/Tribe communities.

(iii) 5% of the total of the postgraduate seats are reserved for (a) those who have served in the rural areas for more than 2 years, (b) doing practice in rural areas having less than 5 thousand population for more than 2 years, (c) Medical graduates of backward areas, and (d) those who are working under the Family Welfare Programme subject to submission of a certificate from the District Magistrate for (a), (b) & (c) and Director of State Health Services for (d)."

14. Thus in the said Prospectus the Institute has provisions not only for eligibility but for disability also and reservations of seats.

15. As against its own Prospectus, the Institute, in its counter-affidavit, has stated as under to negate the claim of the petitioner for reservation available to

Institute Graduates for admission to the Post Graduate Courses :

"As per the practice/convention, the Institute graduates who apply for admission against 33% quota reserved for them, if they are selected and offered the seat and they do not accept the seat, they remain entitled for the benefit of Institute seat for the next/subsequent session(s). If an Institute graduate having been selected joins the PG course offered to him, as per his/her choice and after joining if the Institute graduate resigns before 31st of January and 31st of July, he/she is treated as not having utilised the 33% reservation quota and the seat so vacated by the Institute graduate is offered to another Institute graduate on the waiting list. However, if the Institute graduate joins the PG course and resigns after 31st of January and 31st of July, he/she is considered to have availed of the benefit of reservation for which the Institute graduate is entitled. If such an Institute graduate resigns after 31st January and 31st of July he/she is not considered subsequently as an Institute graduate for the benefit of 33% quota reserved for Institute graduates. The reason being that he/she has already availed of the benefit of reservation once and the seat so vacated by him after 31st January and 31st of July cannot be offered to any other Institute graduate on the waiting list since the last date of admission to postgraduate courses at the Institute is 31st of January and 31st of July of each year. This practice/convention is being followed right from the beginning.

In this particular case Dr, Sanjeev Dadhwal applied for admission to MD course in pediatrics for the session July, -1991 as an Institute graduate for the 33% seats reserved for them. His first preference was pediatrics. He was selected against the 33% seats reserved for the Institute graduates and offer was made to him on 13th June, 1991. He joined as Junior Resident (Pediatrics) in the Department of pediatrics on 27th July, 1991. He submitted his resignation from the post of Junior Resident on 11th October, 1991 and accordingly his resignation was accepted and he was relieved of his duties w.e.f. 11th October, 1991. It would, Therefore, be seen that Dr. Sanjeev Dadhwal has in fact availed of the benefit of Institute graduates for the session July, 1991. Since he resigned on 11th October, 1991 the seat vacated by him could not be offered to any other Institute graduate on the waiting list since the last date of joining of MD course was 31st July, 1991. In this process the Institute graduate was deprived of one seat in the year 1991."

16. The institute has not filed any rule or regulation of the institute or any resolution of the institute on the subject under consideration. Along with its additional affidavit filed on 23-1-95, two copies of circulars dated 6-6-78 and of February 1979 issued by the Govt. of India, Ministry of Health and Family Welfare (Department of Health) have been filed.

17. The circular dated 6-6-78 goes to show that from the next academic session of the institute (after issue of the circular) 33% of the total sanctioned number of post-graduate seats in any year should be kept reserved for the graduates passing out their MBBS course from the All India Institute of Medical Sciences.

This circular says that on the basis of the sanctioned strength of post-graduate seats as available with the institute at present namely; 108, total number of post-graduate seats to be reserved would be 36 (clinical subjects -- 27, para clinical -- 5 and non-clinical -- 4). This circular also says that the number of seats so reserved shall be inclusive of the number of the graduates of the institute getting admission by merit in the open competition for admission to post-graduate courses in the All India Institute of Medical Sciences. It does not speak of any disability,

18. The circular of February 1979 says that the question of reservation of seats for the All India Medical Sciences graduates in the junior residency against the 33% reserved seats has been considered in consultation with the Directorate General of Health Services and it has been decided that the institute should themselves decide about the reservation of seats of post-graduates clinical/ para non-clinical department-wise taking all relevant considerations into the view.

19. The controversy now boils down to a question whether we decide on the basis of the Prospectus issued or we should be guided by the alleged established practice/convention of the Institute as has been stated by it in its counter-affidavit.

20. Before doing so it would be necessary to understand as to what should be meant by "Prospectus". It has also to be seen whether the school/college which issues a Prospectus is bound by the contents thereof or whether the college/school can act contrary to the contents of its prospectus.

21. In the Lexicon Webster Dictionary, the meaning to the term "Prospectus" has been given as follows :

"A brief sketch describing the main features of some proposed enterprise, as the plan of a literary work, or the proposals of a new business; a descriptive outline of an established organisation, as a college."

22. From the above definition it would appear that the school/college which issues a Prospectus gives complete information about itself in it. The Prospectus is the instrument through which the school/college "holds out" its contents or "represents" to the general public interest.

23. In the present case before us the Prospectus deals with admissions to MD/MS (3 years course). It provides eligibility and disability conditions and also for the reservations of seats. Regarding eligibility conditions the requirement is that the candidate must possess the MBBS degree of the All India Institute of Medical Sciences or of a University recognised by this Institute for this purpose and must have completed the required period of pre-registration internship or rotating horsemanship (12 months) in a recognised hospital. It is also provided that the candidate must have obtained 55% marks in aggregate in all the MBBS professional examinations. Disability provided is that the candidates with more than two failures in MBBS examination will not be eligible for admission to MD/

MS (3 years courses).

24. The Prospectus also provides for certain deductions. It says a deduction of 1% and 3% respectively shall be made for having failed once or twice in any of the MBBS professional examination for calculating percentage of marks for eligibility determination.

25. Regarding the reservation of seats the Prospectus says that 33% of the total of postgraduate seats are reserved for Institute graduates. Here the term "Institute graduate" should mean those graduates who obtained the MBBS degree from the All India Institute of Medical Sciences. There is no dispute on this issue.

26. On a perusal of the Prospectus issued by the Institute nowhere it is to be found that any Institute graduate is, for any reason, debarred from availing the benefit of reservation available for Institute graduates, meaning thereby that if a candidate is an Institute graduate and is otherwise eligible he should get the benefit of reserved seats for Institute graduates if he is within the merit zone.

27. The Institute does not object to the candidature of the petitioner on the ground of eligibility but certainly objects his request for being considered as Institute graduate for availing seats reserved for the Institute graduates. Therefore, now the point to be considered is whether on the basis of the challenged continued practice of the Institute, the petitioner can be labelled as non-Institute graduate in respect of his claim for seats reserved for Institute graduates.

28. In our opinion, when the petitioner acquired the MBBS degree from the All India Institute of Medical Sciences, he is an Institute graduate and shall continue to be so. The question thus is whether the petitioner can be debarred from the benefits of 33% of the post-graduate seats reserved for Institute graduates. We find that, on the one hand there is a Prospectus of the Institute, the contents of which nowhere debar an Institute graduate from availing the benefits of reserved 33% seats of the post-graduate seats and on the other hand there is, as contended, the alleged practice of the Institute to debar an Institute graduate from the benefits of such 33% of the post-graduate seats on the ground that in case an Institute graduate has availed such reservation in the past and after being given a seat in a post-graduate course he resigns after 31st of January and 31st of July, as the case may be, he would not be permitted to avail such reservation in future. The reason given by the Institute is that once a person is given the facility of reservation and he vacates the seat after the appointed day and prevents offer of the same to some other person on the waiting list, he should not be allowed to enjoy the benefits of reservation any more.

29. In our view, the reason of such debar from (sic) given by the Institute, should not be acceptable when such disqualification does not find place in the Prospectus and also in the Circular of the Government of India dated 6-6-1978. The Institute should have acted according to the contents of the Prospectus and

should not have adopted a practice contrary to the same and to bring in an element of arbitrariness. We go by the written contents of the Prospectus held out by it and not by the alleged practice adopted by it.

30. Before disposing of this petition on the basis of our view expressed above it is necessary for us to look into an additional contention raised by the Institute in its additional affidavit dated 25-1-95. In para 4 thereof the following has been contended, namely :

"His request to be treated as an Institute Graduate has already been declined by a Division Bench of this Hon"ble Court by order dated 15-12-94."

31. The order dated 15-12-94 reads as follows :

"15-12-94 : Present : Mr. S. K. Misra, Sr. Advocate with Mr. S. Mukherjee, for the Petitioner.

Mr. S. P. Kalra, for the Respondent.

CW 3992/94

There are three principal arguments raised in the writ petition; one is denial of the benefit of 33% (institute graduates) category reservation to the petitioner. The second and the third being the reservation of 33% being not implemented and given effect to course wise/ subjectwise and display of result of all the candidates.

As far as first question is concerned the respondent-AIIMS has stated that once the benefit is availed of by an institute graduate he is not entitled to get the same benefit for the second time subject, however, that he vacates the seat on or before 31st January and 31st July of the academic year so that seat is not wasted and could be allotted to another institute graduate. We find that the petitioner has availed of the benefit of institute candidate when he joined as junior resident (Pediatrics) in the Department of Pediatrics on 27th July, 1991. The petitioner, however, resigned from the said post of junior resident and his resignation was accepted and he was relieved of his duties with effect from 11th October, 1991. The case of the institute is that the said seat could not be allotted to any general category since the petitioner resigned on 11th October, 1991 and the last date for joining MD Course was 31st July, 1991. It is stated that this practice is going on for the last many years and the same is the interpretation given by the institute. We are satisfied with the reasons given by the respondent-AIIMS for denying the benefit? of 33% to institute graduates category for the second time and we do not like to interfere with the same. So far as second and third submissions of the learned counsel for the petitioner are concerned we would like the institute to file an additional affidavit.

Prima facie we are of the opinion that the distribution of reservation of 33% should be coursewise/subjectwise. The petitioner in the present case has applied for radio diagnosis course and we direct by way of interim order that in case if

the quota of institute candidates or other categories is filled up and the petitioner is high in the merits one seat may be kept reserved in the general category.

Let the matter be listed again on 17-1-1995.

sd/-D. P. Wadhwa, J.

sd/-Dr. M. K. Sharma, J.

December 15, 1994."

32. The learned counsel for the respondent has vehemently argued that in view of the above order which says "we are satisfied with the reasons given by the respondent-AIIMS for denying the benefits of 33% to institute graduates category for the second time and we do not like to interfere with the same", now it is not open to this Division Bench to decide whether the petitioner is entitled to claim 33% reservation available to institute graduates. His submission is that so far as prayer No. 1 of the petition is concerned that has already been dismissed by the earlier Division Bench and before this Division Bench only the prayers 2 and 3 remained to be decided. The stress of the arguments is that on 15-12-94 whatever orders have been passed are on CW 3992/94 and not on CM 7276/94 which prayed for interim relief.

33. On the other hand the learned counsel for the petitioner has submitted that the order dated 15-12-94 was by way of interim measure and it never disposed of the writ petition. His main argument is that the whole writ petition is still pending before this Division Bench and the same has not been dismissed. He submits that the aforesaid order dated 15-12-94 nowhere dismissed the writ petition wholly or in part. He also contended that a writ filed in a High Court cannot be decided in piece-meal unless the petitioner himself gives up one or more prayers in the petition. He submits that in this case the petitioner never gave up his prayer No. 1 nor made a request that prayer No. 1 may be disposed of at the first instance and his prayers 2 and 3 may be disposed of at a later stage. The whole petition was there before the earlier Division Bench and was to be decided in one go. What he contends is that since time was passing, results were to be published in December 1994 and admissions were to be given in January 1995, the petitioner after filing his petition in the month of September 1994, much before the commencement of the examination, was contesting his claim vehemently before the earlier Division Bench for getting some interim orders so that his rights regarding availability of reservation as institute graduate to him are safeguarded before everything is over. For that he was all along trying to obtain orders from the Court that as an interim measure he may be permitted to apply as an institute graduate or in the alternative to apply as art institute graduate and also under the general category so that his claim for reservation as an institute graduate does not become infructuous due to the time taken in final disposal of the writ petition. In view of this exigency of the situation and the urgency involved the petitioner was trying hard to get an interim order and for that purpose his CM No. 7276/94 was listed for disposal on 15-12-94. The

learned counsel for the petitioner also submitted that on 15-12-94 the petitioner's CM 7276/94 was listed for consideration and, in fact, on that CM alone orders were to be passed. He contends that due to typing error CM No. 7276/94 has not been mentioned at the top of the order dated December 15, 1994, though, in fact, orders were passed on that CM only. He further contended that the order dated 15-12-94 cannot be termed as a judgment. He submitted that nowhere in that order it was written that the writ petition was dismissed or disposed of in the light of that order. In the alternative he has submitted that in case the Court comes to a conclusion that the aforesaid order dated 15-12-94 is a judgment then it should be treated as per incuriam. He cited a number of authorities in support of his contention that the order dated 15-12-94 is per incuriam. These are State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, .

34. We have been shown the Daily Cause Lists of the High Court. We have also perused the order-sheets of this case. From the Cause Lists it would appear that CM 7276/94 was listed for hearing on 31-10-94, 17-11-94 and 15-12-94. From the order-sheets it also transpires that CM 7276/94 has not been finally disposed of so far and whatever orders there are they are by way of interim measure.

35. We are of the view that no final orders were passed by the earlier Division Bench and there were only interim expressions of opinion at various stages of hearing of this writ petition. We nowhere find that the writ petition was dismissed in part at any stage of the hearing. We also find that prayer No. 1 of the writ petition has not been dismissed by the earlier Division Bench. On close scrutiny of the order dated 15-12-94, in the light of the development of the proceedings before the earlier Division Bench and the urgency involved in the matter under issue, we are of the view that on 15-12-94 the Hon'ble Judges of the earlier Division Bench were not inclined to interfere at that stage with the declaration of the results by the institute in accordance with its continued practice and were not inclined to give any interim relief to the petitioner at that stage so far as his prayer for being treated as institute graduate was concerned. In our view it was only an expression of opinion at an intermediate stage and not a final decision of the writ petition so far as its prayer No. 1 was concerned. This view of ours is supported by the contents of para 3 of the aforesaid order dated 15-12-94 which reads as under :

"Prima facie we are of the opinion that the distribution of reservation of 33% should be coursewise/ subjectwise....."

Let the matter be listed again on 17-1-1995."

36. Here we find that the Hon'ble Judges of the earlier Division Bench expressed an opinion that the distribution of reservation of 33% should be coursewise or subjectwise. Therefore, if the contention of the learned counsel for the institute regarding prayer No. 1 is accepted then on the same analogy prayer No. 2 also would be deemed to have been decided against the institute. That is not so. It is

again an expression of opinion at an intermediate stage. Further, the last line of the order dated 15-12-94 says that "let the matter be listed again on 17-1-95". This last line would show that none of the prayers made in the petition was finally decided and all the matters were still open for consideration and decision.

37. Since we are of the view that the petitioner is entitled to the relief claimed in prayer No. 1 of this petition we would not like to shut him out merely on the grounds that the Hon"ble Judges of the earlier Division Bench had at an intermediate stage expressed some view in their order dated 15-12-94 on the matters in issue.

38. Coming to the alternative plea of the petitioner, since we are of the view that order dated 15-12-94 can by no stretch of imagination be treated as a judgment, it will be futile to enter into an exercise whether order dated 15-12-94 is a judgment in per incuriam or not.

39. In view of above, we are not in agreement with the contention of the institute that the request of the petitioner to be treated as an institute graduate has already been declined by Division Bench of this Court by order dated 15-12-94. We accordingly reject it.

40. In view of the discussion made above this petition should succeed in part to the effect that the petitioner was entitled to be treated under the category of the institute graduates to avail the benefit of reservation of 33% for institute graduates in the Post-Graduate Courses -- Session January, 1995. Rest of the petition need not be considered as the petitioner himself gave up his rest of the prayers.

41. Since the results are already out and all the available seats have been filled up there is a problem as to how to accommodate the petitioner. Admittedly, the marks obtained by the petitioner deserve him a seat in postgraduate course in the discipline of Ophthalmology as an institute graduate candidate. The petitioner had been fighting for his rights since September 1994, much before the exams were to take place and the results declared. Therefore, it would not be fair if the petitioner is denied of his rights only because a seat could not be reserved for him in the Ophthalmology discipline pending disposal of this writ petition. Had it been reserved there would not have been any problem. We are, Therefore, not inclined to deny the petitioner of his rights only because of the developments which took place before this writ petition was decided finally. Accordingly, we direct the institute to create a seat in the post-graduate course -- Session January, 1995, in the discipline of Ophthalmology in order to accommodate the petitioner and to give admission to the petitioner in the same, For that, if any formalities are required the institute shall do the same at the earliest but it shall allow the petitioner to join forthwith so that his studies do not suffer and he is not subjected to any deficiencies of attendance etc. due to late joining of the course. The petitioner shall be entitled to all benefits, privileges and accommodation etc. whatever should be available to a graduate who joins post-

graduate course in the discipline of Ophthalmology, The petitioner shall be so entitled with effect from the date he joins the course as per our directions given above.

42. The petition is disposed of accordingly.

43. Order accordingly.