
(2003) 09 DEL CK 0131

In the Delhi High Court

Case No : Civil Writ No's. 5801, 5930, 6205-06 and 6211 of 2003

Priyanka Gogna

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-09-2003

Acts Referred:

Constitution of India, 1950 — Article 141, 144, 226

Citation : (2004) 109 DLT 456

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Jugal Wadhwa, Adv Maninder Singh and Abhinav Mukherjee, G.D. Goel and Sanjeev Goel, for the Appellant;

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—Rule.

2. By consent of parties the Petitions are taken up for final disposal. The conceived provision is the following:

"5.5. Procedure for selection to MBBS course shall be as follows:

(i) In case of admission on the basis of qualifying examination under Clause (1) based on merit, candidate for admission to MBBS course must have passed in the subjects of Physics, Chemistry, Biology & English individually and must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination as mentioned in Clause (2) of Regulation 4. In respect of candidates belonging to Scheduled Castes, Scheduled Tribes or Other Backward Classes, the marks obtained in Physics, Chemistry and Biology taken together in qualifying examination be 40% instead of 50% as above;

(ii) In case of admission on the basis of competitive entrance examination under Clauses (2) to (4) of this regulation, a candidate must have passed in the subject of Physics, Chemistry, Biology and English individually and must have obtained a

minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination as mentioned in Clause (2) of Regulation 4 and in addition must have come in the merit list prepared as a result of such competitive entrance examination by securing not less than 50% marks in Physics, Chemistry and Biology taken together in the competitive examination. In respect of candidates belonging to Schedule Castes, Scheduled Tribes or other Backward Classes the marks obtained in Physics, Chemistry and Biology taken together in qualifying examination and competitive entrance examination be 40% instead of 50% as stated above:

Provided that a candidate who has appeared in the qualifying examination the result of which has not been declared, he may be provisionally permitted to take up the competitive entrance examination and in case of selection for admission to the MBBS course, he shall not be admitted to that course until he fulfills the eligibility criteria under Regulation 4."

3. The challenge in this writ petition is directed towards the Notice/Order of Vardman Mahavir Medical College & Safdarjung Hospital dated 2.9.2003 by which the six petitioners' admission to the MBBS Degree Course has been cancelled. The facts are not in issue since this controversy has its conception in previously decided Petition C.W. 5264/2003 entitled Fahad Ansari v. Dr. Jagdish Prasad and Ors. which was heard and decided by this Court on August 28, 2003. Each one of the petitioner has obtained less than 40 (forty) per cent in the Common Entrance Test (CET). The prayers in the writ petition are as follows:

"a) Quashing the impugned notice dated 2.9.2003 (Annexure P-5) issued by the respondent No. 3.

(b) Quashing the impugned letters dated 30.8.2003 (Annexure P-7) (Colly) sent by the Ministry of Health & Family Welfare, New Delhi to the respondents No. 2 and 3.

(c) Restraining the respondents from implementing any action as contained in the impugned notice dated 2.9.2003 (Annexure P-5).

d) Allowing the petitioners to continue their studies in the MBBS Degree Course of the respondent No. 3.

e) Grant any other relief deemed fit and proper in the circumstances of the case including costs of the petition in favor of the petitioners."

4. As already observed in Fahad Ansari's case in the event that the Scheduled Caste and Scheduled Tribe candidates who have obtained less than 40% marks have been offered admission it is clearly contrary to the latest decision of the Hon"ble Supreme Court in The State of Madhya Pradesh and Others Vs. Gopal D. Tirthani and Others, . This landmark judgment is also a Restatement of the law on the questions of admissions to students pursuing the medical stream. In particular the following passages are relevant:

"In the case of Dr Preeti Srivastava and Another Vs. State of M.P. and Others, , the Constitution Bench has expressly discarded the submission that there need not be any qualifying marks prescribed for the common entrance examination. The Medical Council of India, as an expert body, is the repository of the nation's faith for laying down the extent of reservations, if any and the lowering of qualifying marks consistent with the broader public interest in having the most competent people for specialized training and the competing public interest in securing social justice and equality. Even when it is permissible to prescribe lesser qualifying marks for a reserved category (not a mere separate channel of entry of candidates) and the general category of candidates at the post-graduate level, there cannot be a big disparity between the two. The level of disparity in qualifying marks subjects to its being permitted by the expert body, must be minimal so that the candidates seeking admission into post graduation can put up to a certain level of excellence. Referring to Ajay Kumar Singh and Others Vs. State of Bihar and Others, ; State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, and Post-Graduate Institute of Medical Education and Research etc. Vs. K.L. Narasimhan and another etc., , the Constitution Bench observed that it is true that in spite of having been admitted through any channel or may be by reservation, merely because everybody has to take the same post-graduation examination to qualify for a post graduate degree, it is not a guarantee of quality. A pass mark is not a guarantee of excellence. There is a great deal of difference between a person who qualifies with the minimum marks and a person who qualifies with high marks. If excellence is to be promoted at the post-graduate level, the candidates qualifying should be able to secure good marks while qualifying. Attaining minimum qualifying marks has a direct relation with the standards of education. Qualifying marks is an assessment of the calibre of students chosen for admission. If the students are of a high calibre, training programmes can be suitably moulded so that they can receive the maximum benefit out of a high level of teaching. If the calibre of the students is poor or they are unable to follow the instructions being imparted, the standard of teaching necessarily has to be lowered to make them understand the course which they have undertaken; and it may not be possible to reach the levels of education and training which can be attained with a bright group. The assemblage of students in a particular class should be within a reasonable range of variable caliber and intelligence, else the students will not be able to move along with each other as a common class. Hence, the need for a common entrance test and minimum qualifying marks as determined by experts in the field of medical education.

That minimum qualifying marks cannot be done away with is also the view taken by this Court in Dr. Sadhna Devi and others Vs. State of U.P. and others, . In Pre-P.G. Medical Sangarsh Committee and Another Vs. Dr. Bajarang Soni and Others, , classification of in-service candidates as a distinct class by themselves was upheld. Relaxation of minimum qualifying marks for them to 33% as against 50% for others was upheld because at that period of time there was no

stipulation to the contrary made by Medical Council of India. Dr. Bajrang Soni's case was decided on August 14, 2001 (though reported later); the same Bench of two learned Judges delivered the judgment in *State of Punjab Vs. Dayanand Medical College and Hospital and Others*, , on October 11, 2001. By this time the Medical Council of India had framed the Regulations and Regulation 9 reproduced in the earlier part of this judgment was noticed by the Court. Preeti Srivastava's case (*supra*) too was considered. Then the Court held--

".....it is not open to the university or the Government to dilute that standard by fixing marks lower than what is set out by the Medical Council of India. If they had any difficulty they ought to have approached the Medical Council of India for fixing of appropriate standards in that regard. The State Government could not unilaterally frame a scheme reducing the standard in violation of the terms of the Regulations framed by the Medical Council of India, which is repeatedly stated by this Court to be the repository of the power to prescribe standards in postgraduate studies subjects, of course, to the control of the Central Government as envisaged in the Act Constituting the Council."

The Court struck down the selecting of students who had secured marks less than the minimum prescribed by the MCI Regulations. The prescription made by the State reducing the minimum marks in the entrance examination for considering the eligibility of the candidates for admission to post graduate medical courses below the minimum prescribed by the Regulations framed by the Medical Council of India was directed to be ignored."

In *Chhavi Raj and Ors. v. The Vice-chancellor and Ors.*, decided by me on 26th August, 2003, I had dealt with this very question and had endeavored to analyze the aforementioned judgment in these words -- "With this restatement of the law no room for any controversy remains. In the above passage His Lordship has drawn the distinction between permissible reservation under the Constitution, and a "separate channel of entry of candidates". Insofar as the Scheduled Caste/Tribe candidates are concerned, the reservation is permissible under Article 16 of the Constitution; any category not falling within that Article may not be eligible for any reservation in the classical sense or a remission in minimum qualifications. Preferential treatment to categories other than Scheduled Castes and Scheduled Tribes can only be protected through the device or stratagem of a "separate channel of entry of candidates". Therefore the petitioners cannot claim exemption from fulfilling the minimum criteria set down by the Medical Council of India." I had also specifically relied on the decision of the Hon"ble Supreme Court in *Dr. Sadhna Devi's* case in the penultimate paragraph, which reads thus:

"Finally there is also no substance in the contention that these seats would revert to the General category. In *Dr. Sadhna Devi and others Vs. State of U.P. and others*, , the Hon"ble Supreme Court issued a direction to the effect that "if the seats reserved for SC/ST/OBC candidates cannot be filled up on account of failure of the candidates belonging to these categories to obtain the minimum qualifying marks, then such seats should be made available to the candidates

belonging to the general category". This direction applies a fortiori to the CWAPP Category which is at best a separate channel of entry of candidates, in contradistinction to candidates enjoying a Constitutional reservation."

5. In *Medical Council of India Vs. State of Karnataka and Others*, , the Hon''ble Supreme Court had opined that the "Indian Medical Council Act is relatable to Entry 66 of List I (Union List). It prevails over any State enactment to the extent the State enactment is repugnant to the provision of the Act even though the State Acts may be relatable to Entry 25 or 26 of List III (Concurrent List). Regulations framed u/s 33 of the Medical Council Act with the previous sanction of the Central Government are statutory. These regulations are framed to carry out the purposes of the Medical Council Act and for various purposes mentioned in Section 33. If a regulation falls within the purposes referred u/s 33 of the Medical Council Act, it will have mandatory force. Regulations have been framed with reference to Clauses (fa), (fb) and (fc) (which have been introduced by the Amendment Act of 1993 w.e.f. 27-8-1992) and Clauses (j), (k) and (l) of Section 33." The earlier observations of the Apex Court in *State of Andhra Pradesh and Another Vs. Lavu Narendranath and Others etc.*, , is apposite to the controversy raised before me in that it was inter alia held that where a reasonable opportunity to know a Notification had been provided there need not be a publication in the Gazette unless called for by law; and that refusal of an application to enter a Medical College is not vocative of a citizen's personal liberty under Article 21 of the Constitution.

6. Mr. Wadhwa, learned Counsel for the petitioners, had resolutely endeavored to persuade me to change my view on the subject of adherence to the minimum percentage applicable to the different categories of students. I continue to hold the opinion expressed by me in *Chhavi Raj*'s case and in *Fahad Ansari* case.

7. Mr. Wadhwa thereupon submitted that since the petitioners had already started attending the MBBS Course, their admission ought not to have been cancelled, despite the fact that all of them have secured less than forty per cent marks. Reliance has been placed by Mr. Wadhwa on *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, , in which the withdrawal of the eligibility certificate that had been issued to the petitioner and the cancellation of his admission to the MBBS Course was quashed. However, the infraction of a mandatory stipulation, as that of the MCI, was not in question. For this very reason the decisions in *Rajendra Prasad Mathur Ors. Vs. Karnataka University and Another*, , *Ashok Chand Singhvi Vs. University of Jodhpur and Others*, , *Kumari Maxey Charan Vs. Rohilkhand University, Bareilly* and another, , *Harpreet Singh Randhawa and Another Vs. State of Punjab and Others*, , *Deepak Makkar Vs. Kurukshetra University, Kurukshetra and Others*, and *Kusum Lata Vs. State of Haryana and Others*, also do not advance the case of the Petitioners. Mr. Wadhwa then relied upon *Jayanta bids was v. University of Calcutta*, JT 2000 (Supp.1) SC 272 even though the Hon''ble Court had taken pains to record that its decision will not be treated as a precedent. Even if this caveat entered by the Court itself

is ignored, this decision has no applicability since the petitioners are at the threshold of their studies, whilst Dr. Jayanta had already completed his MBBS and the clock was attempted to be put back after the lapse of 12 years and that too on the foundation of criteria which was pregnant with twin interpretations. The factual matrix in Rajendra Prasad's case (*supra*) is similar in essential content since he along with others had attended four out of five years study, under the Orders of the High Court and Supreme Court. On the contrary, in its judgment dated September 16, 2003, in *Harish Verma and Ors. v. Ajay Srivastva and Anr.* (Civil Appeal No. 1807 of 2003), the Hon'ble Supreme Court has struck down the admission of those candidates who had secured marks below the minimum prescribed by the Medical Council of India.

8. Mr. Maninder Singh has drawn my attention to Articles 141 and 144 of the Constitution for his submission that neither equitable considerations nor principles of estoppel would be attracted in the face of pronouncement of the Apex Court, which have the force of law and must be implemented by all subordinate Courts. For these propositions reference has justifiably been directed towards *Nand Kishore Vs. State of Punjab*, ; *Vineet Narain and Others Vs. Union of India (UOI) and Another*, . It is also trite but may be reiterated that there is no estoppel against the law. One need not travel beyond the pronouncements of the Hon'ble Supreme Court in *A.C. Jose Vs. Sivan Pillai and Others*, ; AIR 1989 617 (SC); *Indira Bai Vs. Nand Kishore*, and *Chhaganlal Keshavlal Mehta Vs. Patel Narandas Haribhai*, .

9. It has next been contended by Mr. Wadhwa that the admissions granted to students who has secured less than 40% marks in the last academic year, as well as one student whose marks of 39.6% have been rounded off at 40% and who has been given admission in the current academic year should also be cancelled by this Court. In the first place none of these persons have been arrayed in this petition. Secondly, it is trite to state that an error committed earlier will authorise that it be replicated and perpetuated further. Hon'ble Mr. Justice B.P. Jeevan Reddy, speaking for the Bench, made the following observations in *Chandigarh Administration and another Vs. Jagjit Singh and another*, :

"8. Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favor of the petitioner on the plea of discrimination. The order in favor of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favor of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not

entitle the High Court to compel the authority to repeat the illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law -- indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law -- but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favor of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other person's case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the Court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the Court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course--barring exceptional situations--would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world (what is the position in the case or orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises)."

In this regard yet another decision of the Apex Court in Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, is indeed relevant. Hon'ble Mr. Justice N.P. Singh, speaking for the Bench, has made the following observations:

"9. There appears to be some confusion in respect of the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. This guarantee of equality before law is a positive concept and it cannot be forced by a citizen or Court in a negative manner. To put it in other words, if an illegality or irregularity has been committed in favor of any individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of this Court, that the same irregularity or illegality be committed by the State or an authority which can be held to be a State within the meaning of Article 12 of the

Constitution, so far such petitioners are concerned, on the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners can question the validity of orders which are said to have been passed in favor of person who were not entitled to the same, but they cannot claim orders which are not sanctioned by law in their favor or principle of equality before law. Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to other. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination. None of the 98 stall-holders was imp leaded a party to the writ petitions. The appellants questioned the validity of the allotment of 98 shops on concessional rates, without trade zoning restrictions in favor of the stall-holders of Panchkuian Road, but they were primarily interested that same concessions in respect of license fee and relaxation in trade zoning restrictions, be also extended to them. Any such claim on their behalf cannot be entertained on the basis of concept of equality before law as enshrined in Article 14 of the Constitution".

10. In *State of Punjab v. Dayanand Medical College & Hospital (supra)*, the Hon"ble Supreme Court had observed as follows:

"18. What we have now to see is whether the action taken by the appellants is consistent with the prescription made by the Medical Council of India to the extent of obtaining 50% marks in the entrance examination and on that basis operate their rosters. If they do so and if the candidates, who have secured 50% marks, would be admitted, no interference is called for in the matter. If, however, any of the students has secured less than 50% marks that admission alone will have to be cancelled and appropriate direction issued to select as against it another candidate belonging to the reserved category if there is a reserved category candidate who has secured such marks, and if no reserved category candidate is available, he must then be selected from the general category".

11. In *Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another*, it has been clarified that for the issuance of a mandamus the existence of a legal right to the performance of a legal duty by a public authority is an essential condition precedent.

12. The contention of Mr. Wadhwa based on previous alleged irregularities in the grant of admission are, Therefore, rejected.

13. The Petition is without merit and is dismissed.

CW Nos. 5930/2003, 6205-06/2003 and 6211/2003 :

14. The grounds which have been raised in these Petitions are similar to the

above Petition. The only additional argument which needs to be answered is whether Regulation 5(ii) of the Medical Council of India Regulations on Graduate Medical Education, 1997 had been applied to SC and ST candidates. The underlined sentence specifically countenances the holding of the qualifying examination as well as the competitive entrance examination even for candidates belonging to SCs, STs and OBCs. It is incumbent and mandatory that such candidates should have obtained at least 40 per cent in both tiers of examination.

15. The Petitions are without merit and are dismissed.