

(1988) 12 PAT CK 0012

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No's. 248, 1389, 1529, 2330, 4209, 4298, 5278 and 8427 of 1988

Prakash Kiran and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 06-12-1988

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 226

Citation : AIR 1989 Patna 235 : (1989) PLJR 939

Hon'ble Judges : Satya Brata Sanyal, J; R.N. Lal, J

Bench : Division Bench

Advocate : Drona Charya, Prabhat Kumar Verma, Binod Krishna Jha, Subhas Chandra Jha, Ram Bhushan Pandey, Banwari Sharma, Dinu Kumar, Uma Shankar Prasad and R.P. Sharma, for the Appellant; S.N. Jha, Standing Counsel, Mridula Singh, Jr. Counsel to Standing Counsel, Asha Singh, Jr. Counsel to Standing Counsel, Kamalapati Singh, Govt. Pleader, Sangita Das Gupta, Ishwari Singh and R.N. Choudhary, Jr. Counsel to Govt. Advocate, for the Respondent

Judgement

S.B. Sanyal, J.—All these eight writ petitions relate to the admission of the several petitioners in 1st year M.B.B.S. course of 1987 session. They have further prayed for a direction not to admit Scheduled Castes and Scheduled Tribes candidates who have not obtained the minimum qualifying marks of 40 per cent as required by the prospectus for admission in 1987 session (Annexure 4) and for a further direction that if reserved categories candidates fail to secure the said minimum marks, the number of reserved seats be directed to be reduced by the number of candidates of concerned categories and be made available to the general category and the same be filled up according to the result of the Medical and Dental admission test held on 1-11-1987 (Annexure 2). This is the common question in all these writ petitions. For the sake of convenience, the Annexures of C.W.J.C. No. 248 of 1988 will be referred to in this judgment, since, same documents have been marked differently in the different writ petitions. This judgment, therefore, will govern all the writ petitions.

2. I will, however, give a brief facts of each case before I embark to consider the common argument of the learned counsel for the parties.

C.W.J.C. No. 248/88

3. The petitioner took the test for examination held on 1-11-1987 and got 83 marks out of total of 120 marks. The petitioner's serial No. in the list of successful candidates is 450. The merit list (Annexure 2) shows that serial Nos. 421 to 503 of the general category were put in the waiting list. It is said that even though there are vacancies numbering 34 for unfulfilled reserved quota not being filled up either by absentation or not obtaining the minimum required marks, these vacancies should be made available to the general category candidates, and once that is done, the petitioner by virtue of her position in the merit list (Annexure 2) is qualified for admission. It has been averred that there were 580 seats for admission in all the Medical Colleges of Bihar in M.B.B.S. course and 15 seats are available for admission in Patna Dental College. Out of these 595 seats, 76 seats have been reserved for the Scheduled Castes candidates and 49 seats for Scheduled Tribes candidates. Out of these reserved seats. 66 candidates of Scheduled Castes candidates and 25 candidates of Scheduled Tribes candidates were admitted, having obtained the minimum marks of 40 per cent prescribed by the prospectus. Thus 34 seats of these two reserved categories reverted to the general category. It is, therefore, submitted that under para 3(g) of the prospectus (Annexure 4), those vacancies ought to have been made available to the general category candidates and the petitioner admitted in the 1st year M.B.B.S. course. It has also been averred that the Medical Council of India by its letter dated 27th August. 1983, has insisted that for the Scheduled Castes and Scheduled Tribes candidates, the minimum marks at 40 per cent must be maintained in lieu of 50 per cent marks for general candidates and the Medical Council of India has also insisted that the list of candidates, who have been admitted below the prescribed marks of 40 per cent should be furnished to the said council (Annexure 5).

In the supplementary affidavit, it has been stated that the Government, even though it had no power to relax the minimum marks for the Scheduled Castes and Scheduled Tribes candidates, has illegally during the pendency of the writ petition, reduced the required 40 per cent marks to 35 per cent (vide Annexure 6) and is taking admission of such candidates on the basis of reduced minimum marks (Annexure 7). It has also been submitted that 12 seats out of the reserved quota for Government of India nominees are also unfilled up as no nominees have been selected. It has also been submitted that many candidates have not taken admission in different categories out of the 15 per cent of the total seats required to be filled up by All India Entrance Examination and, therefore, those seats should also be filled up from the waiting list candidates of the general category. On 24-2-1988; at the time of this writ petition, the respondents were directed to provisionally admit the petitioner in one of the Medical Colleges of the State of Bihar and permit her to attend the classes and

receive training subject, however, to the final order to be passed by this Court.

C.W.J.C. No. 1389 of 1988

4. This petitioner is also desirous of her admission in 1st year M.B.B.S. course of 1987 session. She secured 83 marks Out of total 120 marks and was placed at serial No. 447. It is claimed that the petitioner's position is 25 in the waiting list as two candidates from the waiting list did not appear in interview. Other assertion of facts is same and similar to C.W.J.C. No. 248 of 1988. At the time of admission of this writ petition on 19-5-1988, the petitioner was permitted provisional admission subject to the result of this writ petition.

C.W.J.C. No. 1529 of 1988

5. The petitioner's serial number in the merit list (Annexure 2) under the heading "waiting list" is 449. In view of two candidates of the waiting list of the general category having not taken admission, the petitioner claims his position as 29 in the waiting list. Eleven persons from the waiting list having already taken admission, the petitioner states that his position has improved to 18. All other assertions are the same as in the above two writ petitions. On 19-5-1988, at the time of admission, the Court ordered that the petitioner is permitted to attend the classes in the 1st year M.B.B.S. course in one of the Govt. Medical Colleges.

C.W.J.C. No. 2330 of 1988

6. This writ petitioner also got 83 marks out of total of 120 marks, and his serial number amongst the successful candidates is 462. Therefore, his position in the waiting list is 42, which the petitioner has stated to have improved to 40, for, two general category candidates of the waiting list having not taken admission. It is also stated that 11 candidates out of the said waiting list from serial Nos. 421 to 431 have already taken admission. Therefore, the petitioner's present position is 29 in the waiting list. All other averments are the same like those of the other writ petitioners. The petitioner was granted provisional admission by virtue of the order of this Court dated 2-5-1988 at the time of admission.

C.W.J.C. No. 4209 of 1988

7. This writ petitioner is said to be placed at serial No. 25 in the waiting list. It is said that as 11 persons from the waiting list have been admitted, his present position will be 14. At the time of admission of the writ petition on 16-6-1988, the petitioner was granted provisional admission subject to the result of the writ petition. All other assertions of facts are the same.

C.W.J.C. No. 4298/88

8. The petitioner has secured 84 marks out of 120 marks and her serial number is 431 and her position in the waiting list of general category is 11. Two candidates from the general category waiting list having not turned up for admission the petitioner's position is 9 in the waiting list. Therefore, she has

been selected for Dental course. It is said that the petitioners position as per her merit qua available vacancies entitles her to be admitted in the 1st year M.B.B.S. course. The petitioner has prayed for her admission in one of the Medical Colleges in one of the vacant seats in the State of Bihar as per merit and choice in 1987 session of 1st year M.B.B.S. course. She has been permitted to be provisionally admitted in the regular M.B.B.S. course, subject to the final order to be passed as per order dated 16-6-1988 at the admission of this writ petition.

C.W.J.C. No. 5278 of 1988

9. The petitioner has obtained 83 marks out of total 120 marks. Her serial number in the merit list is 444 and her position is 24 in the waiting list. In the counter-affidavit, however, she has been shown as 23 in the waiting list, and it is said that after adjustment of 11 seats, her position would be 12. Other assertions are the same and similar to other petitioners. At the time of admission on 29-7-88, she was permitted to be provisionally admitted in 1st year M.B.B.S. in any of the Medical Colleges subject to the final order to be passed in the writ petition.

C.W.J.C. No. 8427 of 1988

10. This petitioner has also obtained 83 marks out of total 120 marks and his serial number is 491 in the merit list. The waiting list, as stated earlier, is from serial No. 421. Therefore, his position is 70th in the waiting list. It is said that Scheduled Castes and Scheduled Tribes who have secured less marks than 40 per cent, if kept out of consideration, as also the vacancies obtainable under different heads of reservation be taken into consideration, the petitioner stands a fair chance of admission in 1st year M.B.B.S. course of 1987 session. In this case, however, at the time of admission of the writ petition, no order for provisional admission of the petitioner has been passed.

11. The first point urged by all the counsel appearing for the petitioners is that the respondents having represented to the petitioners through the prospectus that Scheduled Castes and Scheduled Tribes candidates participating in the examination will be considered for selection to fill up their quota only when they obtain the minimum marks of 40 per cent and the representation further being that unfilled quota of reserved categories will revert to the benefit of the general category candidates, the action of the respondents in reducing the minimum marks to 35 per cent and thus filling up the vacancies of the reserved quota is arbitrary, hit by the principles of estoppel and is ultra vires Articles 14 and 15(1) of the Constitution of India. In support of this contention, learned counsel for the petitioners strongly relied on the case of Dr. Anand Kumar Mishra and Others Vs. State of Bihar and Others, as also the case of Abodha Kumar Mohapatra and Others Vs. State of Orissa and Others, .

12. It is true that in Dr. Anand Kumar Mishra's case, a Division Bench of this Court held that where the notice and prospectus for admission to post-graduate Medical Course declared that selection of the candidates shall be done on the

basis of merit determined by the marks obtained by the candidates at the competitive test, and no reservation for Scheduled Castes and Scheduled Tribes was made at that time, and the candidates had applied acting upon the said representation made in the notice and prospectus, the Government is estopped from changing the basis of selection by ordering blanket reservation of 14 per cent and 9 per cent seats for Scheduled Castes and Scheduled Tribes respectively, irrespective of merit in arriving at the said conclusion. This Court relied upon the decision of *Amalendu Kumar Vs. The State of Bihar and Others*, , where a Full Bench of this Court held that the minimum qualifying marks even in case of reserved category must be such as would meet the requirement of the dominant objective. The reduction of minimum qualifying marks of Scheduled Castes and Scheduled Tribes which were reduced from 55 per cent to 40 per cent and then to 35 per cent was held to be violative of Article 15(1) read with Article 14 of the Constitution. Much water has flown since then and these decisions are no longer good law in view of the decision of the Supreme Court in the case of *State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others*, and the case of *Aarti Gupta and Others Vs. State of Punjab and Others*, . In *Kumari Nivedita Jain's* case (supra), the Full Bench decision of this Court reported in *Amalendu Kumar Vs. The State of Bihar and Others*, was reversed, which was the very foundation of the case relied upon by the learned counsel, for the petitioners. In that case, by an Executive Order, the State Government completely relaxed the conditions relating to the minimum qualifying marks in Pre-Medical Examination for selection of students to Medical Colleges of the State in respect of candidates belonging to Scheduled Castes and Scheduled Tribes. It was argued that the minimum qualifying marks insisted by the Medical Council of India is 40 per cent for Scheduled Castes and Scheduled Tribes and, therefore, the State Government acted contrary to the Medical Council Regulations. It was held in the said case that the Medical Council Regulations prescribe the eligibility of candidates for admission to Medical course for maintaining proper standard in Medical Colleges and institutions. This is a mandatory provision. Regulation II, on the other hand, relates to selection of students in Medical Colleges. Regulation I, therefore, lays down the conditions or qualification for admission into Medical Colleges which come within the competence of the Medical Council u/s 33 of the Act and, therefore, mandatory, whereas Regulation II deals with the process or procedure for selection from amongst eligible candidates for admission and, therefore, recommendatory or directory in nature. In *Aarti Gupta's* case (supra), where like the instant case, the minimum qualifying marks for selection of the Scheduled Castes and Scheduled Tribes candidates was reduced from 35 per cent to 25 per cent and the plea raised was that of estoppel and the action branded as arbitrary, the Court held, following *Nivedita Jain's* case (supra) as to how the selection has to be made out of the eligible candidates for admission in Medical Colleges, is a matter which has necessarily to depend upon circumstances and conditions prevailing in particular case. It reiterated that even deletion of the percentage of marks for the purpose of selection to reserved quota is permissible, even though in national interest and for maintaining general

efficiency of the professional men, certain standard should be maintained even for selection out of the eligible candidates. The plea of estoppel was also not accepted.

13. In the instant case, the Government reserved 125 seats for Scheduled Castes and Scheduled Tribes, and when in the selection test the number of candidates was not available, the question of reduction of the qualifying marks arose. As in Aarti Gupta's case (supra), I also hold that in this case the Government action cannot be held to be arbitrary because the circumstances have been pleaded to show why the variation was made. I, therefore, find no strength in the submission of the learned counsel for the petitioners in the first point urged before us.

14. The second point urged is that most of the petitioners have obtained provisional admission by obtaining interim orders from this Court in May and June, 1988 and have continued to study in 1st Year M.B.B.S. course since then and, therefore, they should be adjusted to various vacancies still not filled up, otherwise their career will be marred. In this connection our attention has been drawn to the last paragraph of State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, , where their Lordships held that respondent Nivedita Jain who had already been admitted to the Medical College, on the basis of the interim order of the High Court and had been prosecuting her studies, should be allowed to continue her studies and her career should not be put in jeopardy. Learned counsel for the petitioners also relied on the case of Rajendra Prasad Mathur Ors. Vs. Karnataka University and Another, , the case of A. Sudha Vs. University of Mysore and Another, and the case of Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, .

15. In the instant case, the petitioners pleaded vacancies because the reservation quota for the Scheduled Castes and Scheduled Tribes to the extent of 34 seats could not have been filled up by reducing the marks for selection. The Scheduled Castes and Scheduled Tribes candidates who have already taken admission pursuant to the said reduction of marks have not been impleaded in this case, nor can there be any order cancelling their admission. Therefore, most of those vacancies are not available. The petitioners' counsel submitted that apart from Scheduled Castes and Scheduled Tribes quota, there are various reservations to be filled up by the Government of India nominees, the candidates not turning up for admission towards the 15 per cent of the total seats to be filled up by All India Entrance Examination, so on and so forth, and, therefore, there are still several vacancies to accommodate the petitioners who have been allowed provisional admission by this Court. It may be mentioned that the petitioners were not admitted by the institutions either under wrong notion of law or deliberately, treating the petitioners as eligible for selection or by accepting any capitation fee. In all the cases, except in C.W.J.C. No. 8427 of 1988, where no order at all has been passed for provisional admission and C.W.J.C. No. 1529 of 1988, where the petitioner has only been allowed to attend

classes, the term of the provisional admission is subject to the result of the writ petitions and/or final order to be passed by this Court. In the case of Rajendar Pd. Mathur (supra), the students even though ineligible for admission to the B.E. degree course, were admitted by the Colleges either wrongfully or for the sake of capitation fee and the students were allowed to continue their studies for four years after their admission. The Court observed in that case as follows (at 1455):

".....the blame for their wrongful admission must lie more upon the Engineering Colleges which granted admission than upon the appellants..... The fault lies with the Engineering Colleges which admitted the appellants because the principals of these Engineering Colleges must have known that the appellants were not eligible for admission, and yet for the sake of capitation fee in some of the cases, they granted admission to the appellants. We do not see why the appellants should suffer for the sins of the managements of these Engineering Colleges."

And after having so held, allowed the candidates, whose admission was taken by the Engineering Colleges, to continue their studies in the respective colleges. In A. Sudha's case, similarly, the students took admission on the representation of the College authorities that the candidate was eligible, having secured more than 50 per cent marks in B.Sc. Examination. This information was supplied to the candidate by none else than the Principal of the Institute in a letter to the candidate. In those circumstances, the Court held (at p. 2310):

"We do not think that we shall be justified in penalising the appellant by not allowing her to continue her studies in the M.B.B.S. Course. Prima facie, it was the fault of the Principal of the Institute.....On a bona fide interpretation of the Regulations framed by the Mysore University for admission to M.B.B.S. course in the academic year 1985-86, which to some extent, suffers from ambiguity."

In State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, admission to the Medical Colleges was on the basis of an interim order passed by the Court and the Madhya Pradesh High Court struck down the Government order abolishing the minimum qualifying marks for selection. It seems that at the time of admission of the writ petition, an interim order was passed admitting her to the Medical College and since then she was studying in the said college. This was, however, a case of an individual.

16. The petitioners contend that since they have been ordered provisional admission by way of interim order, and few months having already elapsed, their continuance of studies should not be interfered with, even if their case on merit fails. It may be observed that in the instant cases, the petitioners have taken provisional admission at their own risk with their eyes open that their admission will abide by the result of the writ petitions. As held in the case of Aarti Gupta and Others Vs. State of Punjab and Others, , it is not within the jurisdiction of the Court to require the State Government to create additional seats to accommodate the petitioners, nor will it be just and proper to exclude the more

meritorious candidates in the waiting list from being considered for admission. Since the petitioners before this Court could steal a march over them by moving this Court and obtain provisional admission behind them. To follow this course would be shaking the confidence of the candidates who, relying upon the fairness of the authorities to fill up the vacancies strictly . according to merit, did not move this Court. I, therefore, feel that the cases relied upon by the learned counsel for the petitioners do not apply to the facts and circumstances of this case. Recently, a Division Bench of the Supreme Court comprising of Mr. Justice M. M. Dutt and Mr. Justice S. Natrajan, on an application filed by the Union of India, laid down certain guidelines for allocation of seats which are vacant in the under-graduate course pursuant to the resolution of All India Entrance Examination conducted by the Central Board of Secondary Education, New Delhi, for 15 per cent of the total seats reserved by earlier order of the Court. Their Lordships ordered, after having obtained an opinion of the Expert Committee, that the eligible candidates would be given a maximum of twenty days time to join the Medical Colleges allotted to them and the candidates would be admitted to the vacant seats according to their preference in M.B.B.S. course or B.D.S. Course.

17. In the instant cases, I think, the just and proper procedure would be to publish the vacant seats available from any reserved quota or falling vacant because of some candidates not taking admission in various Medical Colleges in some newspaper of All India standing, namely, the Times of India and the Hindustan Times, inviting the students strictly according to their merit in the waiting list, giving them twenty days" time to take admission, bearing in view their first and second preference, from the date of publication in the newspaper. If the seats are filled up by this process to the exclusion of the petitioners or by inclusion of some of the petitioners, who have obtained interim orders from this Court, there is an end of the matter. If, however, the seats still remain vacant, then those seats should be filled up by the petitioners" inter se merit, since, the State must not allow seats remaining vacant as it has a public duty to fill up the vacancies as enjoined under Article 41 of the Constitution of India : See the case of Samir Kumar Das and Vs. State of Bihar and Others, . In short, whatever vacancies are available, should be filled up within a period of twenty days from the date of publication of the advertisement, notifying the vacancies strictly according to the merit of the candidates in the waiting list. If some of the petitioners, who have obtained interim order, are excluded by this process, they cannot lay any grievance because they were permitted provisional admission on being clearly told that their absorption will be subject to the decision in the writ petitions.

18. I, therefore, direct the respondent Director of Health Services and the Controller of Examination to immediately find out the seats vacant in all the Medical Colleges of the State of Bihar, both M.B.B.S. and B.D.S. course, and bring out an advertisement within ten days from to day in the newspapers indicated above, giving twenty days time, inviting the candidates to lake

admission strictly according to their merit in the waiting list in the different courses, and by this process, fill up all the vacant seats. It is also made clear that if a person higher in the merit list does not take admission within the time prescribed, this will pass on to the next man in the waiting list, and so on and so forth, and if ultimately, seats still remain vacant, such of the petitioners, who have obtained interim orders from this Court, be admitted, again on the basis of their inter se merit. I direct that a copy of this judgment be handed over to Mr. Kamalapati Singh, learned Govt. Pleader No. V, appearing on behalf of the respondents for immediate compliance.

19. The writ petitions are disposed of in the light of the observations and directions made above. There will be no order as to costs.

R.N. Lal, J.

20. I agree.