

(2012) 09 GAU CK 0072
In the Gauhati High Court
Case No : Writ Petition (C) No. 3739 of 2012

Miss Rajashree Khound

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 13-09-2012

Acts Referred:

Constitution of India, 1950 — Article 14
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(1), 30, 33, 39

Citation : (2012) 09 GAU CK 0072

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : B.D. Das, Mr. H.K. Sarma, Mr. N. Goswami and Mr. D. Nath, for the Appellant; D. Saikia, Standing Counsel, Health Department, Mr. B. Gogoi, for Respondent Nos. 1, 2 and 3 and Mr. M.R. Pathak Standing Counsel, Education Department for Respondent Nos. 4 and 5, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Mrs. Justice Anima Hazarika

1. This writ petition has been filed by the petitioner Miss Rajashree Khound seeking an order from this Court directing the Respondents to allow her to take admission in MBBS course for the session 2012 on the basis of her selection in the Combined Entrance Examination as per the result published on 24.07.2012. The petitioner has demonstrated academic excellence by way of securing 89.3% marks in HSLC Examination followed by 86.6% marks in Higher Secondary (Science). Thereafter she contested for admission to MBBS/BDS courses in the Medical Colleges of Assam and Regional Dental College at Guwahati for the session 2012 through the Combined Entrance Examination. The petitioner secured 186 marks and her rank in the Entrance Examination is claimed to be 199. In the Educational Notice published showing the names of candidates who appeared for counseling and selected by a Selection Board thereby allowed for provisional admission into the First Year MBBS/BDS courses in the Medical

Colleges of Assam and Regional Dental College at Guwahati for the session 2012, the name of the petitioner bearing Roll No. 381071 finds place against Serial No. 6 in the list of "Un-reserved (General Merit)" candidates for Jorhat Medical College, Jorhat. However, when the petitioner appeared before the respondent No. 3, the Principal, Jorhat Medical College, Jorhat for admission in terms of her selection, she was verbally informed that as she was found suffering from Hearing Impairment of approximately 69% in the left and 71% in the right ear, she was not eligible for admission in the Medical College. This was followed by an application dated 29.07.2012 filed by the petitioner asking the Principal to put in record the reasons for rejection of admission followed by a representation filed by her on 30.07.2012 to the Director of Medical Education, Assam stating that due to her hearing problem she was wearing hearing aid and that she is quite a normal girl having no physical disabilities but she is being denied admission inspite of her selection without giving any lawful reason. The petitioner further stated that her hearing impairment is of no hindrance for pursuing studies in MBBS course with the aid of modern sophisticated appliances. Per contra, the respondent No. 2, the Director of Medical Education, Assam has filed an affidavit-in-opposition, inter alia, disclosing that during the admission process of the writ petitioner consequent to her selection in the Combined Entrance Examination, the Principal, Jorhat Medical College constituted a Medical Board which examined the candidates for their medical fitness and the said Medical Board found the writ petitioner unfit for admission into MBBS Course due to her bilateral sensory neuronal deafness (Right ear 60%, Left ear 77%). It is the stand of the respondents that in terms of the Admission Rules (Regulation for Admission of Undergraduate Students) Rules 2007 (amended upto 2012), and the Medical Council of India guidelines, a candidate must be found physically fit by the Medical Examination Board at the time of admission. The respondents have also relied upon a Medical Council of India's circular dated 14.07.2000 containing the guidelines of the said Council for filling up of reserved seats for persons having locomotor disabilities in Medicine Courses. Quoting a case decided by the Hon'ble Delhi High Court (Rekha Tyagi -Vs- Vice Chancellor, University of Delhi and others) wherein it was held that section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and full Participation) Act, 1995 (for short, the Act 1995) has no application for reservation of seats in educational institutions as the said section falls under the Chapter "Employment". The Medical Council of India further noted that the said judgment was reversed by the Hon'ble Supreme Court of India mandating reservation of seats in favour of persons suffering from physical disabilities, and that the Medical Council of India had decided stipulation of benchmarks/degrees of disability for allowing students suffering from disabilities to get admission into Medical College. However, the said benchmark fixed by Medical Council of India apparently relates only to locomotor disabilities. The circular further provides that candidate seeking benefit of reservation has to present him/herself before Medical Board and obtained valid disability certificate from Medical Board which is not more than 3 months old from the date of submitting application for admission in reserved

categories for disabled candidates. It is in terms of this Medical Council of India guidelines that the Medical Board conducted thorough examination including Audiogram which revealed the gross impairment of hearing of the writ petitioner.

2. I have heard Mr. B.D. Das, learned Senior counsel assisted by Mr. H.K. Sarma, Advocate, appearing for the petitioner. Also heard Mr. D Saikia, learned Standing counsel, Health assisted by Mr. B. Gogoi, Advocate for respondent Nos. 1, 2 and 3 and Mr. MR Pathak, learned Standing counsel, Education Department for respondent Nos. 4 and 5.

3. There is no dispute at the bar regarding the eligibility of the writ petitioner to get admission into the MBBS courses in terms of her educational qualifications, she having selected for the MBBS course and even being short listed for admission. The fact regarding her "hearing impairment" of 60% in right ear and 77% in left ear is also an admitted fact. It is also the stand of the respondent authorities that the Writ petitioner has been hitherto denied admission due to her aforesaid "hearing impairment" and that the respondent authorities have constituted an expert committee to asses the degree of hearing loss of the writ petitioner requesting the writ petitioner to appear before such expert committee which was however not adhered to by the writ petitioner. It is also stated by the respondent No. 2 on oath that a seat has been kept vacant at Jorhat Medical College, Jorhat in the MBBS course for the session 2012 under Unreserved Category.

4. The question that requires to be answered now is as to whether the writ petitioner can be denied admission into the MBBS course merely because of her "hearing impairment" and can she be subjected to further medical tests to qualify herself for admission even after her selection?

5. The right of a person suffering from disability is no more a concept of mere equity or good conscience. It is now a set of enforceable legal rights in terms of the provisions of the Act 1995.

Hearing impairment falls within type (iv) of the term "Disability" as defined u/s 2(i) of the Act 1995. The term "hearing impairment" has been defined u/s 2(1) of the same Act meaning "loss of sixty decibels or more in the better year (sic) in the conversational range of frequencies.". Thus the petitioner with her ascertained degree of hearing impairment falls within the definition of "person with disability" within the meaning of section 2(+) of the Act 1995. Section 39 of the Act 1995 mandates as follows :

39. All educational institutions to reserve seats for persons with disabilities - All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three percent seats for persons with disabilities.

6. The applicability and ambit of the aforesaid section 39 of the Act 1995 has been subjected to judicial interpretation by the Hon"ble Supreme Court of India

in the case of All Kerala Parents' Association [of the] Hearing Impaired -versus- State of Kerala (C.A. No. 6120 of 2001 decided on 11.09.2002). In the backdrop of a decision by the Kerala High Court holding that section 39 occurring in Chapter VI of the Act dealing with Employment, the expression "seat" in section 39 would mean "posts" in the question of reservation posts for appointment in Educational Institutions and would not arise for reservation of seats in Educational Institution; the Apex Court laid down the law at paragraph 3 in the following terms :

3. The aforesaid section 39 unequivocally deals with the question of reservation of seats for persons with disabilities in educational institutions of the Government, as well as institutions receiving aid from the Government. The language is clear and unambiguous, which itself indicates the legislative intent. It is well settled that when the language of any statutory provisions is clear and unambiguous, it is not necessary to look for any extrinsic aid to find out the meaning of the statute inasmuch as the language used by the Legislature is the indication of the legislative intent. We fail to understand as to how and on what principles of construction the High Court has given a construction to the provisions of Section 39 not only by doing violence to language of Section 39, but also rewriting the provisions of Section 39. If Section 39, as has been construed by the High Court, would be interpreted to mean it relates to employment merely because the provision occurs in the Chapter VI dealing with employment then the "educational institutions" would have to be interpreted to mean the Government post and the question of receiving aid from the Government would not arise at all. Natural and ordinary meaning of words should not be departed from unless it can be shown that legal context in which the words are used requires a different meaning. We have therefore no hesitation to come to the conclusion that the High Court was wholly in error in construing Section 39 of the Act to mean it relates to reservation in Government employment and not in relation to admission of students with disabilities in the Government institutions as well as educational institutions receiving aid from the Government. Further, reservation in Government employment is provided u/s 33 of the Act. We, therefore, set aside the impugned judgment of Kerala High Court and hold that Section 39 deals with the reservation of seats for persons with disabilities in Government educational Institutions as well as educational institutions receiving aid from the Government, and necessarily therefore the provisions thereof must be complied with.

7. Subsequently, in the case of Dr. Raman Khanna -versus-University of Delhi, a Single Bench of Delhi High Court by a judgment and order dated 11.08.2003 reported in 2003 VAD Delhi 343, while dealing with the question as to whether for ensuring the reservation in admission to the Medical Courses is made available to deserving candidates there shall be modifications in the stipulations laid down by the Medical Council of India in its guidelines, i.e. 40% to 60%", has held that it is advisable that the authorities should ensure that horizontal method of reservation is implemented rather than the vertical or additive method of

reservations. It was also held that the disability quota cannot be extinguished even partially and cannot lapse in favour of any other category. It was held that minimum 3% of seats must be reserved for physically handicapped to be distributed among any or all of the sub-categories, as the case may be.

8. In the background of the peculiar fact of this case, the law laid down by a Division Bench of Gauhati High Court in the case of Smt. Anju Talukdar and Another Vs. State of Assam and Others, can be cited for pointed beneficial guidance. Hon''ble Chelameswar C.J. (as he was then) speaking for the Division Bench while dealing with the legality of a provision of qualifying the qualification criteria of admission to paramedical courses in the State of Assam in respect of 3% reservation of seats in favour of persons with locomotor disability thereby limiting the scope of the said reservation to and within "Only the persons with Locomotor disability of lower limbs and having between 50% to 70% of disability shall be eligible for this Quota" had held as follows :

15. Apart from that when the language of Section 39 of the Act, 1995 is clear and categoric that the benefit of reservation should extend to all categories of persons with disabilities, which by definition under the Act recognizes seven categories of disabilities, denying the benefit also appears to us to be wholly illegal in the absence of any legally tenable justification, which justification if exists should have been placed before this Court by the Medical Council of India as it is supposed to be an expert technical body dealing with those areas.

16. Coming to the question of prescription of 50% to 70% disability which in turn is confined by the impugned advertisement to be disability of lower limbs is also plainly contrary to the language of the enactment and therefore void.

Even the guidelines issued by the Medical Council of India on 14.07.2003 do not appear to have considered this question in the context of paramedical courses. Looked at any angle, the impugned notification, insofar as it restricts the benefit under the Act, 1995, is wholly unsustainable. We, therefore, direct the respondents to consider the cases of the candidates falling under any one of the seven categories of disabilities recognized under the Act, 1995 for admission to the various courses covered under the impugned notification against the 3% of the total number of seats sought to be filled up. Goes without saying that the best amongst the candidates with disabilities falling under each one of the seven categories are entitled for admission.

9. The aforesaid law was laid down in no uncertain terms negating the validity of the guidelines issued by the Medical Council of India on the face of the Medical Council of India having not placed any material before the Court inspite of receipt of notice. In the backdrop of the rights of reservation accruing to "persons with visual and hearing impairment" as referred to in Paragraph 12 of the judgment in the case of Anju Talukdar (supra), the law laid down in Paragraph 14 thereof can be beneficially quoted as under :

14. Even today it is not very clear whether there is anything in law which

excludes either a person with visual impairment or hearing impairment from seeking admission to a medical course in this country not against any reserved quota but purely on merit, that is, on the basis of marks secured by such a candidate in the qualifying examination. In the absence of such restriction (we presume so in view of the lack of assistance by the Medical Council of India to enlighten us in this regard) we have no option but to reach the conclusion that denying the benefit to the above mentioned two categories of persons with disabilities under the Act, 1995 is illegal.

10. Following the law laid down by the Apex Court in All Kerala Parents' Association [of the] Hearing Impaired (supra) and Division Bench of Gauhati High Court in the case of Anju Talukdar (supra) it can be definitely concluded by this Court that statutory mandate of providing reservation to physically disable persons for admission into educational institutions as provided u/s 39 of the Act 1995 cannot be made subject to restrictive interpretation by the executive or for that matter any authority below the status of the Parliament so as to dilute, marginalize or otherwise impair the absolute right granted to the physically disabled persons by the Central Legislation. In other words, the terms of section 39 of the Act 1995 cannot be rewritten by the respondents in the instant case even with the aid of the circulars issued by the Medical Council of India.

11. But the facts of the case at hand is little different. The Writ petitioner here is not claiming the benefit of reservation for being a person with disability. In spite of suffering the physical disability of "hearing impairment", she by dint of her own merit has competed with general candidates and have secured her position as a general candidate entitling her for admission into MBBS courses. The plea of the respondents is that in spite of her having qualified in the Entrance Examination on merits, the Writ petitioner has to submit herself for further assessment as regards the degree of her hearing loss so as to be certified by the experts as to whether she is fit for pursuing the MBBS Course.

12. If the intent of the legislature framing the Act, 1995 is sought to be deciphered in the statements of objects and reasons as well as the preface of the Act it will be unfailingly found that Chapter V (Education) and other provisions of the Act has been framed to remove any discrimination against persons with disabilities in the sharing of developmental benefits vis-?-vis non disabled persons, development of strategies for equalization of opportunities for persons with disabilities and to make special provision for integration of persons with disabilities into social main stream. The intent of the legislature has further been crystalised in the following tenets of section 30 of the Act:-

30. Appropriate Governments to prepare a comprehensive education scheme providing for transport facilities, supply of books, etc. - Without prejudice to the foregoing provisions, the appropriate Governments shall by notification prepare a comprehensive education scheme which shall make provisions for -

... (g) restructuring of curriculum for the benefit of children with disabilities;

(h) restructuring the curriculum for benefit of students with hearing impairment to facilitate them to take only one language as part of their curriculum.

13. Hence the mandate of the nation is that it is the educational institutions which have to restructure the educational system and curriculum so as to meet the requirements of the students suffering from disability. It is not for the students suffering from disability to come up and struggle to cope up with the existing curriculum or educational system which is by and large designed only for general students without specific and special needs. To deny a student the right to education on the plea of his/her physical disability being the impediment for availing the course of study will be an impermissible negative interpretation of the welfare legislation.

14. Having held as above there is no escape from the further inevitable conclusion that "hearing impairment" of writ petitioner per se cannot subject her to any disqualification for getting admission into MBBS courses which she is otherwise entitled to by dint of her selection in terms of merit. The intention of the authorities to subject her to further medical tests so as to judge her ability to undergo the Medical Courses is wholly impermissible in law being grossly violative of the mandates of Act, 1995. In the backdrop of a scenario when a student is unable to compete with the general candidates has been given the right of reservation under the Act, 1995 in addition to a mandate on the State to restructure the curriculum of studies for the benefit of students with disabilities including "hearing impairment", a permission to the respondents to subject the writ petitioner who is a person suffering from disability but has competed as a general candidate securing a position amongst the general candidates, to undergo further physical tests to conform to the standard of curriculum and educational system framed by the respondents largely keeping in view the general candidates without special needs will amount to negation of the mandates of the Act, 1995 and impermissible in the touchstone of Article 14 of the Constitution. The mandate of the Act, 1995 rather calls upon the Respondents to restructure the curriculum for the benefit of students with "hearing impairment" so as to facilitate such students to avail of the mandates of equalization of opportunities.

15. Accordingly, this writ petition is allowed. Interim order passed earlier is made absolute. The respondents, especially, the respondent Nos. 2 and 3 are directed to offer admission to the writ petitioner immediately in the seat kept vacant, as indicated in paragraph 5 of the affidavit-in-opposition filed by the respondent No. 2. The writ petitioner will not be subjected to any further medical tests so as to qualify her for getting the admission.

16. Further respondent Nos. 4 and 5 are directed to return the original certificates etc., forthwith submitted by the petitioner at the time of admission in the Engineering College, keeping the photostat copies thereof in order to facilitate her to take admission in Jorhat Medical College.

17. In the facts and circumstances of the case, there shall be no order as to costs. While parting with this case, I am constrained to pass the following direction to respondent No. 1 to comply with the mandatory provision laid down in sub section (g) and (h) of section 30 of the Act, 1995 without any deviation.

This direction is particularly issued in view of reservation of 3% seats for the persons with disability in all Government run and aided educational institutions and programme.