
(2021) 10 BOM CK 0085

In the Bombay High Court

Case No : Writ Petition No.7936 Of 2020

Shaikh Ainashwa Mohd.Habeebuddin

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 08-10-2021

Acts Referred:

Indian Veterinary Council Act, 1984 — Section 22, 36, 36(i), 36(j), 36(k), 36(p)
Indian Medical Council Act, 1956 — Section 22

Citation : (2021) 10 BOM CK 0085

Hon'ble Judges : Ravindra V. Ghuge, J;S.G. Mehare, J

Bench : Division Bench

Advocate : V.D.Hon, A.V.Hon, P.S.Patil, K.C.Sant, M.D.Narwadkar

Final Decision : Dismissed

Judgement

1. We have considered the strenuous submissions of the learned Sr.Advocate for the petitioner and the learned Advocate for respondent Nos.1 to 3 and 5. Though this matter was heard for more than one hour, the learned Advocate for respondent No.4/Management has not appeared before the Court.

2. The petitioner, a student of B.H.M.S. Course, purportedly admitted on 12/10/2019 in the respondent No.4 college, has put forth prayers B, C, D and E as under :-

"B. Issue a writ of certiorari or writ in the nature of certiorari to quash and set aside the communication dated 31/08/2020 of the Director of AYUSH, Maharashtra State, Mumbai to the extent of the petitioner holding that the petitioner is not eligible for admission to B.H.M.S. Course.

C. Issue a writ of mandamus or writ in the nature of mandamus to the respondents to hold and declare that the petitioner is eligible for admission to B.H.M.S. course as she complies with the NEET-UG eligibility criteria applicable to the O.B.C. category student and the petitioner be permitted to pursue the course and appear for the examination of B.H.M.S. Course.

D. Pending the hearing and final disposal of this writ petition grant stay to the operation, implementation and execution of the communication dated 31/08/2020 of the Director of AYUSH, Maharashtra State, Mumbai to the extent of the petitioner only.

E. Pending the hearing and final disposal of this writ petition issue writ, order or directions to the respondent No.3 Maharashtra University of Health Sciences, Nashik to issue hall ticket to the petitioner for B.H.M.S. examination of first year scheduled to be held on 24.11.2020 and the petitioner be permitted to appear for the said examination and to declare her result."

3. The undisputed factors emerging from the record and the submissions of the parties, are as under :-

[a] The NEET-UG Exam 2019 was conducted by respondent No.5 authority.

[b] The petitioner had filled in application Form No.9195062079.

[c] In the said State Common Entrance Application Form, the petitioner has mentioned her choice on reservation as under :-Reservation status of the candidate- OPEN Select Specified Reservation - NONE

[d] The minimum marks for the open category were 120.

[e] The minimum marks for the OBC category were 107.

[f] The petitioner scored 113 marks.

[g] The admission to the B.H.M.S. course is based on the marks scored by a candidate in the NEET test.

[h] The petitioner has placed before the Court a receipt bearing No.559 dated 12/10/2019 indicating deposit of Rs.50,000/- as tuition fees. The receipt appears as under :-

[i] A bonafide certificate was issued by the Management dated 14/10/2019 declaring that the petitioner was a student of the said college.

[j] The petitioner acquired a caste certificate on 14/01/2020, which indicates that she belongs to the MUJAWAR caste which is recognized as OTHER BACKWARD CLASS (OBC).

[k] The petitioner received a certificate of validity on 11/11/2020 certifying her caste as belonging to MUJAWAR 339.

[l] The Management wrote a letter to the Director, Directorate of Aayurveda, Mumbai on 31/07/2020 for recognizing the petitioner as a student who had not registered in CET - 2019/2020. She was made to pay a fine of Rs.15,000/-.

[m] On 31/08/2020, the Director AAYUSH addressed respondent No.5, which is the admission regulatory authority, declaring that respondent No.4 college had illegally admitted the petitioner when her NEET score of 113 was less than the

minimum score of 120 required for the open category.

[n] The college Management wrote to respondent Nos.2 and 5 on 13/11/2020 that the petitioner was admitted through the Institute/ Management quota. She had applied for admission from the Open Category as she did not have a caste certificate. She was admitted in the quota reserved for the OBC category on the condition that she would submit her caste certificate and validity certificate. She had scored 113 marks and was eligible from the OBC category which required a minimum of 107 marks. She has paid Rs.15,000/- as penalty and therefore her admission should be regularized.

4. The learned Senior Advocate has vehemently contended that the petitioner is not at fault. She does belong to the MUJAWAR caste and falls under the OBC category. She has honestly stated at the time of filling in the NEET form that she applied from the Open Category as she did not have the caste certificate. Subsequently, she has received her caste certificate and has also received a validation certificate from the competent committee.

5. The learned Senior Advocate has then relied upon the judgment delivered by the Hon'ble Apex Court in Civil Appeal No.603/2020 filed by Union of India Vs. Federation of Self Financed Aayurvedic Colleges, Punjab and others alongwith other petitions, decided on 20/02/2020. He refers to paragraph Nos.4, 7 and 9 to 12, which read as under :-

"4. As stated above, the point that arises for our consideration is whether the students seeking admissions to Under Graduate courses (BAMS, BUMS, BSMS and BHMS) and Post Graduate courses can be denied admission on the ground that they did not take the NEET or that they did not get the minimum percentile prescribed by the 2018 Regulations. It would be convenient to refer to the facts in SLP (C) No.29 of 2020 which has been filed against the judgment of the High Court of Punjab and Haryana dated 18.12.2019 in Civil Writ Petition No.23710 of 2019 (O&M), as the lead matter.

7. Per contra, Ms. Pinky Anand, the learned Additional Solicitor General appearing for the Central Council submitted that the 2018 Regulations are perfectly valid having been made in the valid exercise of the power conferred on the Central Council under Section 36 of the Act. Ms. Anand submitted that Section 22 of the Act pertaining to the minimum standards of education in Indian Medicine includes the power to conduct entrance examination for admission to the Under Graduate courses. According to Ms. Anand, the Central Council is not denuded of the power to make Regulations as Section 36 of the Act enables the Council to make Regulations generally to carry out the purposes of the Act. She urged that the minimum qualifying percentile fixed for admission to the Under Graduate courses (BAMS, BSMS, BUMS and BHMS) is required to be maintained in order to ensure minimum standards of education. She contended that general standards for admission to professional courses are fixed on the basis of a detailed study and the correctness of such decision is beyond the ken of this

Court.

9. We are in agreement with the contention made on behalf of the students and the Institutions that introduction of an all India examination will not be covered by Section 36 (i), (j) and (k) of the Act. However, Section 36 (p) refers to any matter under the Act for which provision may be made by the Regulations. In our considered opinion, Section 22 which deals with the minimum standards of education in Indian Medicine, covers the topic of an all India common entrance examination. We are supported in this view by a judgment of this Court in *Veterinary Council of India v. Indian Council of Agricultural Research*¹. Section 22 of the Veterinary Council of India Act is in pari materia with Section 22 of the Indian Council of Medicine Act. An all India common entrance examination was introduced by Regulations made by the Veterinary Council of India in 1993 and an examination was conducted pursuant thereto from the academic year 1995-1996. The dispute pertaining to the validity of the Regulations was resolved by this Court by holding that the Veterinary Council of India is authorized to frame regulations prescribing the standards of veterinary education and such power includes power to make Regulations relating to grant of admissions and veterinary qualifications. This Court observed that such authority to frame regulations regarding admissions is necessary for maintaining the standards of education. The instant case is squarely covered by the law laid down by this Court in *Veterinary Council of India* (supra) therefore, we are of the opinion that the 2018 Regulations cannot be said to be ultra vires the Act.

10. The last date for admissions to the Under Graduate courses for the academic year 2019-2020 was 15 th October, 2019 and 31st October, 2019 for Post Graduate courses. One of the contentions raised on behalf of the Institutions and the students is that a large number of seats in the first year Ayurvedic, Homeopathy and Unani courses are not filled up. To illustrate, Mr. P.S. Patwalia, learned Senior Counsel submitted that there are 540 seats available for admission to the first year BAMS course in Guru Ravidas Ayurved University. Only 27 seats could be filled up in the all India counselling held on 25.06.2019. In the second counselling which was held on 24.07.2019, only 28 candidates were found eligible. After the State counselling, 320 out of 540 seats remained vacant. On the basis of interim orders passed by the High Court of Punjab and Haryana, admissions were made without insisting on NEET and in the process, 275 seats were filled.

11. Similar statements were made on behalf of the Institutions and the students from the other States that insistence on the minimum qualifying marks in the NEET would render a large number of seats in the Under Graduate courses for the academic year 2018-2019 vacant. A fervent plea was made by the learned counsel appearing for the students that they may be permitted to continue as they have already been admitted and they would lose a precious year in case their admissions are cancelled. In any event, the seats vacated by them cannot be filled up.

12. Prescribing a minimum percentile for admission to the Under Graduate courses for the year 2019-2020 was vehemently defended by the Central Council and the Union of India by submitting that the minimum standards cannot be lowered even for AYUSH courses. We agree. Doctors who are qualified in Ayurvedic, Unani and Homeopathy streams also treat patients and the lack of minimum standards of education would result in half-baked doctors being turned out of professional colleges. Non-availability of eligible candidates for admission to AYUSH Under Graduate courses cannot be a reason to lower the standards prescribed by the Central Council for admission. However, in view of admission of a large number of students to the AYUSH Under Graduate courses for the year 2019-2020 on the strength of interim orders passed by the High Courts, we direct that the students may be permitted to continue provided that they were admitted prior to the last date of admission i.e. 15th October, 2019. The said direction is also applicable to students admitted to Post Graduate courses before 31 st October, 2019. This is a one-time exercise which is permitted in view of the peculiar circumstances. Therefore, this order shall not be treated as a precedent."

6. He then refers to the order dated 04/05/2021 delivered by this Court at Nagpur in WP N.410/2021 filed by Takhtmal Shrivallab Homeopathic Medical College and Hospital and others Vs. Union of India and others, cited by Advocate Narwadkar, representing the respondent No.5 Examination Regulatory Authority and contends that the view taken by the Nagpur Bench would not apply to the case of the petitioner. No fault can be attributed to the petitioner. She is a young student and it would be harsh to take away her admission. He further submits that if the petitioner had produced a false caste certificate or had obtained a validity certificate fraudulently, she could be deprived of the said admission. But, this is not the case.

7. The learned Advocate representing respondent Nos. 2, 3 and 5 are united in submitting that the petitioner was surreptitiously admitted by the College from the OBC category when she was found to have scored marks below the minimum required for the OPEN category. Though she may belong to the OBC category, she had never appeared for the NEET test from the said category. The admissions to the B.H.M.S. Course are regulated by respondent No.5 and a person taking the NEET test has to score a minimum of 50% to secure admission from the Open Category. As such, on the date of her admission, she was not eligible as she did not even have a caste certificate which she has subsequently acquired on 14/01/2020.

8. The learned Advocate representing respondent No.5 refers to the NEET UT-29 information brochure published by the Govt. of Maharashtra, Commissionerate, Common Entrance Test Cell and submits that Rule 4.9, in so far as the minimum percentile marks to be scored and Rule 9.1.5.1, mandating that the request of an applicant for change in category from Open to Reserve once the provisional merit list is declared, will have to be strictly applied. Rule 4.9 and Rule 9.1.5.1. are as under :-

"4.9 NEET UG 2019 Eligibility for Admission to MBBS/BDS/BAMS/BUMS and BHMS Courses : A candidate belonging to open category must secure not less than 50 percentile marks in Physics, Chemistry and Biology (PCB) taken together at NEET UG-2019. A candidate belonging to constitutional reservation (Annexure B); and constitutional reservation with Person with disability claim, must secure not less than 40 percentile marks in Physics, Chemistry and Biology (PCB) taken together in the NEET UG -2019. Person with disability candidate in General Category must secure not less than 45 percentile marks in Physics, Chemistry & Biology (PCB) taken together in the NEET UG-2019 or decided by respective central council time to time.

9.1.5.1. CONSTITUTIONAL RESERVATIONS :-

The candidate should have claimed the constitutional reservation in the original Online application form for the State of Maharashtra. For claiming of category, no document required at time of online registration. Request for category claim after submission application form will not be granted.

The Caste Certificate and the Caste / Tribe Validity Certificate :-No document is required to claim the reservation in online application form. Document is required only at the time of document verification process. If a candidate claiming reservation in online application form does not produce document, then he / she will be automatically considered in open category if otherwise eligible

Candidates belonging to Backward Classes / SEBC / EWS must have claimed so in his online registration form of Maharashtra State quota seats, failing which such a claim will not be entertained subsequently. Candidate belonging to above categories (except EWS) should produce Caste Certificate, Caste Validity Certificate and Non-Creamy Layer Certificate (wherever applicable) at the time of physical document verification process. However, EWS candidates must produce eligibility certificate issued by the competent Authority. Candidate who fails to produce above said certificates will be considered as Open Category Candidate provided he/she fulfills the eligibility criteria of NEET-UG 2019.

The applicant request for change in category from Open to reserve once provisional merit list is declared, will be straight way rejected. The candidates belonging to the backward class categories will be required to submit the Caste Certificate / validity at the time of document verification failing, which the category claimed, will not be granted and the candidate will be treated as a general candidate. While applying online all the category candidates must mention their category as SC, ST, VJ/DT(A), NT-B, NT-C, NT-D, OBC, SEBC and EWS.

EWS reservation - 10% seats of the available seats will be reserved for EWS candidates. For MBBS/BDS/ BAMS/BHMS and BUMS courses, this reservation will be applicable only if central Government / respective council increases existing seats. For courses other than MBBS/BDS/BAMS/BHMS and BUMS courses 10% EWS reservation will be applicable on available seats (refer annexure-T).

The Caste Validity Certificate :

The candidates belonging to the following Backward Class categories i.e. SC, ST, VJ/DT(A), NT-B, NT-C, NT-D, OBC, SEBC and EWS will be required to submit the Caste Validity Certificate at the time of physical Document Verification, failing which the category claimed, will not be granted and the candidates will be treated as a general candidate.

[Emphasis Supplied]

9. It is obvious that the petitioner had applied for admission from the Open Category and specifically declined the option of "select specified reservation", leaving no choice or discretion with the College Management to make alterations by converting her admission from Open Category to OBC Category at the level of the College and that too, surreptitiously. The permission to do so before admitting the student was not taken by the College Management from respondent No.2 or 5. Moreover, no such permission would have been granted, in view of Rule 9.1.5.1 (underlined portion in the provision reproduced above.) As such, it is the respondent No.4 College, which has illegally admitted the petitioner from the OBC category after realizing that she had not qualified from the OPEN category though having opted for admission from the Open Category.

10. The learned Senior Advocate has cited an order dated 15/01/2021 passed by this Court at Aurangabad in WP No.6264/2020 and 7776/2020. Firstly, the said order is by way of an ad-interim arrangement, in which the respondent colleges were directed to submit the proposals for verification and scrutiny of documents of the students, to the Director of Aayush. Secondly and more importantly, it is a consenting order based on a similar consent order dated 22/12/2020 at the Principal Seat. A consenting order is not to be cited.

11. In the order delivered at Nagpur in Takhta bal (supra) dated 04/05/2021, the Court had considered the judgment delivered by the Hon'ble Apex Court dated 20/02/2020 in Union Of India (supra), relevant paragraphs having been reproduced hereinabove. The Nagpur Bench concluded that the Hon'ble Supreme court had disapproved of lowering the percentile or admitting students who had scored such marks which rendered them eligible only after the minimum 50% percentile was reduced below permissible limits. As a one time measure, the admissions were protected for reasons which are evident from the paragraphs reproduced above. The Hon'ble Apex Court has specifically observed in paragraph No.12 that this is a one time exercise, which is permitted in view of the peculiar circumstances and the said order shall not be treated as a precedent. The Nagpur Bench, therefore, declined to regularize the admissions of the students who were admitted in colleges for the B.H.M.S. course and were taking education, despite having scored below the qualifying (minimum) marks.

12. In Union of India (supra), the Hon'ble Supreme Court was dealing with a case of students having been admitted though having scored lesser marks. It was held that such students become doctors and treat patients. Lack of minimum

standards of education would result in half baked doctors. Non availability of eligible candidates cannot be a reason to lower the standards prescribed by the Nodal Body dealing with admissions.

13. In the case in hand, the College admitted the petitioner by converting her admission from Open Category to the OBC category, knowing fully well that she had scored below the minimum required for the OPEN category. The college also knew that she did not have even a caste certificate, much less a caste validity certificate. Rule 4.9 mandates that a candidate applying from any reserved category will have to submit the caste certificate / validity certificate at the time of document verification, failing which, the category claimed would not be granted and the candidate will be treated as a General Candidate. As such, when the College Management was bound by the said provisions, it could not have admitted the petitioner to the said Course by indulging in an illegality of changing her admission from the OPEN category to the reserved category at it's personal level.

14. In view of the above, this petition fails. The same is dismissed.

15. We leave it open to the petitioner to deal with the Management for the illegal admission and we express no opinion on the same. In the event, the petitioner initiates any legal action against the Management, the observations made in this order would not come in way of the litigating parties.

16. At this juncture, the learned Senior Advocate submits that if there are seats available so as to accommodate the petitioner from the Management Quota, she would prefer to make an application to respondent No.5.

17. The learned Advocate representing respondent No.5 submits that he would not make any statement except that if such an application is filed, it would be scrutinized strictly within the permissible limits of the provisions and the law applicable.