
(1993) 06 BOM CK 0020
In the Bombay High Court
Case No : Writ Petition No. 1703 of 1991

Vinaykumar Karnawat

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 17-06-1993

Acts Referred:

Post Graduate (Medical) Admission Rules — Rule 10, 2, 6

Citation : (1994) 1 BomCR 687

Hon'ble Judges : M.S. Vaidya, J; B.N. Deshmukh, J

Bench : Division Bench

Advocate : K.G. Nawandar, for S.R. Malani, for the Appellant; V.G. Gangapurwala, A.G.P. for respondent Nos. 1 to 3 and N.B. Khandare and S.K. Kadam, for the Respondent

Judgement

M.S. Vaidya, J.—The petitioner in this case has moved this Court under Articles 226 and 227 of the Constitution of India for a direction to respondents Nos. 1 to 3 directing them to allot to him the seat for M.S. (General Surgery) for the batch commencing from January, 1990 on the ground that he was the most eligible candidate being the highest scorer of marks in merit. He has also sought a direction for quashing and setting aside the merit list prepared by the authorities as at Exhibit "C" insofar as it pertains to the subject of M.S. (General Surgery) for the batch commencing from January, 1990.

2. On considering the facts and the law on the point, we think that the petitioner is entitled to be considered for allotment of the seat in the subject of M.S. (General Surgery), which had reverted from the All India Entrance Examination.

3. It may be noted at the outset that respondents Nos. 5 to 50 were added to the petition, because they were the candidates in the merit list of the candidates to be interviewed for the seat of M.S. (General Surgery) in the relevant batch. None of them has, however, appeared before us.

4. The petitioner had passed his M.B.B.S. Examination in December, 1987 and

had completed his internship in December, 1988. Though he applied for admission for M.S. (General Surgery) in July, 1989 batch, he could not succeed in getting the same. The petitioner applied thereafter again in January, 1990 batch showing his first preference for M.S. (General Surgery). He could not get the admission in any faculty opted for by him as against the seats available for post-graduation courses in the college. According to the petitioner, he waited till December, 1990 and then joined with effect from 31st December, 1990 the diploma course, E.N.T. (D.L.O.). According to him, this was done under protest and this admission was taken against the batch of July, 1990.

5. The All India Entrance Examination for the seat in question was to be taken for admission to the relevant seat, as it was for other seats also. The result of All India Entrance Examination was delayed for quite some time and consequently, one seat of January, 1990 batch for M.S. (General Surgery) from that college for which the examination was held in January, 1991, was returned in April, 1991. An advertisement in that context was published on 23-4-1991 and the date for the interviews was fixed on 30th May, 1991. The petitioner's grievance is that he was not called for the interview though he was one of the aspirants for the seat in the batch of January, 1990 and though he was the highest scorer among the left over students.

6. The candidates, who were summoned for the interview, were- respondent Nos. 28 (Dr. A.N. Shinde), 30 (Dr. Kum. S.S. Kawthale), 31 (Dr. Miss Faruqui H.G.), 32 (Dr. S.S. Kulkarni) and 35 (Dr. U.S. Bangali). It is not in dispute that all of these candidates had secured marks less than the petitioner in the relevant subject. The petitioner contended that if the authorities would not have allowed him to join E.N.T. (D.L.O.) course under protest, he would not have joined that course at all and would have waited the result of All India Entrance Examination, as a result of which, the seat now in dispute had become available. His second contention was that the advertisement was published on 23-4-1991 and the interviews were fixed, without calling him for the interview, on 30th May, 1991 in such a manner that he was deprived of the opportunity of consideration, which he would have availed by tendering resignation of the E.N.T. (D.L.O.) post given to him and which he had accepted under protest. According to him, he has deprived of the opportunity to resign his post according to the procedure prescribed by the rules and to appear for the interview for the post of M.S. (General Surgery). Contending that merit was the sole basis for admission to the post-graduation courses and asserting, further, that no rule could be allowed to deprive a meritorious student of the opportunity, to betterment of his qualification, the petitioner submitted that he deserved to be called for the interview and as a matter of right, he was entitled to be called for interview and admitted to the course for which he had aspired so long.

7. It was also contended by him that it was needless to say that for considering his eligibility for the purpose of admission, it was necessary to consider the position on merits as it obtained for the batch in January, 1990, and that no

student who had subsequently acquired the necessary qualification could be considered for the seat.

8. At the time of the arguments, it was also submitted by the learned Counsel for the petitioner that in the period that has intervened, the petitioner had passed the E.N.T. (D.L.O.) course in 1992 and that as such, presently there was no bar of concurrent registration or any bar of that sort for him to seek admission to the M.S. (General Surgery) course.

9. The petition was resisted by the authorities and an affidavit in reply was filed by the Dean of the Medical College at Aurangabad. The main contention raised in the affidavit in reply was that as the petitioner had joined the E.N.T. (D.L.O.) course with effect from 31-12-1990 he was not entitled under the rules to be considered for the seat of M.S. (General Surgery) that had become available in April, 1991. Referring to certain decisions given by this Court in their writ petitions in the year 1990, it was submitted that this Court had taken a view that a candidate who had already registered was not eligible for another registration in any other subject or to change over from the diploma course to degree course in the same subject. It was submitted that in pursuance of the aforesaid decisions of this Court, the petitioner's petition for the reliefs that are now sought and prayed deserved to be rejected.

10. At the time of arguments, the learned Assistant Government Pleader, also contended that the seat in question had virtually lapsed, as it could not be filled in during the academic year 1990-91.

11. The point raised later, namely, in the context of lapsing of the seat, can be disposed of in no time. Indeed, the authorities in question had advertised the seat that had become available in April, 1991 under an advertisement dated 23rd April, 1991, though it was a seat for January, 1990 batch. This very fact suggests that even the authorities themselves had never thought that the seat in question had lapsed and that it was not available to anybody. Indeed, certain candidates were, in fact, interviewed in pursuance of the advertisement and it was only because of the interim relief granted in this petition that the result of the interviews were not declared. But for that, the authorities would have very probably declared the results of the interviews also. After going through this elaborate procedure, it was certainly not open for the authorities now to contend that the seat in question had lapsed. The rules do not provide for lapsing of such seats. Nor is there any authority on the basis of which one could say that the seat in question had lapsed or was, in fact, treated as lapsed. The principle of estoppel by conduct also may have its own role to play in this context. It cannot be said, by any stretch of imagination, that the petitioner alone would be debarred from aspiring for the seat on the ground that the seat in question had lapsed. The contention raised by the learned Assistant Government Pleader in this context deserves to be rejected outright.

12. It may be noted in this very context that the Supreme Court itself has

decided against lapsing of seats. In Jeevak Almast Vs. Union of India (UOI) and Others, , it is observed :-

".....It is well known that our country does not have sufficient number of qualified doctors and every step should, therefore, be taken to turn out as many doctors with post-graduate qualification as possible. The problem to be resolved, therefore, is as to what method should be adopted to fill up these unfilled reserved seats."

It is, therefore, crystal clear that we have to proceed necessarily on the basis that the seat in question was available to an eligible meritorious candidate.

13. Coming then to the next contention regarding the concurrent registration, true it is that this Court has consistently taken a view that a candidate who was already registered for his post-graduate course, was not eligible for another registration in another subject or for a change over from diploma course to the degree course in the same subject. This is the normal rule in accordance with the rules governing the subject. The aforesaid view has been taken in the context of cases where no question had arisen in respect of an opportunity to a registered candidate to resign from the post of the course which he had been prosecuting before joining the new course. The decisions were given on the facts of those cases and we still hold that on the basis of the rules, the aforesaid decisions were correct.

14. In the present case, the problem has arisen because though the petitioner had applied for the seat in January, 1990 and was the best student according to the merits amongst the left out students, he could not be admitted to the desired course for want of availability of a seat in that batch. It was only a chance that after the results of All India Entrance Examination were declared, a seat became available for the first time in April, 1991 and the opportunity to the petitioner to offer himself for that seat arose in that month. Till then, he had no option but to opt for the course other than his desired course. He had, in fact, joined the E.N.T. (D.L.O.) course and he was admitted by the authorities to that course under protest as against the July, 1990 batch. This admission he had taken only on 31-12-1990 and he had joined that course with effect from that date. The advertisement for the seat now in dispute was published on 23rd April, 1991 and the interviews were fixed on 30th May, 1991. The petitioner had hardly an opportunity to apply his mind to the point whether or not he should resign his post in E.N.T. (D.L.O.) course and should aspire for the M.S. (General Surgery) course. He was never called for the interview so as to make him aware of the situation and so as to enable him to offer himself for the said seat. It was in this context that certain rules of the relevant admission rules were referred to and relied upon.

15. It was a common ground in this case that after the decision of the Full Bench of this Court in Ashwin Prafulla Pimpalwar and etc. Vs. State of Maharashtra and Others, , the rules for admission to the post-graduate courses, being the rules of

the years 1989, 1990 and 1991 were held to be invalid and they could not be applied. Therefore, the State Government was required to apply the rules, which were more or less based on the rules framed in 1971. This Court has already pointed out in *Dr. Sheela Laxmikant Kulwal v. The State of Maharashtra and others*, Writ Petition No. 3258 of 1992, decided by this Bench on 10th/11th February, 1993, reported in *Dr. Sheela Laxmikant Kulwal Vs. The State of Maharashtra and Others*, that the adoption of the rules of 1971 was also an instance of non-application of mind, because a number of provisions which were really good and desirable provisions in the rules which were set aside by the Full Bench were not even considered for incorporation in the rules, which were to operate in the period after the decision of the Full Bench. Several instances can be given even illustratively to substantiate this view points but, for the purposes of this case, that does not appear very necessary.

16. For the purposes of this case, it may be pointed out, however, that one of the illustrations of non-application of mind pertained to omission to consider the cases that could arise in the light of the All India Entrance Examination, which was a more recent phenomenon. The reversion of seats from the All India Entrance Examination was a new phenomenon that had come into existence long after the rules for 1971 were drafted. Naturally, the rules of 1971 did not make any provision to deal with cases of that sort. The only rules that remained in the field after the decision of the Full Bench referred to above were the rules of 1971 and consequently the contingencies which arose due to the reversion of seats after the All India Entrance Examination were not covered by them. The fact, however, remains that those being the only rules in the field, such cases also are required to be dealt with under the rules of 1971 as far as they could be made applicable. It goes without saying therefore that if those rules of 1971 did not govern a particular contingency, the solution that would have to be devised would have to be on the basis of principles of equity, fairness and good conscience, keeping in mind simultaneously the provisions of the rules of 1971.

17. Reference was made by Shri Gangapurwala, learned Assistant Government Pleader, to Rules 2, 6 and 10 in this context. The said rules may be quoted here with advantage.

"Each recognised post graduate teacher in Clinical para-Clinical and Basic Medical subject shall admit for post-graduate registration not more than two candidates per year in a Unit for University Post-Graduate degree or diploma taken together, i.e., one per terms of six months or as allowed according to rules of the Medical Council of India. The students whose terms are complete will not count. Student whose terms are intimated to be discontinued by the College will also not count. Concurrent registration of same student in diploma and degree and 2 specialities at a time will not be permitted unless one registration period is over or is discontinued."

"6. A candidate selected for registration will not in ordinary course be allowed to change his registration from one subject to another. A candidate who desires to

change registration from one subject to another will have to give three months notice before the commencement of the next term to enable notification of his vacancy for others. Such application will automatically terminate the existing registration and it will be treated as a fresh application for registration in new subject, such applications shall bear signature of the teacher concerned with termination and should be made after full consideration as they are irrevocable once lodged with the Dean's office. Registration by itself has no special priority either in registration or in posts."

"10. The candidate who desires to discontinue his course has to give notice three months before commencement of next term and full fees for next three months thereafter will be charged in absence of such notice, if certificate of terms put in is required."

Thus, Rules 6 and 10 lay down the procedure for discontinuance of a course. It was a contention of the petitioner in Dr. Kulwal's case that the rules were not mandatory in their nature, and a reference was also made to a decision in Dr. Makarand Chandrakant Ghaisas v. The University of Poona and others, in Writ Petition No. 5306 of 1986 decided on 28th April, 1987 at Bombay. But, it was held in Kulwal's case that the said decision was not applicable to the facts of the case in view of the restructuring of Rule 2 by adding the words "of same student in diploma and degree." Consequently, it was held in that case that the provisions contained in Rule 2 were mandatory. In respect of Rule 10, it was pointed out in that case that in view of the fact that Rule 2 had made a specific exception "in cases where the registration period is over or is discontinued", the rest of the candidates who desired to discontinue their course had to give a notice of three months before the commencement of the next term and full fees for the next three months thereafter would be charged in the absence of such notice, if the certificate of terms put in was required. Finding, on facts, further that in Kulwal's case and the cases decided along with that case the petitioners were deprived of an opportunity to resign before the commencement of the term and that they were entitled on merits to admission to post-graduation courses, it was directed that they should be admitted to the post-graduation courses sought for by them.

18. In the present case, three questions were posed before us for decision, namely :-

(1) Whether the students who had applied for January, 1990 batch alone could be considered for the allotment of the reverted post or whether the students who subsequent to that month had become eligible could be considered?

(2) Whether the concurrent registration barred the present petitioner from seeking admission to the post-graduation course as against the seat that was left unallotted from the January, 1990 batch? and

(3) Whether the eligibility as in January, 1990 was to be considered or whether or not the eligibility on the date on which the seat had become available for

allotment was to be considered?

19. While advertng to the first question, it may be noted as a matter of fact that some of the persons who were summoned for interview on 30-5-1991 for the reverted seat i.e., respondents No. 28, 30, 31, 32 and 35, were all the students who had applied for admission for M.S. (General Surgery) in January, 1990 batch. It was only the petitioner out of that batch who was excluded from the interview, because he was not summoned for the interview. As already pointed out above, the Rules of 1971, which hold the field at present for admission to the post-graduation courses, were silent on the point as to whether a particular category of students were to be preferred to the other category of students. In that event, a consideration does weigh to the effect that if the seat was not reserved at all for the All India Entrance Examination in January, 1990 batch. In all fairness, therefore the seat which has reverted as a result of the All India Entrance Examination should be available only to those students who had applied for January, 1990 batch, because the seat had reverted from that batch and for the benefit of that batch only. The students who had acquired the necessary qualification after January, 1990 batch could not apply for the seat of January, 1990 batch though, by a chance, that seat had become available late.

20. Out of the other two questions, question No. 3 is to be answered ordinarily in favour of January, 1990 but for the considerations discussed hereafter. While advertng to these two questions, it may, however, be noted that the seat had been advertised only in April, 1991 though it was reverted seat of the January, 1990 batch. The petitioner was prosecuting, at that time, the course of E.N.T. (D.L.O), which he had joined and which he was allowed to join under protest. Ordinarily, he could not have been considered for the reverted post if his registration for E.N.T (D.L.O.) was to be continued. But it was not possible for him to resign the post without three months' notice as required by Rules 6 and 10, because, the date of interview was fixed on 30th May, 1991 as advertised in the advertisement dated 23-4-1991. By taking admission under protest to E.N.T. (D.L.O.) course, he had made his intention clear to the authorities concerned to reserve his right, as and when it might accrue, if at all it did, to join the M.S. (General Surgery) course. If the seat was not reserved in January, 1990 for All India Entrance Examination, it would have enured for the benefit of the students of January, 1990 batch, and probably, the petitioner, who was then the highest scorer of marks among the left over students of that batch seeking admission to the M.S. (General Surgery) Course. In this context, a reference also may be made to the observations of the Supreme Court in *Jeevak Almast v. Union of India*, (cited supra), which emphasised upon the merit as the basis for the allotment of the seat. In that case, about 1600 seats had reverted to the States and the question before the Supreme Court was, how those seats should be allotted. After directing that the seats reverting from each State should be informed to the concerned authorities from the respective States, the Supreme Court went on to say:---

"..... Once these particulars are available the Selection Committee operating in the State and/or Union Territory or in the respective medical colleges covered by the scheme, as the case may be, shall draw up a list of the remaining candidates seeking admission as against the 75 per cent of the seats and the candidates who had taken the All India Entrance Examination but have not been found fit on the basis of the marks secured in their respective selection tests and in the event of there being no selection tests in the States relating to the 75 per cent quota then at the MBBS Examination. This shall be on the footing that the marks in the respective tests or the test and the examination are at par and admission would be on the basis of merit..."

21. When the petitioner was, therefore, the person securing the highest marks amongst the left over students from the January, 1990 batch, he was certainly entitled to be considered for the allotment of the seat, which had reverted in April, 1991 from the All India Entrance Examination. There was no question of the petitioner making an application afresh for the seat when it was advertised. The petitioner had a right to avail, under Rule 10, three months" time to make up his mind as to whether or not, to continue with the diploma course in which he was studying, or whether or not, to join the M.S. (General Surgery) course after resigning from that course. The petitioner was not even summoned for the interview though the rules did offer to him an opportunity to make his mind within 90 days. It was contended that he could have made up his mind in the period intervening between the publication of advertisement on 23-4-1991 and the date of interview fixed on 30-5-1991. This contention has no substance in it, because, for doing that also, he was summoned for the interview. Moreover, he had joined the diploma course only on 31-12-1990 and his next term was to commence in January, 1991. He could not have under Rules 6 and 10 resigned his post in Diploma Course with a three months" notice so as to enable him to join M.S. (General Surgery) course in the term commencing from January, 1991. His claim was totally and grossly ignored by the authorities for one reason or the other that was not warranted by law. If the merit is the basis of right to admission and if the petitioner was the meritorious student amongst the left over students of January, 1990 batch, it was obligatory upon the authorities to summon him for the interview and to require him to make up his mind in one way or the other.

22. When the observance of Rule 10 by the petitioner was thus made impossible, and when the rules were silent on the point of the manner in which the reverted seats should be allotted it can hardly be said that Rule 10 did contain a provision that was mandatory in the cases of this type. Therefore, in law and in equity, the petitioner was entitled to be considered on merits, for the allotment of the seat for M.S. (General Surgery).

23. Add to this, the situation that in the period that had intervened since then, he had completed his course of E.N.T. (D.L.O.) and the bar of Rule 2 also does not survive in his case on the date on which he would be now considered for that

post.

24. In the light of all these considerations, we think that this petition deserves to succeed at least in part. The petitioner has sought a direction for quashing and setting aside the merit list at Exhibit "C" for the subject of M.S. (General Surgery). It is not necessary to quash or set aside that merit list. Those candidates have already been interviewed as matter of fact and it is only the petitioner who was not summoned for the interview and who is not yet considered on the basis of merit and the other relevant considerations under the rules for allotment of the seat in question. Prayer (B) sought in the petition need not, therefore, be granted.

25. In prayer (A), it is sought that direction be issued to the authorities to allot the seat for the course of M.S. (General Surgery) for the batch commencing from January, 1990 to the petitioner, he being the eligible candidate in merit. Such a direction also would not be warranted to on the facts of this case, because the authorities have not yet arrived at their final decision, may it be on account of the interim relief that was granted in this petition. It is sufficient to direct the authorities concerned to summon the petitioner for interview, to consider as per rules his case on merits for the allotment of the reverted seat for M.S. (General Surgery) course for the January, 1990 batch and to declare the result according to the rules. It is needless to say that the selected student would join the course as against a seat available for the said batch with effect from July, 1993 Orders accordingly.

26. Rule is made absolute in the above terms. No order as to costs.

Rule made absolute.