

(2019) 08 CAL CK 0166

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 12230 (W) Of 2019

Maheboob Laskar & Anr

APPELLANT

Vs

Union of India & Ors

RESPONDENT

Date of Decision : 14-08-2019

Acts Referred:

Indian Medical Council Act, 1956 — Section 33

Rights Of Persons With Disabilities Act, 2016 — Section 2(r), 34(1), 57, 96

Citation : (2019) 08 CAL CK 0166

Hon'ble Judges : Tapabrata Chakraborty, J

Bench : Single Bench

Advocate : Anirban Bose, Alauddin Mandal, Kaushik Chanda, K.J. Tewari, Indranil Roy, Sunit Kr. Roy, Jahar Lal De, Smita Das Dey, Supratic Roy, Debaki Nandan Maiti

Final Decision : Disposed Of

Judgement

Tapabrata Chakraborty, J

1. The present writ petition has been preferred challenging inter alia the Regulations on Graduate Medical Education (Amendment), 2019 framed by Medical Council of India (in short, MCI) and published in the official gazette on 5th February, 2019.

2. Mr. Bose, learned advocate appearing for the petitioner no.1 (hereinafter referred to as the petitioner) submits that the petitioner is suffering from hearing impairment. He participated in the National Eligibility-cum-Entrance Test (UG)-2019 (in short, NEET) under OBC (NCL) category and sub category of Persons with Disabilities (in short, PwD) category. The NEET examination was held on 5th May, 2019 and 20th May, 2019 and the result was published on 5th June, 2019. Thereafter, the petitioner was asked to appear before a medical board at SSKM Hospital (in short, the said medical board) and to obtain a disability certificate. The petitioner appeared before the said medical board and upon examination he was issued a disability certificate on 24th June, 2019,

annexed at page 67 of the writ petition. In the same, the disability range was specified to be 41.42%.

3. He submits that MCI, in exercise of power conferred under section 33 of the Indian Medical Council Act, 1956 (in short, the said MCI Act) issued an amendment notification dated 22nd January, 2018 amending the Regulations on Graduate Medical Education, 1997. Clause 4(3) was substituted by the said notification providing inter alia that 5% seats of the annual sanctioned intake capacity shall be filled up by candidates with benchmark disabilities in accordance with the provisions of the Rights of Persons with Disability Act, 2016 (in short, PwD Act) and for such purpose the specified disability contained in the schedule to the PwD Act was annexed as Appendix "G". Para 1C(b) of the said Appendix is a verbatim reproduction of paragraph 1C(b) of the schedule to the PwD Act. Subsequent thereto, by an amendment notification gazetted on 5th February, 2019 it was stated that specified disability shall be in accordance with Appendix "H". Thereafter, by an amendment notification gazetted on 13th May, 2019 it was stated that specified disability shall be in accordance with Appendix "H-1".

4. Mr. Bose submits that it would be explicit from clause 1(ii) of the said amendment notification gazetted on 13th May, 2019 that the same was given prospective effect and as such the same cannot be made applicable to the present case since the admission process commenced on and from the date of issuance of the public notice dated 29th November, 2018, when the amendment notification dated 22nd January, 2018 was in operation.

5. He argues that the petitioner is a candidate with benchmark disability as defined under Section 2 (r) of the PwD Act and the amendment notification dated 13th May, 2019 had totally debarred a candidate with hearing disability of more than 40% to pursue a medical course. The suitability riders, as incorporated in the amendment notifications dated 5th February, 2019 and 13th May, 2019, cannot override the provisions of the PwD Act. A similar issue came for consideration before the Madurai Bench of Hon'ble Madras High Court (State of Tamil Nadu & Ors. - Vs- J. Vibin & Anr.) in which a judgment was delivered on 30th April, 2019 affirming a direction towards allotment of seat to a physically challenged candidate having benchmark disability of visual impairment of 75%. Reliance has also been placed upon judgments delivered in the case of Pranay Kumar Podder -vs- State of Tripura and Others, reported in (2017) 13 SCC 751 and MAT 23 of 2019 (The State of West Bengal & Ors. - Vs. - Tathagatha Ghosh & Ors.).

6. Mr. De, the learned advocate appearing for the State respondents denies the contention of the petitioner and submits that as per the amendment notifications, issued by MCI, the petitioner does not come within the zone of consideration for admission in MBBS course and that the opinion of an expert body should not be substituted.

7. The learned Additional Solicitor General assisted by Mr. Tewari, learned advocate, submits that the notification dated 4th January, 2018 conferred jurisdiction upon State Governments towards designation of certifying authorities in terms of Section 57 of the PwD Act for assessing the specified disabilities and such certificates need to be mandatorily followed.

8. Mr. Roy, learned advocate appearing for the MCI submits that neither the amendment notification dated 5th February, 2019 nor the amendment notification dated 13th May, 2019 is under challenge in the present writ petition and in the absence thereof, the petitioner cannot be granted the relief, as prayed for.

9. Drawing the attention of this Court to paragraphs 3 and 18 of the judgment delivered in the case of J. Vibin (*supra*), Mr. Roy submits that the Hon'ble Court was only considering an issue as to whether the 2019 amendment to the Medical Education Regulations is applicable to the case of the writ petitioners / respondents therein. While considering such issue, certain observations have been made that the guidelines are unfair, discriminatory and unlawful. Such observations, according to Mr. Roy, are at best only obiter dicta. The judgment delivered in the case of Tathagatha Ghosh (*supra*) is also distinguishable on facts inasmuch as the same was delivered at a juncture when the suitability riders for admission in MBBS / BDS course have not been brought into force by regulations having statutory force.

10. Drawing the attention of this Court to the provisions of the second proviso to section 34 (1) of the PwD Act, Mr. Roy submits that issuance of guidelines and notifications setting the standard of eligibility for pursuing a MBBS course is permissible. Had there been no requirement towards specification of suitability riders, no expert committee would have been constituted and no notification would have been issued to that effect. It cannot be construed that the PwD Act debars MCI from laying down suitability standard. Section 96 specifically provides that the provisions of the PwD Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

11. He denies that the notification dated 13th May, 2019 would not apply to the present admission process. Mere participation in an admission process does not confer any vested right upon the petitioner and even during the period of hiatus from the date of commencement of the examination till the date of allotment of a seat no right stands crystallized in favour of the candidates and they are bound by the rigors of the new notification.

12. Records reveal that by an order dated 25th July, 2019 this Court passed an interim order directing the respondents to keep one seat in State quota under PwD category, vacant and also directed the petitioner to appear before the said medical Board so that he can be examined with the aid of "assistive devices". Pursuant to such direction, the petitioner was examined and a report has been filed wherein it has inter alia been observed that the petitioner is not eligible for

admission in medical course as per the MCI/DCI guideline.

13. Indisputably, the notice to conduct the NEET was issued on 29th November, 2018. At that juncture the MCI notification dated 22nd January, 2018 was in operation. The results were declared on 5th June, 2019 and subsequent thereto, the petitioner was asked to appear before the said medical board constituted in terms of the notification dated 4th January, 2018. The disability certificate was issued by the said medical board on 24th June, 2019 as per the notification dated 5th February, 2019 though by that time a new notification dated 13th May, 2019 had come into operation. The suitability riders, as incorporated by the notification dated 13th May, 2019, were not in operation at the time of commencement of the admission process. The said process, which has commenced on and from 29th November, 2018, ought to have been completed in accordance with law that stood at the time of initiation of the process. The selection process commences on the date of advertisement, when the candidates are invited to apply. The notification 13th May, 2019 is prospective in nature and there is nothing in the same showing any necessary intendment for enforcing the same retrospectively.

14. The petitioner admittedly comes within the purview of the definition of benchmark disability, as provided under section 2(r) of the PwD Act. As regards hearing impairment and visual impairment, the suitability riders provided in the notifications dated 5th February, 2019 and 13th May, 2019 are identical. By the latter notification, any person suffering from visual impairment / hearing impairment equal or more than 40% have been totally debarred from availing admission in MBBS course. No reason has been disclosed towards such quantification of disability percentage and towards total exclusion of candidates with benchmark disabilities as defined under the PwD Act and as such the said riders in the amendment notification are unreasonable and unlawful. Under clauses 4B and 4C in the said amendment notification dated 13th May, 2019 notes have been appended to the effect that persons with visual impairment/hearing impairment of more than 40% may be made eligible to pursue the MBBS course and may be given reservation, subject to the condition that the disability is brought to a level of less than the benchmark of 40% with advance low vision aids /assistive aids. As per the said notes, even if a person does not fulfil the benchmark disability, as provided under PwD Act, he/she would be treated to be a candidate under the reserved quota. The said notes redefine the reservation quota and are clearly in conflict with the provisions of the PwD Act.

15. It has been argued by Mr. Roy that the observations in the judgment delivered on 30th April, 2019 in the case of J.Vibin (*supra*) pertaining to the amendment notification of 2019 are at best only obiter dicta inasmuch as the said notification was not under challenge.

16. Obiter is a remark made or opinion expressed by the Court in a decision upon a cause by way of an illustration, argument, analogy or expression. Such observations are not directly on the question considered by the Court and are

made upon travelling into a territory without being invited. All the observations made in the judgment need to be read as a whole and not in isolation. A particular observation cannot be taken up and highlighted. In the case of J.Vibin (*supra*) the Court was considering as to whether the suitability riders incorporated in the amendment notification, which came into operation after commencement of the admission process, can debar a candidate, who fulfils the benchmark disability as provided under the PwD Act, from admission in a course under such reserved category after he/she had emerged to be successful in a competitive examination process. The said issue is inextricably bound with the issue of reasonability towards imposition of fresh eligibility riders by way of amendment notification and as such the argument of Mr. Roy that the observations made by the Court that the notifications are unfair, discriminatory and unlawful are at best obiter dicta, is not acceptable to this Court.

17. As a rule, a Court is bound by the decision of all Courts higher than itself. Judicial propriety also demands that the findings arrived at on the rudiments of similar facts and circumstances by another Court should be given respect and should be followed.

18. In view thereof, this Court directs the respondents to grant admission to the petitioner in the MBBS course in the academic session 2019-20 in a State quota seat under PwD category forthwith.

19. With the above observations and directions, the writ petition is disposed of.

20. There shall, however, be no order as to costs.

21. Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties upon compliance of all necessary formalities.