

(2004) 01 OHC CK 0049

In the Orissa High Court

Case No : Writ Petition (C) No's. 3081, 3082, 3398, 3399 and 4294 of 2002

Orissa Medical Science Association

APPELLANT

Vs

State of Orissa and Others
 Dr. Mamata Mohanty, Dr.
Chhanda Kanungo, Dr. Nagaja Nandan Das and Dr. Samir
Kumar Das Vs State of Orissa and Another

RESPONDENT

Date of Decision : 12-01-2004

Acts Referred:

Citation : (2004) 97 CLT 692 : (2004) 1 OLR 130

Hon'ble Judges : P.K. Mohanty, J;M. Papanna, J

Bench : Division Bench

Advocate : C. Choudhury, B. Mohanty, S. Mohanty, Y. Mohanty and P.C. Mohanty in W.P. C No. 4294 of 2002, B. Ray, C. Choudhury, B. Mohanty, D. Chhotray, S. Mohanty and D.R. Das in W.P. C No. 3081 of 2002, B. Ray, B. Mohanty, S. Mohanty, D.R. Das and B. Maharana in W.P. C No. 3082 of 2002, C. Choudhury, B. Mohanty, S. Mohanty, D.R. Das and B. Moharana in W.P. C No. 3398 of 2002 and C. Choudhury, B. Mohanty, D.R. Das, B. Maharana and Vijaysree in W.P. C No. 3399 of 2002, for the Appellant; Additional Government Advocate for O.P. No. 1 and S. Mohanty, for O.P. No. 2, for the Respondent

Final Decision : Dismissed

Judgement

P. K. Mohanty, J.—In this batch of writ petitions, the Orissa Medical Science Association and four other individual in service doctors call in question the modified prospectus, 2002 for admission to the Post Graduate Medical Course in the Government Medical Colleges of the State and have sought for a direction to the State Government and the P.G. Medical Selection Committee to make selection of in-service candidates on the basis of marks awarded in their M.B.B.S. Examination 55% of marks or above and are continuing in Government services are eligible for being admitted to the course.

2. The petitioners case in brief is that, the State Government, because of dearth of doctors for employment in rural areas and in the KBK districts, represented and assured the Medical Graduates, that in the event they accept Government

employment, they would be permitted to join P. G. course on the basis of marks obtained in their M.B.B.S. examination for such admission. The petitioner claims that such assurance was given pursuant to the criteria fixed by the Medical Council of India (Opp. Party No. 2) in its Post Graduate Medical Education Regulation, 2000. The members of the petitioner's association acting on good faith applied for admission to the P. G. Course but suddenly in the month of August, 2002 a modified prospectus, for P. G. Medical selection was published, superceding their earlier prospectus wherein Clauses 9.1 to 9.1.5 and 9.15 was substituted by Clauses 9.1 to 9.4 prescribing the method of selection of candidates, a copy of which is annexed as Annexure- 2. According to the petitioner, the State Government keeping in view the assurance, formulated a guidelines by its resolution dated 31st August, 2001 giving relaxation to the in-service candidates in adopting a separate procedure for selection stipulating therein that the admissions for such in-service candidates shall be on the basis of the marks obtained by them in First, Second and Third M.B.B.S. examination. A copy of the resolution is annexed as Annexure- 3 to the writ petition. The petitioner claims such decision of the Government was keeping in view the guidelines of the M.C.I, with the object of achieving desired result of permitting the in service candidates qualified themselves with the P. G. qualification and is not liable to the interfered with.

3. The Opp. Party No. 1 - State of Orissa has filed a counter affidavit denying the claim of the petitioner. According to the State, till 2001, selection of candidates for admission to the P. G. Medical Course of different disciplines in the three Medical Colleges of the State both for direct and in service category were being made through an entrance examination conducted by a Selection Committee every year. No assurance was given to any individual or group at any point of time that in the event of any Medical Graduate joining in rural areas or KBK district service, the Government would permit them to join the P.G. Medical Course on the basis of the marks obtained in M.B.B.S. course and that they would not have to appear at any Entrance Examination for the purpose. It is stated that the in-service doctors are usually out of touch with the theoretical studies, as such, it is difficult for them to compete with the direct candidates to qualify in the entrance examination. The number of qualified in-service candidates is less than the number of seats ear-marked for in-service category as it is difficult for them to compete with the direct candidates, as they are usually out of touch with the theoretical studies. Number of seats of in-service category was adjusted towards direct general category in the preceding years. The direct category do not always join in the Government service after completion of P.G. Course, and hence, having more P.G. seats filled up by the direct category is not in the interest of the State, and therefore, with a view to ensure that the in-service candidates also get admission to all the seats ear-marked for them, the Government had revised the procedure in Health and Family Welfare Department Resolution No. 32974/H dated 31.8.2001 providing selection of in- service candidates on the basis of marks secured by them in

M.B.B.S. examination. The prospectus, 2002 was prepared on the basis of the said resolution. Some members of the Association being aggrieved with the decision of the Government, filed writ petitions before this Court in O.J.C. Nos. 12568, 13722 and 13755 of 2001 challenging the resolution and the relevant provisions of the P.G. Prospectus, 2002 prepared on the basis of the above resolution. The High Court allowed the writ petitions and struck down the resolution dated 31.8.2001 and the relevant clauses of the P.G. Prospectus, 2002 like Clauses - 6.1, 6.1.1, 6.1.2, 6.1.3, 6.2, 6.4 and 9.1 in its entirety and Clause 14. A copy of the judgment has been annexed as Annexure-A/1. The State Government filed SLP before the Apex Court which was dismissed on 15.7.2002, a copy of which is Annexure-B/1. According to the State Government since Clause 9.1 of the P.G. Prospectus in its entirety provides that in-service candidates for P.G. (Medical) courses shall be selected strictly on the basis of their individual cumulative performance at the First, Second, Third and Final M.B.B.S. examination was struck down by the High Court the revised prospectus was published in the month of August, 2002 keeping in view the judgment of this Court.

4. Sri Bijan Ray, learned Senior Advocate appearing for the petitioners submits that the executive power of the State government under Article 162 of the Constitution was exercised by the State Government in enforcing the Regulation of M.C.I. framed under the Indian Medical Council Act, 1956 and as such, the executive power being rational to the nexus and the object of achieving the desired result of permitting in-service candidates to qualify themselves with Post-Graduate qualification is not available to be whittled down due to dearth of doctors in the State to function in the rural areas, the Government agreeing with the petitioner's Association issued the prospectus that such in-service candidates are to be selected on the basis of their academic career, and that such resolution is in consonance with the Regulations of the Medical Council of India. It is further submitted that the modified prospectus works out great prejudice and injustice and is, therefore, liable to be struck down. The learned Senior Advocate contends that the impugned prospectus is otherwise illegal and hit by doctrine of promissory estoppels, curtailing the right already accrued in favour of the petitioner. Confronted with the judgment of this Court in the case of Dr. Dillip Kumar Das and Others, Dr. Gudla Siva Prasad and Others and Dr. Nanda Kishore Sahoo and Others Vs. State of Orissa and Others, the learned counsel submits that the decision rendered by the Division Bench of this Court is a decision per incurium having not taken into consideration, the decision of the Apex Court in Pre- P. G. Medical Sangharash Committee v. Dr. Bajrang Sani and Anr. AIR 2001 SC 2473 and on misinterpretation of the decision relied on.

5. The learned Senior Advocate in essence contends that the decision of this Court in Dr. Dillip Kumar Das's case, striking down the earlier prospectus, 2002, stipulating marks obtained by the in-service candidates at the M.B.B.S. Level to be the qualifying marks and on such basis to make the selection, is a judgment rendered without noticing the decision of the Apex Court in Pre- P. G. Sangharash

Committee Case (supra) is a judgment per incurium and has to be ignored. In Dr. Dillip Kumar Das's case (supra), this Court held that Regulation 9(2) (iii) can have application only in a case where the State has only one University and the same or common pattern of examination in M.B.B.S. is effected by that university and the candidates seeking admission to Post- Graduate Medical Course are persons, who are qualified in the same university. As such, the in-service candidates on the basis of individual cumulative performance at the first, second, third and final M.B.B.S. Examination is violative of regulation 9 of the Medical Council Regulation. On such finding, the Court struck down that provision and declared that the admission to the Post Graduate Medical Course can be had only on the basis of the performance of the candidates in the common entrance examination along with the direct candidates as prescribed subject to other reservations provided in the prospectus. The aforesaid judgment was challenged by the State Government before the Supreme Court of India and by order dated 15.7.2002, the Apex Court dismissed the Special Leave Petitions.

6. The contention of Sri Ray, learned Senior Advocate for the petitioners is that in Dr. Dillip Das's Case (supra) having not taken note of and considered the decision of the Apex Court in Pre- P. G. Medical Sangharsh Committee and Anr. v. Dr. Bajrang Sani and Anr. (supra), while deciding the issue, the judgment would not stand on the way of this Court in considering the matter afresh also in our considered opinion cannot be, accepted. The Apex Court in Pre- P. G. Medical Sangharsh Committee's case, while holding that it is permissible for the Government to fix that the in- service doctors constitute, a distinct class by themselves giving a special treatment and no grievance can be made on the ground that the minimum eligibility marks for their selection in respect of seats earmarked for them should also be the same as that of the fresh or open candidates, is neither discriminatory or arbitrary, observed that during the academic years in question there was no stipulation by the Medical Council of India for any minimum eligibility marks to be secured in the entrance examination for admission to the Post- Graduate Medical Course, though in 2000 such a stipulation has been made for the obvious reason that during the years under our consideration, there is no such stipulation, the challenge in this regard does not merit consideration or acceptance. In that case, the question for consideration before the Apex Court was, whether the decision of the Government/ University fixing 33% to be the qualifying marks for in-service candidates to render them eligible for admission to the P.G. Courses and the reservation of seats for in-service candidates can be sustained as permissible under law. The decision in Pre P.G. Medical Sangharsh Committee's case has no application to the petitioners' case, since by then, the Medical Council Regulation, 2000 had not come into existence.

7. In State of Madhya Pradesh and Ors. v. Gopal D. Tirthani and Ors. 2003 (5) SC 473, the Apex Court has laid down that when there were more Universities than one in a State, the standard of different Universities and their assessment methods cannot be uniform and may differ and, therefore, it would be eventual

to assess the comparative merits of individual performance by reference to Clause 3 of the Medical Council of India Regulation, 2000 necessarily by holding a common entrance test. The Apex Court further held that in view of Regulations framed by the Medical Council of India for holding a common entrance test, even if there are two separate channels of entry and allows clearance only to such candidates; who secure minimum qualifying marks as prescribed by the Medical Council of India Regulations. If the State has a departure from such Rule or for carving out an exception in favour of any classification, then it is for the State to represent to the Central Government and/ or Medical Council of India and make out a case of justification.

8. Yet in a recent decision in *Harish Verma and Ors. v. Ajay Srivastav and Ors.* 2003 (6) SC 706, the Supreme Court has held that there can be only one entrance test for determining eligibility for Post Graduation in Medical Science for in-service candidates and those not in service. The requirement of minimum qualifying marks cannot be lowered or relaxed contrary to the Medical Council of India Regulations framed in this behalf. The Court further observed that subject to securing minimum qualifying marks, if the in-service candidates formulate a class by themselves for whom a separate channel of entry has been carved out, then within the group there may be scope for assigning weightage for rural service rendered, for the purpose of determining merit inter se but such weightage cannot be utilized for the purpose of relaxing the condition as to minimum qualifying marks as prescribed by the Medical Council of India. The Apex Court struck down the admission of such in service candidates, who secured less than the minimum prescribed by the Medical Council of India under Regulation 9 of Post Graduate Medical Education Regulations, 2000.

9. In *Dr. Subhasish Singh and Ors. v. Convenor P.G. (Medical) Selection Committee, 2003 and Ors.* and a batch of writ petitions, reported in *Dr. Subhasish Singh and Others Vs. Convenor, P.G. (Medical) Selection Committee, 2003 and Others*, this Court, while holding that the State Government has the power and competence to reserve for its in-service candidates a maximum limit of 50% of the P.G. seats in their favour observed that the admission to the course has to be made on the basis of merit and merit alone through a common entrance test, for such in-service and fresh candidates and no exception can be made for in-service candidates by stipulating a different criteria.

10. In the conspectus of the decisions referred to above, there is no scope for doubt that, admissions to the Post Graduate Medical Course for both in- service and non-service or fresh candidates, has to be made on the basis of a common entrance or preadmission test and the candidates securing minimum qualifying marks as prescribed by the Medical Council of India in the Post Graduate Medical Education Regulations, 2000 are only eligible for admission to such course. Thus the contention of Sri Ray, learned Sr. Advocate, that the judgment rendered by another Division Bench of this Court in *Dr. Dillip Kumar Das's case (supra)* has to be ignored being a judgment per incurium and that the in-service doctors should

be selected for P.G. admission on the basis of their performance in the qualifying M.B.B.S. Examination cannot be accepted. In view of what has been held earlier, the impugned revised/modified Prospectus, 2002 for admission to the Post Graduate Medical Course, suffers from no infirmity or illegality to be interfered with in the present writ petitions.

In the result, the writ petitions are dismissed, but there shall be no order as to costs.

M. Papanna, J.

11. I agree.