

(2013) 09 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition No. 3197 of 2011

Dr. Syed Abdul Wahab Abdul Aziz

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 03-09-2013

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226
Indian Medical Council Act, 1956 — Section 19A, 33
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(i), 39, 72

Citation : (2013) 6 ABR 153 : (2013) 6 ALLMR 1

Hon'ble Judges : Ravindra V. Ghuge, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : Ameya Sabnis holding for Mr. A.M. Pathan, for the Appellant; V.D. Godbharale, AGP for Respondents 1 and 2 and Shri S.K. Kadam for Respondent 3, for the Respondent

Final Decision : Partly Allowed

Judgement

B.P. Dharmadhikari, J.—By this petition filed under Article 226 of the Constitution of India, the petitioner, an employee with respondent No. 1 State of Maharashtra, has assailed the norms laid down for the purposes of availing the benefit of 3% reservation provided for physically handicapped persons. Submission is, barring a person suffering from visual impairment is not in consonance with the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the "1995 Act") and also it violates Article 14 of the Constitution of India. The basic facts are not in dispute. The petitioner has passed his M.B.B.S. course as a physically handicapped person from Government Medical College and Hospital at Aurangabad in 2003. He had taken admission in 1998-99. The petitioner then completed compulsory internship and joined employment as a Medical Officer in 2006. In 2009 he passed M.P.S.C. examination and presently is permanent State Government servant. As he became eligible for acquiring post graduate qualification, he

appeared in 2011 PGM SET Entrance Test. He has, in paragraph 4 of his petition, stated that while filling in that form he was informed that the candidates with locomotory disability were only eligible for reservation and hence the petitioner could be denied an opportunity. Because of this information, on the alleged duress, he filled in the form from open category. He cleared the examination and secured 138 marks. The result was declared in third week of February 2011 and he was placed at Sr. No. 197. Since he wanted his claim to be considered as a reserved category candidate and to secure benefit of 1995 Act, present petition has been filed. Prayer in the petition is to set aside the bar provided for candidates with other disabilities and restricting the benefit of reservation only to candidates with locomotory disability of lower limbs.

2. The session in which the petitioner could have secured that admission on the basis of his performance in PGM SET Entrance Test is already over. The petition is being prosecuted only to enable him to secure the benefit of reservation in future.

3. It is in this background, we have heard Shri Sabnis, learned Advocate for the petitioner; Shri Kadam, learned Advocate for respondent No. 3 and Shri Godbharale, learned AGP for respondent Nos. 1 and 2 - State authorities.

4. Learned Advocate Shri Sabnis submits that the petitioner was not found unfit to seek admission to & undertake M.B.B.S. course or thereafter to function as a Medical Officer. Accordingly, the petitioner has been functioning as a permanent Medical Officer and his visual impairment to the extent of 45% has not adversely affected discharge of his duties. This factor and aspect has been totally lost sight of while restricting the benefit of reservation only to candidates with locomotor disability of lower limbs. He contends that the benefit of reservation of 3% provided for u/s 39 of the 1995 Act has got no relevance when the above facts are kept in mind. He contends that the admission brochure of relevant NEET PGM Rules do not debar a candidate with visual impairment from getting admitted as a open category candidate. As there is no such bar, the prescription of disability of lower limb for taking benefit of Section 39 of the 1995 Act is unsustainable as it lacks nexus with the object sought to be achieved. He has invited our attention to the relevant provision as contained in the Post Graduate Medical Education Regulations, 2000 (hereinafter referred to as "2000 Regulations") framed u/s 33 read with Section 19A of the Indian Medical Council Act, 1956 (hereinafter referred to as "1956 Act"). The amendments made in the relevant clauses/policy from time to time are also pressed into service to substantiate this argument. He has taken support from the judgments of Gauhati High Court in the case of Smt. Anju Talukdar and Another Vs. State of Assam and Others, and Division Bench of this Court in the case of Ms. Kritika Purohit and another Vs. State of Maharashtra [Writ Petition No. 979 of 2010], dated 17th November 2011.

5. Our attention has also been invited to Civil Application No. 7892 of 2013 seeking leave to amend the petition, challenging the notification dated 21.12.2010, restricting reservation only to persons with locomotor disability of lower limbs between 50% to 70%. It is not in dispute that the Civil Application

for amendment is to be considered at the stage of final hearing.

6. Learned Advocate Shri Kadam appearing for respondent No. 3 has invited our attention to Sections 33 and 19A of the 1956 Act. He contends that accordingly 2000 Regulations have been framed and there is no challenge to the said Regulations. He has invited our attention to the document which prescribed eligibility for reservation in the year 2009 when the petitioner appeared for entrance examination. He has urged that said Annexure specifically pointed out to the petitioner that no other disability could be allowed as per 2000 Regulations. The petitioner was aware of this and hence to avoid the bar at threshold, he appeared in the said examination as open category candidate.

7. Various notifications which prescribing the norms in this respect from time to time are also relied upon by him. He has urged that the controversy stands concluded because of the judgment of the Honourable Supreme Court, delivered on 24.8.2011, in the case of Dr. Kumar Sourav Vs. Union of India and others in Writ Petition (C) No. 184 of 2005. According to him, the issue reached the Honourable Supreme Court from the judgment of Orissa High Court where a challenge was by a candidate suffering from locomotor disability only. The Honourable Apex Court noted that the percentage of disability between 50% to 70% was not found proper by the High Court and during pendency of challenge Medical Council of India had itself made amendment and brought it down to 40% to 50%. Because of this development, challenge before it was found rendered infructuous by the Honourable Apex Court. Learned Advocate Shri Kadam submits that thus this act restricting benefit of reservation to candidates with locomotor disability of lower limb and then reducing percentage thereof was specifically before the Honourable Apex Court and the Honourable Apex Court has approved it.

8. He has also invited our attention to certain other judgments.

9. Learned AGP Shri Godbharale has invited our attention to the Rules regulating admissions to M.B.B.S. course in the year 1998-99 when the petitioner was admitted thereto. The relevant provision then prevailed was different and in any case, said admission is irrelevant in the light of subsequent norms evolved by the Medical Council of India. He contends that in 2009, when the petitioner appeared for the post-graduate entrance examination, he was very much aware that no other disability was being recognised for the purposes of said admission. He has also produced NEET UG 2013 Rules and NEET PGM 2013 Rules along with MHT-CET 2011 Rules to substantiate his contentions.

10. In his reply argument, learned Advocate Shri Sabnis for the petitioner has relied upon few judgments and 2000 Regulations to again urge that Medical Council of India has not provided visual impairment as a total bar for working as a Medical Officer.

11. It is necessary to note that minimum marks for clearing the entrance test for PoD is 45% i.e. 135 marks & Petitioner did score 138 out of total 300 marks.

Thus he qualified for further consideration had he been accepted as eligible for reservation. Respondent no. 3 MCI has in its reply affidavit, in paragraph 7 stated that the Civil Surgeon of General Hospital, Latur found Petitioner physically handicapped due to "Anophthalmos" in right eye with 6/24 vision leading to visual impairment to the extent of 45%. Said affidavit does not point out any problem with the left eye. Perusal of "Annexure D" of PGM-CET 2011 shows that it deals with Physically Handicapped students. While restricting the benefit of 3% reservation to candidates with locomotory disability of lower limbs between prescribed percentage, it adds that no other disability is allowed as per MCI Regulations. In the proforma of certificate, it also requires the medical practitioner issuing the certificate to certify that candidate does not suffer from any major visual disability. This later declaration is also part of the medical fitness certificate at "Annexure I" of these Rules to be submitted by the able bodied candidate not seeking benefit of Section 39 of 1995 Act.

12. We find it convenient to refer to the various judgments cited by the parties little later in the course of this judgment. Relevant provisions on the basis of which the entitlement of the petitioner needs to be examined, deserve a look first. However, we grant CA 7872 of 2013. Petitioner to carry out the amendment forthwith.

13. The petitioner has filed Medical Certificate dated 21.8.1997 which shows him to be 45% blind. On the basis of the said certificate, he got admission in M.B.B.S. course and after passing out he completed his internship. Then after successful completion of internship, he has been employed as a Medical Officer in the employment of respondent No. 1 State Government. He has procured this employment after clearing the M.P.S.C. examination. He is working as a medical officer in public hospital since then.

14. Perusal of the Rules framed by the Government of Maharashtra for the Common Entrance Examination conducted in 1998-99 reveals that a candidate was required to submit a certificate of physical fitness as per it's Annexure "J". Then a Doctor, after conducting clinical examination of the student desiring to take admission was required to certify that the student did not give him any personal history of any disease incapacitating him to undergo the professional course. The certificate also required him to mention that there was no evidence of major defects of posture, locomotion, vision, hearing or any other systemic disorder. It is apparent that the petitioner submitted this fitness certificate and in the light of the Medical Certificate dated 21.8.1997, referred to above, he was found not suffering from any major defect of vision and therefore only he was permitted to complete the M.B.B.S. course. His employer also did not find any disqualification in him.

15. Relevant Rules for MHT CET 2011 show that every candidate had to give a medical fitness certificate as stipulated in its Annexure "I". Said certificate was to be issued by the registered Medical Practitioner. There the Doctor issuing the certificate has to mention that the aspirant has not given any personal history of

any disease incapacitating him to undergo the professional course and upon clinical examination it was found that he was medically fit to undergo the professional course. In addition, said Doctor has to also certify that there was (i) Absence of any incapacitating and/or progressive systemic disease/disorder/condition, (ii) Absence of any disability of upper limb/s, (iii) Absence of any major visual/auditor disability, (iv) Absence of psychosis/neurosis/mental retardation, (v) Ability to maintain erect posture and (vi) Reasonable manual dexterity.

16. These Rules prescribe a form of Medical certificate to be submitted by the physically handicapped person at Annexure "D" separately. This form is to be referred to by us again. But the MHT CET 2011 Rules show that even a candidate not seeking benefit of reservation under 1995 Act has to submit the fitness certificate and it is obvious that the petitioner has again submitted that certificate issued by the competent medical practitioner

17. Learned AGP has also placed before the Court NEET UG 2013 Rules. Annexure "C" is the form of medical certificate to be given by a person with disability. Said form is not in any way different than the form prescribed in MHT CET 2011 Rules. The form of medical certificate to be submitted by every candidate is prescribed in Annexure "H" and that form is also same.

18. The admission to Post Graduate courses are regulated by NEET PGM 2013 Rules. Rule 12.2.2003 deals with the verification of documents. As per it's clause (xxi), a person with disability has to give medical fitness certificate as per Annexure "D". Perusal of said Annexure "D" again does not show any major change in so far as present controversy is concerned. A general candidate is supposed to give medical fitness certificate as per Annexure "A" as stipulated by clause (xxi) of the very same provision. This certificate of medical fitness is on same lines.

19. Perusal of 2000 Regulations show that it's Rule 9 is about selection of post-graduate students. This Rule does not speak of any reservation or disability.

20. Medical Council of India had issued amending notification on 25.3.2009 and this Regulation 9 of 2000 Regulations has been amended by providing a reservation of 3% of seats for candidates with locomotor disability of lower limbs between 50% to 70%. Vide further notifications dated 21.7.2009, 17.11.2009, 16.4.2010 and 27.12.2010 some amendments are made to Rule 9. However, those amendments are not relevant for the purposes of adjudication of the present controversy. Thus stipulation in paragraph No. 2 of Annexure "D" that no other disability shall be allowed as per Medical Council of India Regulations is not supported by substantive provisions of 2000 Regulations & appears only in format.

21. In this background precise question to be considered by this Court is, "Whether a candidate, like the present petitioner, who has already passed M.B.B.S. examination and is serving as a Medical Officer on permanent basis in

the Public Dispensary, can be allowed to better his qualifications by appearing in the postgraduate course? " The relevant judgments cited by the parties need perusal in this background.

22. Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, is the judgment cited by the petitioner, where, the Honourable Apex Court has observed that a subordinate legislation like Rule is not only required to be made in conformity with the provisions of parent Act but the same must also be in conformity with the provisions of any other Act as it can not violate any other plenary legislation made either by the Parliament or State Legislature.

23. The petitioner has also relied upon the Division Bench judgment of Gujarat High Court in the case between Palak Kailaschandra Jain Vs. Union of India dated 27.11.2000. There the provisions of 1995 Act fell for consideration before the said Division Bench. In paragraph No. 15 of the judgment, said Division Bench has looked into the objections of the State Government. Learned AGP there had contended that a disabled person may not be in a position to undergo the course of medical studies because the nature of disability & it may not be possible for such disabled person to undergo the course of studies along with other students who are not disabled. The Division Bench has found some substance in this submission. It has, therefore, also observed that it would be open to confer discretion on the body granting admission to determine whether looking to the nature and degree of disability, a particular candidate would be in a position to undergo the course of study and practice, at least as a Physician. Said Division Bench has mentioned that it cannot be a ground for negating the claim of disabled persons as a class for reservation of 3% seats in Medical Colleges on the strength of Section 39 of 1995 Act. Here, there is no Rule framed by MCI which disentitles an open category student from seeking admission if he is suffering from any of the disabilities dealt with in 1995 Act.

24. The petitioner has also relied upon another Division Bench judgment of Gujarat High Court in the case of Danubhai Unadbhai Mori Vs. State of Gujarat and Others, . There the Division Bench has found that Medical Council of India cannot change the definition of "disabled person" on its whims and fancies.

25. Dr. Devai R. Mehta Vs. Union of India [AIR 2011 Gujarat 33 (1)] is again Division Bench judgment of the Gujarat High Court which considers provisions of 1956 Act and provisions of 1995 Act. After considering the orders of the Supreme Court in the case of M.C.I. Vs. D.S. Rashmi Rajan in SLP (C) No. 7952-7953/2005, dated 25.4.2005, the Division Bench has noted amendment to Regulations made in 2009, which permit admission of persons with disabilities of lower limbs between 40% to 60%, if no person with said disability between 50% to 60% is available. In paragraph No. 21, this Division Bench has also made reference to the judgment of Gauhati High Court in the case of Smt. Anju Talukdar and Another (supra) and noted that there claim was by a person who had visual impairment or hearing impairment. It also took note of the finding of Gauhati High Court that Section 39 of 1995 Act was very clear and conferred

benefit of reservation on all seven categories recognised as "disabilities" u/s 2(i) thereof. In paragraph No. 22, this Division Bench has held that Medical Council of India has power to frame regulations laying down the minimum criteria for admission, qualification and it can also lay down guidelines for fitness. In paragraph No. 24 this Division Bench has held that any decision or regulation framed by the Medical Council of India contrary to Section 2(i) shall be ultra vires the said provisions. It has been held that Medical Council of India cannot alter the definition of "persons with disability" as appearing in 1995 Act. The said Division Bench concluded that the Post-graduate Medical Education (Amendment) Regulations 2009 was not under consideration of the Honourable Apex Court. Then it has also noted that the petitioner before it had become disabled much prior to his admission in M.B.B.S. course. He was admitted with disability and completed that course when suffering from upper and lower locomotory disability. He was found fit for admission to M.B.B.S. course. Gujarat High Court, in this background declared that he cannot be found unfit for admission to postgraduate medical course.

26. Judgment in the case of Smt. Anju Talukdar and Another (supra) looked into by Division Bench of the Gujarat High Court needs mention. There, very same provisions have been considered. In paragraph No. 12, this Division Bench refers to the judgment of the Honourable Apex Court and thereafter to meeting held on 30.6.2003 by the Executive Committee of the Medical Council of India. This Division Bench has then held that the Medical Council of India considered the feasibility of prescribing 40% to 60% locomotory disability of lower limbs as a norm for admission to M.B.B.S. Post Graduate Medical Course. It has found that the Medical Council of India never considered the issue of admission into paramedical courses. In paragraph No. 13 this Division Bench then makes a reference to the judgment of the Delhi High Court in which the decision of Medical Council of India not to extend benefit of 1995 Act to persons with visual and hearing impairment was found irrational. In paragraph No. 14, it has noted that even on that day there was no provision debarring such person with visual impairment or hearing impairment from seeking admission to medical course, purely on merit. In paragraph No. 15 it has then noted that Section 39 of 1995 Act conferred benefit of reservation on all seven categories specified as "disabilities" in 1995 Act.

27. The Division Bench judgment of this Court in the case of Ms. Kritika Purohit and another (supra) was concerned with admission of visually impaired students to the course of Bachelor of Physio Therapy. Petitioner No. 1 in the said matter was visually impaired and sought admission to that course upon precept of Inclusive Education under Rule 2(a) of Article 24 of the United Nations Convention on Rights of Persons with Disabilities. As per the earlier order of Court, she was given that admission and she passed First Year examination with 62% marks. She was studying in Second Year when the matter was being looked into by the division Bench. This Court then found that there was no question of petitioner being asked to discontinue her studies on the ground of visual

impairment. It found the stand of respondents-authorities discriminatory and adversely affecting the right to life and equal opportunity of the petitioner.

28. It is in his background that the judgment of Honourable Apex Court relied by learned Advocate Shri Kadam and delivered on 24.8.2011 needs evaluation. Said judgment is in the case between Dr. Kumar Sourav (supra). The common judgment delivered on 2.2.2005 by the Orissa High Court was questioned by Medical Council of India before the Honourable Apex Court. When SLP was first considered on 24.8.2006, the Honourable Apex Court enquired from the learned Advocate representing Medical Council of India about accommodating candidates with locomotor disability of lower limbs of less than 50% but more than 40%, if sufficient number of candidates for 3% quota were not available. The Medical Council of India thereafter, with previous approval of the Central Government amended it's Regulation and made a provision for filling such seats from the persons with locomotor disability of lower limbs between 40% to 50%. Because of this provision made, the Honourable Apex Court noted that virtually the directions issued by Orissa High Court were complied with and hence the challenge before it was rendered infructuous.

29. It is, therefore, obvious that the questions looked into by the Division Bench of Gujarat High Court or then by Division Bench of this High Court did not arise for consideration before the Honourable Apex Court. The question, " Whether respondent No. 3 Medical Council of India can, while undertaking exercise u/s 39 of 1995 Act ignore the definition of "disabilities" as given in Section 2(i)? " did not arise there. We, therefore, find no substance in the submission of learned Advocate Shri Kadam that the issue stands concluded by the said judgment of the Honourable Apex Court. With respect, we find that in the said matter, the Honourable Apex Court was not called upon to lay down any law.

30. Here, as we have already noted, the petitioner in the face of visual impairment was found not possessing any major visual problem and was, therefore, given admission to M.B.B.S. course. He successfully passed out, competed internship and thereafter also started serving in the Public Dispensary. He appeared in a competitive examination conducted by M.P.S.C. and became a permanent Medical Officer. This, his visual impairment, stated to be 45%, has not disabled him in any way either in education or performance of his duties. He has not been found disqualified at any point of time.

31. Candidates appearing from General Category i.e. Open Category and seeking admission only on the strength of merit are required to submit a fitness certificate and it's perusal reveals that the Doctor has to certify that the petitioner does not possess any "major visual disability". This "major visual disability" envisaged in the certificate of medical fitness at postgraduate level cannot be different in degree and nature than one envisaged in similar certificate on the strength of which the petitioner got admission to M.B.B.S. course. The petitioner applied for PGM-CET 2011 in Open Category and he has therefore, submitted similar fitness certificate as an Open Category candidate. The

certificate, obviously, must have declared him as a person not suffering from any major visual problem. Because of this certificate only, he could appear in entrance test. If it is not bar for open candidate, it can not debar him from seeking the benefit of reservation in terms of S. 39 of 1995 Act.

32. Therefore, a qualified Doctor, not found disabled in any way during his M.B.B.S. studies or to normally discharge his duties in a dispensary, is now being denied opportunity to better his qualifications. Betterment, obviously, is going to augment his skills & capacity to treat the patients in the Public Dispensary. We find the denial of benefit of reservation to him arbitrary and unjustified. Respondent No. 3 cannot, in the present facts, insist that as the petitioner does not possess a locomotory disability of lower limb & has 45% visual impairment, he is not entitled to grant of benefit of reservation for PG course.

33. Petitioner has prayed for quashing Annexure "D" with PGM-CET -2011 brochure. Said document restricts benefit of 3% reservation only to persons with locomotory disability of lower limbs. It expressly disqualifies persons with other disabilities from such benefit. But then format of medical certificate to be submitted by such person obliges medical practitioner issuing it to certify that he does not suffer from any locomotory disability of upper limbs & also does not have any major visual disability. Petitioner admittedly does not have any locomotory disability of upper limbs. Further, he already gave a certificate which stated that he did not have any major visual problem. He has given that certificate as a open category student not seeking benefit of reservation u/s 39. In said certificate in form at "Annexure L" with said brochure, the medical practitioner has certified that Petitioner does not suffer from any major visual disability. Therefore only he was permitted to take the competitive test. Hence, Petitioner fulfilled the requirements of format at "Annexure D" also. As per Section 72 of the 1995 Act, the other provisions or other legislation are not prejudiced by it. If visual impairment as such is not an inherent bar or absolute bar for any course or employment, the persons with such impairment must be treated as any normal citizen in the light of Article 14 of the Constitution of India. This obligation cast under Article 14 on the Respondents is not canceled by 1995 Act. If such a candidate is being denied equal treatment or normal treatment inspite of his merit, burden will be on the person denying such treatment to justify the deviation or exception by assigning valid reasons. When such authority denying the equal treatment falls under Article 12 of the Constitution, its action must be supported by a previous informed decision taken in the meeting i.e. proper resolution. When visual impairment suffered by the Petitioner is not sufficient to debar him for open seat, it can not be used to declare him not eligible for 3% reservation.

34. In this situation, it is not necessary to quash & set aside any stipulation in the medical certificate prescribed for persons with disabilities at-least in present facts. We find that interest of justice can be met with by directing respondent No. 3 to treat the present petitioner as a person with disability in accordance with

provisions of Section 2(i) of the 1995 Act eligible to 3% reservation in terms of Section 39 thereof. If in future, petitioner again succeeds in similar entrance examination, respondent No. 3 shall not deny him said status & proceed to consider his entitlement further as per the law accordingly. With these directions and observations, we partly allow the Writ Petition. Civil Application No. 7872 of 2013 is also allowed. Rule is made absolute accordingly. No order as to costs.