

(1999) 02 GAU CK 0029
In the Gauhati High Court
Case No : Writ Appeal No. 248 of 1998

Ellora Borthakur (Dr.)

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 25-02-1999

Acts Referred:

Assam Medical Colleges (Regulation of Admission to Post Graduate Courses) Rules, 1997 — Rule 4(ii)

Citation : (1999) 1 GLT 265

Hon'ble Judges : Brdesh Kumar, C.J;D. Biswas, J

Bench : Division Bench

Advocate : G.N. Sachewalla, P. Bora, A. Talukdar and A. Senapati, for the Appellant; B.K. Das and K.K. Dey, for the Respondent

Judgement

1. This writ appeal has been preferred against the judgment and order passed by the learned Single Judge dated 25.6.98 in Civil Rule No. 816 of 1998, filed by Petitioners/Respondents No. 7 and 8, directing that in case seat for the session 1995-96 in M.D. (Radiology) is still lying vacant, the case of the Respondent No. 7 would be considered for admission. Accordingly, the Respondent No. 7 was given admission in October, 1998 in the course of M.D. (Radiology) against a seat for the session 1995-96.

2. The case of the Appellant is that she appeared in the entrance examination for admission to the P.G. course for the session 1995-96, but she could not secure her admission, as per her choice in P.G. Course, due to non-availability of the seat. However, subsequently the seats reserved for central pool for the session 1995-96 were released. As those released seats were not allotted on the basis of merit, the Appellant filed writ petition being Civil Rule No. 2870 of 1997, but the same was rejected. She preferred Writ Appeal No. 630 of 1997 which was allowed. Accordingly, the Appellant was given admission in Radiology Diploma course in pursuance of the judgment rendered in Writ Appeal No. 630 of 1997. Later on, the Appellant filed another petition being Civil Rule No. 816 of 1998

claiming her admission in the degree course namely, M.D. (Radiology) on the basis of merit against the vacant seat for the session 1995-96 and an interim order was also passed to consider the case of the Appellant. In the meantime, the Respondent No. 7 claimed the said seat as N.E.C. sponsored candidate. On the basis of recommendation, for granting benefit in the matter of admission against reservation under Rule 4 (ii) of the Assam Medical Colleges (Regulation of Admission of Post-Graduate Courses) Rules, 1997.

3. Sub-rule (ii) of Rule 4 of the Assam Medical Colleges (Regulation of Admission to Post-Graduate Courses) Rules, 1997, relates to reservation of N.E.C. quota reserving two seats in P.G. degree courses and two seats in Diploma course for the candidates recommended by the North Eastern Council. The Respondent N.7 claimed one of the said two seats of P.G. degree course under the provisions of Rule 4 (ii) of the Assam Medical Colleges (Regulation of Admission to Post-Graduate Courses) Rules, 1997, while the Petitioner, in Civil Rule No. 816 of 1998, as indicated earlier claimed the same, on merit. But the Respondent No. 7 has been given benefit of Rule 4 (ii) of the Rules mentioned above in pursuance of the judgment dated 25.6.98. The present Appellant being aggrieved by the aforesaid judgment dated 25.6.98 preferred this appeal.

4. We have heard learned Counsel for the Appellant as well as the learned Counsel appearing for the Respondents No. 7 and 8 respectively namely, Shri K.K. Dey.

5. On behalf of the Respondents, an objection has been raised about the maintainability of the appeal. It is submitted that the Appellant not being a party to the writ petition, would not be entitled to file the appeal without the leave of the Court and has placed reliance upon a decision reported in United Commercial Bank Vs. Hanuman Synthetics Ltd. and Others, Our attention has been drawn to paragraph 7 and 8. It has been observed in the said paragraph that the Appellant who is not a party can prefer an appeal only with the leave of the Court. It is admitted that the Appellant was not a party to the writ petition. It is also submitted that no leave has been sought for filing appeal. The learned Counsel appearing for the Respondents No. 7 and 8 has also placed reliance upon a decision reported in Gopabandhu Biswal Vs. Krishna Chandra Mohanty and Others, It has been held that the person who is not aggrieved by the judgment of the Tribunal and the persons who are not directly affected cannot challenge the judgment

6. So far the question, as to whether the Appellant is an aggrieved person or not is concerned, in the facts and circumstances of the case, she would be one of the persons aggrieved by the order passed by the learned Single Judge. The Appellant had competed for admission to P.G. course. She was given admission in the diploma course instead of M.D. (Radiology). It appears that on coming to know that she would be entitled to admission to the degree course against the vacant seat for the session 1995-96, preferred another writ petition being Civil Rule No. 816 of 1998 as indicated earlier. In that petition also, this Court directed

the authorities to consider the case of the present Appellant But no order could be passed in that regard, against the seat available in M.D. (Radiology) for the session 1995-96. Instead, order was passed in favour of the Respondent No. 7 in pursuance of the impugned judgment, resulting in his admission to M.D. (Radiology) course. The Appellant had shown interest and pursued the remedy seriously throughout to get admission in the said vacant seat. Such circumstances lead us only to infer that the Appellant would be a person aggrieved, as the vacant seat has been given to other person namely, the Respondent No. 7 who is far below in merit to the Appellant. The appeal thus would be maintainable at her instance.

7. So far as the next objection about the leave of the Court before filing appeal is concerned, the learned Counsel for the Appellant submits that at the stage of admission an objection was raised by the Respondents and after preliminary hearing, the appeal was admitted for final hearing on merit despite such objection. We, however, feel that in any case, the question can still be considered at this stage. Considering the facts and circumstances of the case, we are of the view that it is a fit case deserving leave to appeal against the judgment passed by learned Single Judge. The learned Counsel for the Appellant has also placed reliance on a decision reported in *S. Nagaraj and Others Vs. State of Karnataka and Another*, More particularly, our attention has been drawn to paragraph 18 wherein an observation has been made for giving more stress on the substantial justice without sticking to technicalities. The facts averred in the petition have not been disputed that the seats reserved for the central pool, were released against the session 1995-96. The Appellant was given admission in diploma course in radiology. But since a seat for the session 1995-96 was available in M.D. (Radiology), for getting the same, she filed writ petition. She has better merit. But in pursuance of the order under appeal, the admission has been granted to Respondent No. 7 by giving benefit of reservation under Rule 4 (ii) of the Assam Medical Colleges (Regulation of Admission to Post-Graduate Courses) Rules, 1997. It may be mentioned that the vires of the said rule was challenged in the Civil Rules No. 3493 of 1997 and 3544 of 1997 and ultimately, by judgment dated 20.5.98 reported in *Dr. Pankaj Kr. Lahkar and Others Vs. State of Assam and Others*, Rule 4 (ii) of the aforesaid Rules, was struck down. Paragraph 14 of the judgment is quoted below:

14. In view of the foregoing discussion Rule 4(ii) relating to N.E.C. Quota Seats, as it now stands, cannot be allowed, it is liable to be struck down as arbitrary and unfettered and accordingly struck down.

The consequence of the decision rendered in *Pankaj Kr Lahkar (supra)*, the provision relating to reservation for N.E.C. sponsored candidates stood quashed on merit on 20.5.98. The judgment under appeal was rendered on June 25, 1998 i.e. after the decision striking down Rule 4 (ii) of the Assam Medical Colleges (Regulation of Admission to Post-Graduate Courses) Rules, 1997. We feel that at the time when the learned Single Judge decided the matter, no direction could be

issued giving benefit of reservation under the provisions which were already struck down as ultravires. We find that at the time when the matter was decided, this point was particularly discussed by the learned Single Judge and it is observed that the application of the Respondent No. 7, for admission in M.D. (Radiology) course, as recommended by the N.E.C, was under process at the time when the rules were existing. It is observed that the Respondent's case was sponsored by the N.E.C. by letter dated 28.11.97 and the writ petition was filed by the Respondent No. 7 on 19.2.98. It is further observed that the decision of the Division Bench striking down the rule was not retrospective i.e. to say, there is no direction regarding the fate of those candidates who had been given priority before the said decision. It is further observed that if the process had already been started for admission as N.E.C. sponsored candidates for the session 1995-96 and if the seat is still lying vacant, the Respondents could consider the case of the Petitioner accordingly. The learned Counsel appearing for the Respondent No. 7 also argued on the same lines. We, however, feel it difficult to accede to the submission made in this regard.

8. The mere fact that the applicant had moved an application under certain provisions of law then existing would acquire no right under the Rules when such provision is no more there in existence at the time when the order is passed. The Rule was struck down on 20.5.98. The benefit under the provision already struck down was given by order dated 25.6.98. The processing of the application before the Rules were struck down will in no way extend the life of the provision already held to be ultravires, so long the application is finally disposed of. On striking down of the provision, the whole processing of the application, if going on, will stand dropped and finished. No right would be vested by merely moving an application or processing of the application, even though Rules no more remain in existence. In this view of the matter, we find that the Respondent No. 7 has been granted relief under the non-existent provisions. On behalf of the Respondents No. 7 and 8 it has been indicated that as the interim order was passed in the case, a seat was kept vacant although the other seats were filled up as per the judgment of this Court in Writ Appeal No. 630 of 1997.

9. Apart from the above point, it has been submitted that the reservation rules came into force on 1.7.96 and the admission relates to session 1995-96. The said vacancy against the session 1995-96 would obviously be held up in accordance with rules then prevailing and no benefit in that regard can be given under the aforesaid rules framed much after the vacancy in the seat was available. The Appellant had appeared for admission in the competitive examination for the seat against the session 1995-96 according to the Rules then prevailing. For Respondent No. 7, it is submitted that even though the admission granted to Respondent No. 7 was not in accordance with rules when the order was passed, yet he has already been accorded admission in August, 1998 so he should be allowed to continue and complete the course. It is a three years course. The learned Counsel for the Appellant, however, submits that the Appellant is already undergoing the diploma course in Radiology which is a Two-

Year course. It is submitted that Two-Year diploma course and 1st Two Years of the Three-Year degree course of M.D. (Radiology) are same. Hence, it is submitted for the Appellant that she can pursue the degree course in case she gets admission on the basis of merit and the admission on the basis of reservation is struck down as illegal. In the circumstances, more particularly, when the Appellant had been pursuing to get admission in M.D. (Radiology) throughout seriously she can pursue the said course in M.D. (Radiology) if she deserves on merit. The Respondent No. 7, no doubt, may have pursued the course for 6 (six) months but it is abundantly clear that the admission had been given, giving benefit under Rule 4 (ii) of the Assam Medical Colleges (Regulation of Admission to Post-Graduate Courses) Rules, 1997 which was not in existence at all either at the time when the direction was issued or at the time when the admission was given to him. Such an admission is against the law and nullity and cannot be sustained.

10. In view of the discussion held above, the appeal is allowed and the judgment and order passed by the learned Single Judge is set aside. It is further directed that the seat in question pertaining to session 1995-96 in M.D. (Radiology) shall be filled up on the basis of merit. Admission of Respondent No. 7 in M.D. (Radiology) in presence of the order of the learned Single Judge is also set aside.

11. Since a considerable time has already passed, it is directed that the Respondents concerned shall complete the exercise within a period of one month and pass appropriate order of admission on the basis of the merit of the candidates.

No order as to costs.