

(2017) 08 BOM CK 0132
In the Bombay High Court
Case No : 7238 of 2017

Maithilee Tukaram Kadam

APPELLANT

Vs

The State of Maharashtra & Ors.

RESPONDENT

Date of Decision : 29-08-2017

Acts Referred:

Constitution of India, Article 14, Article 21, Article 19 (1) (g) -
Appointment of Commission to inquire into and report on the administration of
autonomous districts and aut

Citation : (2017) 08 BOM CK 0132

Hon'ble Judges : Anoop V. Mohta, Bharati H. Dangre

Bench : DIVISON BENCH

Advocate : Atul Damle, Ravindra A. Harpale, Pooja V. Thorat, Amol D. Wagh,
Anukul Seth, Sagar V. Kasar, C. P. Yadav

Final Decision : Allowed

Judgement

1. The Petitioner has invoked writ jurisdiction of this Court, seeking a declaration that Clause 10.10.1 of Information Brochure of Preference System for admission to Health Science Courses in the State Government/Corporation/ Private and Minority Colleges issued by the Government of Maharashtra for NEET-UG 2017, published on 19.06.2017 is ultra vires and unconstitutional. The Petitioner has also sought direction to the Respondent Nos. 1, 2 and 3 to allow the Petitioner to take admission for M.B.B.S. or B.D.S Course on the basis of her score in NEET-UG 2017.

2. The Petitioner has passed her SSC Board Examination from Latur Divisional Board of Maharashtra by securing 98.64% of marks. The Petitioner has cleared her HSC examination in the year 2015 and thereafter appeared for MH-CET Exam held in the year 2015, when her score was 147 out of 200 marks. She again appeared for MH-CET of 2016 and secured 168 out of 200 marks. On the basis of the said examination, she secured admission for BAMS Course in the Respondent No. 5- Government Ayurvedic College, Nanded for the session of 2016-17 and

was prosecuting her studies in the said course.

3. In January, 2017 as per the directions of the Hon"ble Supreme Court, the Medical Council of India and Dental Council of India in consultation with CBSE published a notification for conducting the NEET-UG 2017 examination on All India basis for MBBS and BDS courses. The said notification prescribed the schedule of selection process for said course. The said Notification also prescribed the eligibility criteria for appearing in NEET-UG-2017.

4. The Petitioner appeared for the NEET-UG 2017 examination conducted on 7th May, 2017 of which the result was declared on 23.06.2017. The petitioner obtained a percentile score of 97.899522 which fetched her All India Rank No. 22576. On the basis of the said score, the petitioner intended to seek admission in the 85% percentage State quota of the State Government either in MBBS or BDS course. The Respondent Nos. 1, 2 and 3 had published a notification/ information Boucher on 19.06.2017 for admission process of 85% State Government Quota for Government colleges as well as private colleges for MBBS and BDS course for the students appearing in NEET-UG -2017. Clause 10.10.1 of the said Information Boucher by which the petitioner is aggrieved, instead created a disqualification for the petitioner since she had secured the seat of BAMS course in earlier year and by the said clause she is not eligible for admission for the next two years under the State quota.

5. The petitioner being apprehensive that her candidature may not be considered for admission of MBBS/ BDS course on the basis of her score in NEET-UG 2017, approached this Court by filing the present writ petition in which she prayed for the reliefs mentioned above. This Court on 11.07.2017 was pleased to issue Rule and rejected the interim relief, allowing the petitioner to be considered during the process of selection on the basis of her merit. Being aggrieved by the said rejection of the interim relief, the petitioner approached the Hon"ble Supreme Court by filing SLP No. 17931 of 2017 and the Hon"ble Apex Court by order dated 17.07.2017 directed this Court to decide the petition on its own merit as expeditiously as possible, preferably not later than one month from the date of the order.

The petitioner approached this Court by filing civil application no. 1861 of 2017, seeking direction to the respondent no.5-College to cancel her admission and return her documents and this court by order dated 14.08.2017 granted the relief in favour of the petitioner.

6. Considering the urgency in the matter and in the light of the directions issued by the Hon"ble Supreme Court, we directed the matter to be listed before us for disposal on 18th August, 2017. On the said date, the Assistant Government Pleader appearing for the Respondent- State sought time to file reply and considering the fact that the admission process was at advanced stage i.e. at the stage of closing of the preference forms, we directed the petitioner to give preference and also observed that the petitioner will not claim any equity if, final

order is passed against her. We directed the respondent no. 2 to accept preference forms of the petitioner. Yesterday the matter was heard by us finally. We have considered the arguments advanced on behalf of the petitioner by Mr. Atul Damle, Senior Advocate and C. P. Yadav, AGP appearing on behalf of the State Government, who has also filed an affidavit. The Counsel for the petitioner argued that Rule/Clause 10.10.1 is arbitrary and is violative of the fundamental right of the petitioner. The Counsel for the petitioner contended that by virtue of the said Rule, criterion of merit for selection has been side tracked and since the petitioner has now competed on the basis her merit, the said clause cannot deprive her of admission on the basis of her score to MBBS course. It is also argued by the learned senior counsel that MH-CET and NEET-UG are two different examinations and in the present NEET-UG-2017 limited number of attempts put and upper age limit is the only embargo imposed on a student and there is no rule like 10.10.1.

The State Government has filed an affidavit-in- reply sworn by the Director of the Medical Education and Research. The stand of the State government is that while taking admission for BAMS course, the petitioner was aware that if she is selected for the course, she will have to complete the course and if she leaves it midway, she will not be eligible for admission in the next two years. The State also has justified the existence of Rule 10.10.1 by elaborating as follows in the affidavit.

1. If candidate pursuing health science course of BAMS appears next years "NEET examination and gets admission to MBBS course, wants to leave the BAMS seat. This will cause wastage of last years" BAMS seat. It is a national wastage. One doctor will be produced less, who would have treated lacks of patients for next 50 years.

2. If this channel is made open, the BDS student will also appear for NEET examination next year and if he gets MBBS seat, then he will waste BDS seat of last year.

3. The candidate from Private Medical College will also appear for NEET examination next year and if gets admission to Government Medical College, will waste last year MBBS seat of Private Medical College.

7.) We have perused the information brochure published by the Central Board of Secondary Education (CBSE) for NEET-UG 2017-18 and also the NEET-UG-2017 brochure for preference system for admission to Health Science Course issued by the Commissioner Common Entrance Cells Test, Mumbai. The information bulletin published by the CBSE is in consonance with the regulation framed under the Indian Medical Council Act, 1956, as Amended in 2016, and the Dentists Act, 1948, as Amended in 2016, which provide for a single eligible entrance examination namely, "National Eligibility - Entrance Test (NEET) for admission to MBBS/BDS Courses. The CBSE was authorised to conduct the said test and to declare the results and provide All India Ranking to the Director General of

Health Services, New Delhi for filling of 15% All India Quota Seats and providing the results to the State Council Authority and admitting institution. The counselling for the seats under the control of States/Universities is to be conducted by the respective Authorities. The brochure published by the CBSE prescribe the pattern for test and also prescribe the eligibility to appear in NEET-UG which was as follows:-

1. Eligibility to appear in NEET-UG

(a) He/she has completed age of 17 years at the time of admission or will complete the age on or before 31 st December of the year of his/her admission to the 1st Year MBBS/BDS Course;

(b) The upper age limit for NEET is 25 years as on the date of examination with relaxation of 5 years for candidates belonging to OBC/SC/ST category. (As per letter no. U.12.023/16/2010-ME-II dated 17.1.2017 received from MoH&FW);

(c) The number of attempts which a candidate can avail at NEET-UG examination shall be limited to 3 (three) uniformly to all the candidates. The candidates who have already appeared in AIPMT/NEET on three occasions are not allowed to take this examination. The candidates will be required to give an undertaking in this regard and submitting false undertaking may result in cancellation of the candidature and action in accordance with norms for handling UFM cases. (As per letter no. U.12023/16/2010- ME-II dated 17.1.2017 received from MoH&FW);

(d) The previous attempts in AIPMT/NEET will be counted against these 3 permissible attempts. The candidates who have already exhausted their allowed 3 attempts are not eligible to apply for NEET(UG), 2017.

(e) Indian Nationals, Non Resident Indians (NRIs), Overseas Citizen of India (OCIs), Persons of Indian Origin (PIOs) & Foreign Nationals are eligible to appear in NEET(UG)2017. (As per letter No. U.12023/16/2010-ME-II dated 13.1.2016 received from MoH&FW).

8.) For the purposes of allotment of 85% of seats in the State Colleges, after exclusion of 15% All India Quota, the State has published its own information brochure of preference system for admission to Health Science Courses in State Government/ Corporation/Private and Minority Colleges. According to the said brochure, the Commissioner State, CET Cell, Mumbai is to conduct the admission process for all the Health Science Courses in State of Maharashtra which was to be based on the marks obtained in the NEET Test. The said brochure also prescribes the eligibility which is related to residence, domicile, age, medical fitness and passing of qualifying examination with the Minimum number of marks prescribed. In the said brochure, Clause 10.10 provides for "disqualification for admission". Clause 10.10 reads as follows :-

10.10.1 :- The candidate who was allotted a seat in any course under MUHS Nashik in previous year (s) and who vacates/ abandons it after availing the said seat, has completed such a period of course which would result into lapse of the

said seat, will not be eligible for admission for the next two years under State quota.

It is further relevant to note that Clause 11.2 of the said brochure contains a provision for refund of fees on change of college/course or cancellation of admission which reads as follows:-

: - Refund of Fees by the College after change of college/course or cancellation of admission :-

The candidate who has been admitted and desire to cancel admission he/she should submit an application. The refund of fees to candidate admitted in the college shall be made after deduction as under :-

1. Before cutoff date as declared by the respective Council - Rs.1500/-(Rs. One thousand five hundred only) to be deducted and rest of the fees to be refunded (Exception for MBBS/BDS as per clause 12).

2. On or after cutoff date as declared by the respective council -No refund of fees.

Further Rule 14 also contains a provision which reads as follows :-

14. Service Bond & Penalty :-

14.1 :- As per Government Resolution (G.R.No.MED 1007/CR-490/07/Ed-2 dated 8th February, 2008 and any G.R. issued in this regard from time to time), candidates joined against the seats of Government Municipal Corporation colleges for admission to MBBS/BDS Courses either through GOI nominee, All India quota or through NEET UG 2017 will be required to sign a bond to serve the Government of Maharashtra or local self government or Defence services for a period of one year, after the completion of internship, failing which he/she will be required to pay Rs.10,00,000/-(Rupees ten lacs only) for the default as penalty.

14.2 Additionally, he/she will be required to sign an undertaking to the effect that he/she will not leave India within a period of five years from the date of obtaining the degree, otherwise he/she will have to pay Rs.10,00,000/-(Rs. Ten lacs only) as penalty.

Penalty for lapse of Seat (MBBS/BDS Course): As per Government Resolution No.CET 3516/CR 169/Edu-2 dated 13/4/2017. Any candidate responsible for lapse of MBBS/BDS seat will have to pay a penalty of Rs.10,00,000/- (Rupees Ten Lacs only). This penalty is applicable to all those candidates who do not join during last round or cancel a seat after last round of admission. This penalty is also applicable to any candidate resigning a seat after cut off date for MBBS/BDS course or also fails to complete the course, irrespective of admission quota of the candidate.

9.) The petitioner is aggrieved by clause 10.10.1. The petitioner has canvassed that the said rule is arbitrary and provides for harsh consequences. As against

this, it is the argument of State Government that if a student leaves the said course, resulting into lapse of seat there is loss of the State Government since it has resulted into wastage of the said seat and it amounts to National Wastage. The petitioner has also attempted to canvass that such Rule is not contained in any of the admission process to the MBBS/BDS Courses in other States and she has cited the example of State of Gujarat, Tamilnadu, where the Rules provide "penalty / fine if a student cancels his admission for taking admission to other course."

10.) We have carefully perused said Rules. Conduct of NEET examination was felt necessary as a common entrance test with an objective that meritorious students be selected which would result into production of better doctors, which could ultimately benefit the Nation and society at large in the backdrop of the fact that State has constitutional obligation and duty to provide good health/ medical service. The Hon''ble Apex Court in the case of Modern Dental College and Research Vs. State of M.P. reported in 2016 (7) SCC 353 took overall view of the large scale malpractice, exploitation of student, profiteering and commercialization qua the larger public interest and recognized right of States to regulate admissions and fees structure of the by virtue of entry 25 of list 3 of Schedule 7 read with Article 19 (6) of the Constitution of India. In this background, the Hon''ble Apex Court held that the CET conducted, both for Government and Private Colleges is more advantageous, which would ensure efficacy, fairness and public confidence. The Hon''ble Apex Court also expressed that it would result in proper assessment of merit of the candidates and it would not even cause any loss to the private educational institutions who still would retain the freedom to establish and run institution, impart education, prescribe fees etc. In this background, in order to discharge the constitutional obligation and to have professional excellence and commitment, the Apex Court expressed that the State can discharge its constitutional obligation only when the aspiring student enter into profession based on merit and for this idea to be achieved, it was necessary to have good and committed medical professionals.

In this background, the NEET-UG-2017 Examination came to be conducted in the month of May, 2017 for admission to MBBS and BDS Courses. The Notification to conduct these Examinations came to be issued by the Central Board of Secondary Education in 2017 which prescribe a eligibility criteria. The eligibility criteria require a candidate to have completed age of 17 years at the time of admission and fixed the upper age limit for the candidates seeking admission in MBBS/BDS course to be 25 years, with relaxation of the reserved category candidate. The said notification also imposed a cap of number of attempts which a candidate can avail at NEET-UG uniformly to all the candidates. It is noteworthy to mention that there was no restriction in regard to the admission to the said Course since the CBSE was a body authorized to conduct the examinations and declare the results. The State Government thereafter was to take over the scores and admit the students in the State Quota Seats and for that purpose, it published a brochure of preference system which is applicable to MBBS, BAMS,

BHMS, BUMS, BPTH, BTh/BASLP/BP&O/B.Sc(Nursing). This brochure contains the restriction clause 10.10.1.

11.) It is undisputed that individuals possess basic human rights independent of any constitution by reason of the basic fact that they are members of human race. The Constitution of India has recognized certain rights to be very basic to the human existence which includes Article 14 and Article 21 of the Constitution of India, which embodies several aspects of life including "Right to education, future / higher education and Right to opportunity". The human race is always endeavouring and attempting to progress in life, overcoming the hindrances and obstacles in the past.

12.) We are confronted with the case of a student, who aspired to be a doctor and first attempted for the competitive examination in the year 2015 but could not secure her seat in MBBS and therefore, again participated in the MH- CET of 2016 and secured a score which made her eligible for a BAMS seat. However, with great zeal, the petitioner again appeared for the NEET -UG 2017 since the notification was published by the CBSE in January, 2017, which made her eligible to appear for the said examination. She appeared for the NEET UG-2017 examination and secured a score which makes her eligible for a MBBS seat in government medical college and on the basis of the percentile/score. The Petitioner committed no wrong by making attempts to secure the seat for MBBS which she was aspiring and the Rule of NEET-UG 2017 made her eligible since she had not crossed the upper age limit of 25 years. The zeal of the petitioner to study and secure a MBBS seat through a tough competitive examination required concerted attempts on her part while she was prosecuting her studies in the first year BAMS.

13.) We are of the opinion that existence of Rule 10.10.1 nullifies all the efforts of the petitioner for the last three years and though she is being successful in clearing the NEET-UG 2017 with flying colours so as to secure the government seat for MBBS, the petitioner has been deprived of the admission to the MBBS course in view of clause 10.10.1. The said clause debars the petitioner from securing admission in the MBBS course for a period of two years, resulting into a situation that the petitioner would be left with no option than to continue as an Ayurvedic doctor. We feel that the said rule imposes unreasonable restrictions on the right of the petitioner guaranteed under Article 21 of the Constitution of India which also imbibes within its sweep the "Right to opportunity of Higher Education and right to progress". The aim of the Petitioner who possesses the potential to become a MBBS doctor has been cut-short by the said rule. The justification of the State Government for the existence of the said rule is that one seat of BAMS has gone waste and according to the State it is a national wastage since one less doctor would be available to serve the society. However, we do not agree with the said submission of the State government since the petitioner is securing admission in the MBBS seat and would rather achieve the goal of the State in better manner since it is well-known fact that the allopathy doctors are more

preferred one; and tomorrow she may specialize in a field/area which is the need of the day.

14.) It is not in dispute that once a seat of the professional course is not permitted to be filled in before the cut-off date, it lapses or when a student leaves that seat, after cut-off date, the seat cannot be filled in and the State has to share burden of the seat throughout the course. It is however, pertinent to note that for wastage of the important seat in the stream of MBBS or BDS, the State Government in its wisdom had imposed a penalty/fine of Rs. 10 lakhs on such student who discontinues his education of MBBS/ BDS seat. We find that the said action on the part of the State Government is perfectly justified as the said amount would compensate the burden which the State Government would have to share throughout the curriculum. However, the State Government consciously did not include any other course like BAMS, BUHS, Nursing etc. in the penalty clause since it did not feel that the said courses are of such nature where the State Government has to spend on every seat. In case, if a MBBS student leaves course, he is penalized and ask to compensate the State government by paying an amount of Rs.10 lakhs and that is how the State shoulders the financial burden of unfilled seats. However, for BAMS course, the State has not levied such a condition in its brochure. However, there is clause in the said Boucher, which we had reproduced above, which did not permit the students to claim refund of fees if the admission is cancelled by the student. There are two classes/streams of medical education in the form of Ayurveda and Allopathy which is creation of State itself. The penalty is applicable only to MBBS students and not to BAMS. The penalty or consequences of withdrawal of BAMS admission cannot be extended to such MBBS course under the impugned rule.

15.) The learned counsel appearing for the Petitioner has attempted to argue that the said Rule 10.10.1 creates two classes and which violates Article 14. No doubt Article 14 in its ambit and sweep involves two facets namely it permits reasonable classification which is founded and an un- intelligible differentiate and accommodates the practical need of the society and that the differentiation must have a rational nexus to the object sought to be achieved. However, it does not allow any kind of arbitrariness and ensures fairness and quality of treatment and opportunity. The principle enshrined in Article 14 of the Constitution of India is "fons juris" of the Constitution.

The action of the State Government suffers from vide of arbitrariness and imposes a reasonable restriction on the fundamental right of the petitioner to pursue her goal of becoming a doctor and a failure on one or two occasions would not deter her from living up to the goal in her life. By now it is settled position of law that the word "life" encompasses "life of choice" and in this background, we find that Rule 10.10.1 curbs the said right of the petitioner and do not have any nexus with the policy of the State to ensure medical care and health to the citizens of its country. The Petitioner would be of more help to the society as a MBBS doctor and merely that she could not secure admission to a

medical seat in the past two years, it should not debar her from taking of the seat in the next two years. By that time, she would loose the zeal to progress in life.

16.) The State Government has taken a stand in the affidavit that such a rule is in existence since 2010 and the MHCET brochure contained this Rule for a long time. We have carefully perused the Rule in existence which created a disqualification for a candidates who cancel their admission after the cutoff date. The said rule finds place in the information brochure of the Government of Maharashtra MHCET consistently for the years 2010, 2011, 2012, 2014, 2015 and 2016. However, by virtue of the said rule the candidate for admission is not permitted to appear in the MHCET examination for subsequent two years if the admission is cancelled after cutoff date. However, the NEET-UG-2017 do not impose any embargo on the candidate appearing for the NEET-UG-2017 examination except there is a cap on number of attempts in the NEET-UG-2017 and the upper age limit for the candidate for admission. In the present case, the petitioner was not disqualified by virtue of NEET-UG-2017 Rules to appear for the examination but she has been refused an admission by virtue of disqualification clause by the State Government. According to us, it has resulted into situation when the petitioner has already left her BAMS Seat, obtained documents from the College with the approval of this Court and clear the NEET examination securing an admission in a Government Medical College in MBBS and at this stage if the petitioner is refused the said admission, she is back to the position of 2015 and three years of her life after passing H.Sc in 2015 would be a mere wastage.

17.) The NEET-UG, 2017 Notification was issued by CBSE in January, 2017. The petitioner appeared for the examination in May, 2017 and the brochure by the State Government prescribing the eligibility criteria for the State College seats is published on 19th June, 2017 by which the petitioner was held to be eligible for MBBS Seat. Since admission process to the MBBS/BDS case was at an advanced stage, we had permitted the petitioner to fill up her preference form by our order dated 18 th August, 2017 since the Counsel for the State Government made a statement before us that after the cutoff date 18.8.2017 preference would not be accepted. We therefore permitted the petitioner to give her preference and accordingly she had given her preference within the prescribed time schedule and she secured the seat at Government Medical College, Nanded/Kolhapur.

When the matter was listed before us on 28 th August, 2017, we enquired from the State Government about the status of the petitioner and it was informed that her preference is treated as valid. In such circumstances, it would be necessary to direct the respondent authorities to allot the seat as per her preference and impart to the exclusion of Rule 10.10.1.

18.) In the aforesaid facts and circumstances, we are of the firm opinion that Rule 10.10.1 creates a unreasonable restriction on the fundamental right of the petitioner guaranteed under Article 19 (1) (g) and Article 21 of the Constitution

of India which includes right of opportunity and the petitioner has availed opportunity in terms of the Rules framed by the CBSE for conducting of NEET-UG-2017 examination and in the light of the said Rules the condition imposed by the State Government in 10.10.1 is not applicable to the petitioner and to be read down to give effect to the eligibility criteria for appearance in the examination of NEET-UG-2017 and accordingly we read down the said provision 10.10.1 to pave way to the petitioner who is found to be eligible as per the NEET-UG-2017 and is qualified on the basis of score of the said examination to secure a seat according to her preference form for MBBS Course. Hence, we allow the writ petition and direct respondent Nos. 1, 2 and 3 to allot M.B.B.S. Seat as per her preference form submitted on 18.8.2017 and permit the petitioner to prosecute her studies in the first year MBBS Course.

Hence, we pass the following order :-

:ORDER:

- (1) Writ Petition is allowed;
- (2) Respondent Nos. 1, 2 and 3 are directed to allot the M.B.B.S. Seat to the petitioner as per her preference form submitted by her on 18th August, 2017 and permit the petitioner to prosecute her studies in the First Year of M.B.B.S. Course.
- (3) No order as to costs.