
(2008) 12 GAU CK 0015
In the Gauhati High Court

Smt. Anju Talukdar and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 17-12-2008

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 2(i), 2(t), 33, 39

Citation : AIR 2009 Guw 54 : (2009) 2 GLT 185

Hon'ble Judges : Jasti Chelameswar, C.J; Ashok Potsangbam, J

Bench : Division Bench

Judgement

J. Chelameswar, C.J.—This is a public interest litigation. Through this petition the petitioners espouse the cause of persons with disabilities. The writ petition is filed with the prayer as follows:

In the premises aforesaid, it is, therefore, prayed that Your Lordships may be pleased to issue a Rule calling upon the respondents to show cause as to why a suitable Writ, Order or Direction should not be issued.

(i) quashing the Educational Notice No. DME/09/2008/7791 dated 12-5-2008, issued by the Respondent No. 2 (Annexure-1) so far as the same (a) restricts the quota/reservation for physically handicapped candidates only to persons with locomotor disability of lower limbs having between 50% to 70% disability and (b) renders the admission of candidates subject to Medical Fitness and

(iii) further as to why direction should not be issued to the respondents to suitably modify and republish an Educational Notice (Annexure-1) providing the reservation in respect of Physically Handicapped Quota for all categories of persons with disabilities as defined under the Act;

Call for the records of the case and on perusal of the records and hearing the parties be pleased to make the Rule absolute and grant the aforesaid prayers;

2. The second respondent here issued a notice dated 12-5-2008 inviting applications from candidates seeking admission into paramedical courses in the 3

medical colleges in the State of Assam. By the said notification the second respondent announced that seats numbering 400 are to be filled up. These 400 seats are distributed among 12 course in the various disciplines in each one of the above mentioned three medical colleges and each of the course is for a period of two years. The notification also indicates that in each one of the courses a certain percentage of seats are reserved in favour of various categories like SC/ST etc. including physically handicapped persons. The notification has indicated that a maximum 3% of seats in paramedical courses will be kept reserved for persons with physical disability. The relevant portion of the notification reads as follows:

2. Quota/Reservation of Seats--The following Quota/Reservation of seats for each course shall be applicable in respect of admission to the Paramedical Courses in each session.

(i) S.C. - 7%, (ii) S.T. (P) - 10%, (iii) S.T.(H) - 5%, (iv) OBC/MOBC - 15% (v) Sons/Daughters of Socially, Economically and Educationally backward classes ordinarily residing in areas covered by the Assam State Char Areas Development Authority - 3%, (vi) Children of tea garden/Ex-tea garden communities/tribes - 3%, (vii) Unemployed Family Quota (Candidates belonging to family in which brothers and sisters are unemployed, Not more than one seat to one family) - 5%, (viii) Physically Handicapped quota - 3%.

Maximum of 3% of seats of Paramedical Courses shall be kept reserved for the candidates with Physical Disability,

Provided that the aforesaid 3% for Physically Handicapped category in Paramedical Courses is not a separate reservation over and above other reservations. If the disabled candidate belongs to reserved categories such as SC/ST/OBC/MOBC or General and any other category, he/she shall be adjusted against the category to which he/she belongs. The seats of Paramedical Courses allotted to this category shall be equally distributed in the 3 Paramedical Institutes of the State. Only the persons with locomotor disability of lower limbs and having between 50% to 70% of disability shall be eligible for this quota.

3. The specific challenge in this writ petition is with regard to the last sentence extracted above insofar as it seeks to specify that reservation of the seats meant for the physically disabled class is confined only to persons with locomotor disability of lower limbs where the disability is between 50-70%.

4. The petitioners challenge the said condition of the impugned notification extracted above essentially on two grounds - (1) while the mandate of the parliament u/s 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, is that persons with disabilities are to be provided with reservation in all educational opportunities, the impugned notification seeks to restrict the benefit only to one category of persons with physical disability and (2) While "person with disabilities" is defined under the above mentioned Act to be a person suffering from not less than 40% of the

disability, the prescription of the impugned notification is that to claim the benefit of reservation under the category of "persons with disability", the disability must be of the order of 50-70% and this is plainly in conflict with the statutory mandate.

5. An affidavit in reply is filed by the respondent Nos. 1 to 3. The substance of the affidavit of the respondents is that the impugned condition limiting the reservation only for the specified category of persons suffering from locomotor disability of the lower limbs between, 50-70% is in compliance with the guidelines issued by the Medical Council of India vide their letter No. MCI? 34(1)2003-MED/117773 dated 14-7-2003. A copy of the said letter is filed as annexure to the affidavit in opposition. Apart from that the respondents also state in their affidavit in opposition at para 7 that people with visual and hearing will not be able to successfully pursue these courses as it involves handling of sophisticated machinery and equipment.

6. It is in the background of the above mentioned pleadings, the two questions raised by the petitioners are required to be decided.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the Act, 1995") is an enactment made by the Parliament in discharge of its obligations arising out of the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region held in December, 1992. India is a signatory to the said Proclamation.

7. Section 2(i) of the Act, 1995 defines the expression "disability" as follows:

(i) "disability" means-

(i) blindness;

(ii) low vision;

(iii) leprosy-cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness;

Section 2(t) defines "person with disability" as follows:

"person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority.

Section 39i of the Act mandates that all the Government educational institutions and other educational institutions receiving aid from the Government shall reserve not less than 3% of seats for persons with disabilities.

i 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 per cent seats for persons with disabilities.

8. From the language of Section 39 it is clear that educational institutions run by the Government or run by private parties receiving aid from the Government are bound to reserve a minimum of 3% of the seats in favour of the persons with disabilities. The expression "person with disabilities", as we have already noticed, is a defined expression. While the Act by definition u/s 2(i) has recognized seven varieties of disabilities to be disabilities such as blindness, low vision etc. for the purpose of this Act, and each one of these disabilities is in turn defined under the Act under various sub-sections of Section 2. Therefore, in our view when Section 39 mandates that not less 3% of seats shall be reserved for persons with disabilities the benefit of such reservation shall be extended to persons with disabilities falling under any one of the seven categories specified in Section 2(1) unless there is something in the said enactment or any other law, which either restricts the benefit to a particular category or authorizes such restriction.

9. Section 33ii of the Act, 1995 provides that every appropriate Government shall appoint in every "establishment" not less than 3% of the vacancies with persons with disabilities. It further stipulates that while making such appointments of persons with disabilities at least 1% each of the posts shall be reserved in favour of persons with (i) blindness or low vision, (ii) hearing impairment, (iii) locomotor disability or cerebral palsy. The proviso to Section 33 authorises the appropriate Government to exempt any establishment from the provisions of this section. Such an exemption is required to be given by the appropriate Government having due regard to the type of work carried on in any department or establishment. In substance Section 33 while mandating the minimum 3% reservation of posts in all Government establishment and also mandates that the three specified categories of persons with disabilities must compulsorily be provided the reservation out of the seven categories recognized under the enactment. It also recognizes the authority of the State not to extend the benefit of Section 33 to certain identified departments. It is neither necessary nor is an issue before us as to what are the factors which are required to be taken into consideration by the Government before exempting any particular department or establishment from the operation of Section 33. The relevance of Section 33 for the purpose of the present writ petition is that in contrast Section 39 does not provide any such express authority either in the appropriate Government or any other body to restrict the benefit of reservation in favour of persons with disabilities, insofar as admission in the educational institutions is concerned, nor any other provision of the enactment which confers such discretion is brought to our notice by the respondents.

ii 33. Reservation of posts. - Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent

for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

10. In view of the specific defence taken by the State of Assam and its functionaries that the impugned notification insofar as it pertains to the objectionable portion, which is the subject matter of dispute in this writ petition, is issued pursuant to the guidelines issued by the Medical Council of India, this Court thought it fit to hear the Medical Council of India in order to ascertain the authority of law to issue such guidelines and also the rationale behind the guidelines issued by the Medical Council of India. Therefore, by an order dated 5-6-2008 the Medical Council of India was directed to be impleaded as a party and Mr. H. Rahman, learned Asstt. Solicitor General of India took notice on behalf of the Medical Council of India. It is recorded in the proceeding of this Court on 16-6-2008 that Mr. Rahman expressed his inability to apprise the Court of the stand of the Medical Council of India as he could not obtain necessary instructions from the Medical Council of India. Eventually the matter was heard on 27-8-2008 and reserved for judgment. Even by that time the Medical Council of India did not choose to appear and justify the guidelines issued.

11. On the other hand the affidavit filed on behalf of the respondent Nos. 1 and 2 categorically stated at para 6 as follows:

This reservation provision has been adopted on the basis of the guidelines of Medical Council of India for filling up of reserved seats for persons having locomotor disabilities, for admission in medicine courses vide their letter No. MCI-34(1)2003-Med./117773 dated 14-7-2003 which inter alia prescribed for reservation for persons with locomotor disability of lower limbs between 50% to 70% should only be allowed the benefit of reservation under the Disability Act for admission in all medicine courses.

12. A copy of communication of the Medical Council of India dated 14-7-2003 where-under the alleged guidelines were issued by the Medical Council of India is annexed to the affidavit. The authority of the Medical Council of India to issue such guidelines is doubtful and cannot be decided in the absence of any assistance by the Medical Council of India. Assuming for the sake of argument that the Medical Council of India has the authority to prescribe the norms and standards on the basis of which admissions to various medical courses in this

country are to be granted, the decision of the Medical Council of India is also not very clear from the communication dated 14-7-2003. We may indicate the substance of the communication as follows:

In November, 1999 the Council decided that there should not be any reservation of any kind under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 for admission in medical courses. However, the Chief Commissioner of Disabilities disagreed with such decision and desired that the Medical Council of India should reconsider the matter. Again the matter was considered by the Executive Committee of the Medical Council of India in January, 2001 and the issue was entrusted in the said meeting to a Sub Committee. On receipt of the report of the said sub Committee again the Executive Committee of the Medical Council of India reconsidered the matter in April, 2001. The Executive Committee proceeded on the basis that persons with disabilities are classified under only three categories, i.e., visually handicapped, hearing impairment and locomotor disorders. Unfortunately such a premises is wrong in the background of the provisions of the Act, 1995. Starting with such a wrong premise the Executive Committee in its meeting in April, 2001 came to the conclusion that persons with visually handicapped and hearing impairment should not be considered for admission in the "MBBS Course". Then the Medical Council of India took note of the judgments of the Supreme Court in All Kerala Parents Association Hearing Impairment and Anr. v. State of Kerala and Ors. CA No. 6120/2001 and Dy. Secretary, Deptt of Health and Ors. v. Sanchita Biswas CA No. 4604/2000. On an examination of those judgments the Medical Council of India reached the conclusion-

Thus with the judgment of the Hon"ble Supreme Court, the law became clear that all educational institutions are also required to permit reservation for disabled persons in accordance with the Act of 1995.

In its meeting held on 30th June, 2003 the Executive Committee of the Medical Council of India considered three questions-

- (1) Whether the guidelines of the MCI providing for locomotor disability of lower limbs between 40% to 60% applies to admissions in MBBS only or it also applies to the PG Medicine courses?
- (2) Whether for ensuring that reservation in admission in medicine courses is made available to deserving candidates, should there be a modification in the stipulation laid down by the Council in its guidelines, i.e. there should be locomotor disability of lower limbs between 40% to 60%? and
- (3) For determining the disability thereby entitling admission in the reserved medicine seats for disabled persons which authority should issue certificate and the time at which the disability certificate is issued?

After taking into account the guidelines issued on 5-7-2001 and after some

discussion the Committee reached the conclusion as follows:

The Committee reiterated that it is only persons with locomotor disability of lower limbs between 50% to 70% should be allowed the benefit of reservation under the Disability Act for admission in the medicine courses. This condition shall apply to admission in all medicine courses for reserved seats.

As can be seen from the questions considered (extracted above) the Medical Council of India was considered the prescription of the limited issue of prescribing 40% to 60% of the locomotor disability of lower limbs to MBBS and also to PG medicine courses. The Medical Council of India never considered the issue of admissions into paramedical courses. Apart from that, the Medical Council of India appears to be of the view that the Supreme Court in CA No. 4604/2000 Dy. Secretary, Deptt. of Health v. Sanchita Biswas approved the policy of the Medical Council of India, not to extend the benefit of reservation under the Act, 1995 to persons with visual and hearing impairment. Unfortunately we do not have the advantage of the said judgment as it is an unreported judgment and none of the respondents took the trouble to place the judgment before us. We are only left with an extract of the judgment as quoted by the Medical Council of India in its communication 14-7-2003 which reads as follows:

It may be noticed that the Medical Council of India (MCI) who issues guidelines for admission to the medical courses in the country, in fact, had taken a decision on 5-11-1999 indicating that there cannot be any reservation for admission into the MBBS course and Post Graduate Medical Course for disabled persons, as provided in Section 39 of the Act. This decision, however, appears to have been reversed by the subsequent resolution of MCI dated 5-7-2001. Under the resolution dated 5-7-2001 it has been unequivocally indicated that 3% reservation for physically handicapped persons for admission into the medical courses should be followed excluding, however, for those who are visually handicapped and hearing defects.

It is not clear from the above extract whether the question of excluding the benefit of reservation under the Act, 1995 in the context of admissions to medical courses insofar it pertains to persons with visual and hearing impairment was an issue before the Supreme Court. On the other hand from the material available we are of the opinion that the issue before the Supreme Court was only whether the minimum of 3% reservation in favour of persons with disabilities in the matter of admissions to educational institutions is available or not as by then, one High Court (the Kerala High Court) took the view that such a reservation is available only in the context of employment under the State, but not in the context of educational opportunities.

13. The irrationality of the decision of the Medical Council of India not to extend the benefit of the Act, 1995 with reference to persons with visual and hearing impairment is already noted by a judgment of the Delhi High Court in CW

2670/2003 Dr. Raman Khanna v. University of Delhi and Ors. and batch. At para 3 of the said judgment the Delhi High Court noted as follows:

In response to my query to Mr. Maninder Singh, learned Counsel for the MCI, as to whether this prohibition applies even to those physically handicapped students who had become eligible for admission on outright merit, he has been bold to state that so far as the MCI is concerned, it would extend its recommendation even to such candidates. There is, however, no empirical evidence of such enforcement, and all the learned counsels have stated, in unison, that they are not aware of any case where such instructions have been enforced by any College and have resulted in the doors of the Courts being knocked on. In none of the petitions before me has this policy of declining reservations to the blind and deaf been assailed. I need not, therefore, cogitate upon this legal nodus. It could not be too sanguine to expect that this policy would soon be laid siege to, since its logical imperfection has been obliquely exposed in Dr. Raman Khanna's petition.

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.

15. Apart from that when the language of Section 39 of the Act, 1995 is clear and categorical 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 14-7-2003 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.

17. In view of the lack of assistance by the Medical Council of India at one stage we thought it fit to take the opinion of an eminent doctor Dr. Harsha Bhattacharjee, Director, Sankardeva Netharalaya, Guwahati and in fact Dr. Bhattacharjee was put on notice. Though we obtained the opinion of the doctor as regards the suitability of the candidates with disabilities to undertake the training in paramedical courses, we are not placing any reliance on the opinion of the doctor for the reason that it would tantamount to substituting the legislative mandate under the Act. In our view, the power to decide whether any one of the candidates suffering from any of the disabilities is not suitable for undertaking the paramedical courses is a matter to be decided only by the Parliament or such other body which is duly authorised in this behalf.

The writ petition stands disposed of.